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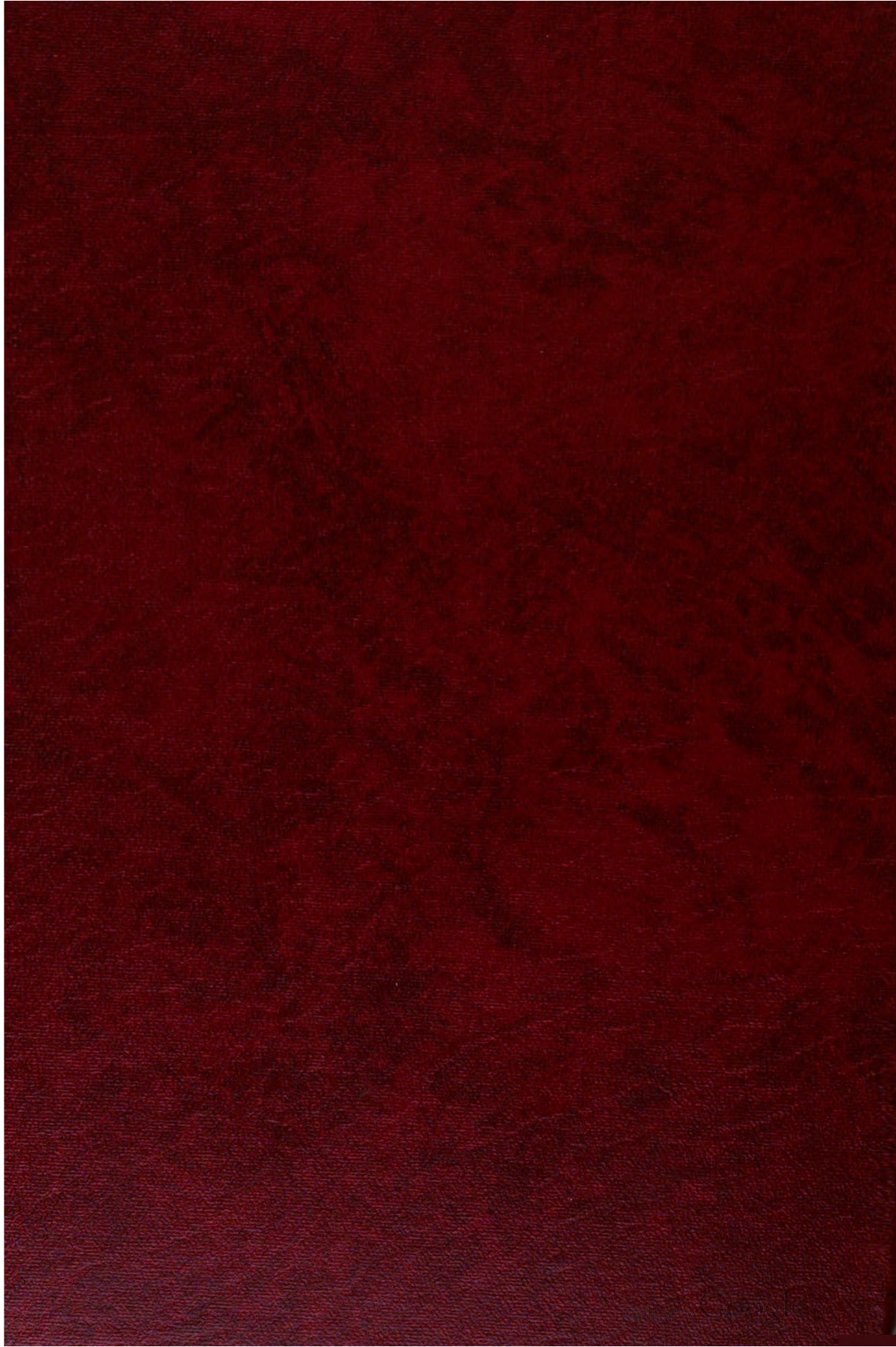
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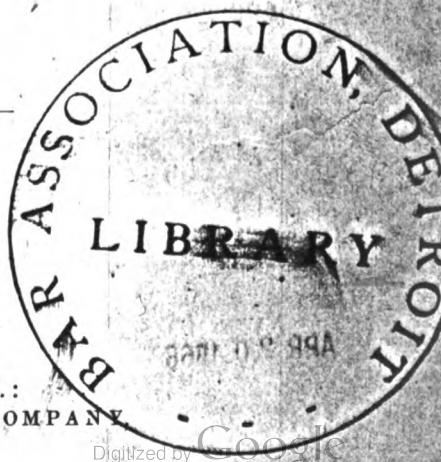
LAW AND THE LAWYERS.

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# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

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## The Albany Law Journal.

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ALBANY, JANUARY 5, 1895.

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### Current Topics.

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WE publish the programme of the New York State Bar Association for the annual meeting to be held on the 15th inst. The features of the meeting, aside from interesting papers on current topics, will doubtless be the address of Judge John F. Dillon on "Property, its rights and duties in our legal and social systems" and the discussion of the topics which have a prominent place on the programme, namely, "What legislation is necessary to carry out the provisions of the new Judiciary Article" and "Should the Code of Civil Procedure be revised, condensed and simplified." Judge Dillon's reputation as a lawyer, as a writer on legal topics and a speaker upon matters relative to the legal profession is such as to give every reason to anticipate a most thorough and able presentation of the subject he has chosen. The changes made in the organization of the courts by the new Judiciary Article are so extensive as to call for very careful legislation in order to adapt procedure to the new condition of affairs, and while so much interest has been manifested in the question of code revision as to indicate that there will be a very large attendance of those interested in this question, both these topics are timely and indicate a disposition on the part of the association to deal with live questions which are not only of interest to the bar but the discussion of which will result in practical benefit by way of necessary legislation.

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One of the most important duties Governor Morton has had occasion to discharge at the commencement of his term of office is the selection of a competent legal adviser as a successor of Professor Collin, who acted in that capacity during the incumbency of Governor Hill and Governor Flower. Professor Collin was not only admirably adapted to the position as a man and a lawyer, but had during the long period which he had served in that capacity acquired knowledge with regard to the statute law of the State which enabled him very readily to determine the bearing of a statute submitted to him for examination. The governor, in the selection of Mr. Charles Z. Lincoln, of Cattaraugus, has evidently appreciated the importance of the position, and has made the selection with very great care, doubtless upon the recommendation of very many of Mr. Lincoln's associates in the Constitutional Convention where he made a most admirable impression as an able and clear-headed lawyer. Mr. Lincoln brings to the position a most excellent reputation as a man of high standing in his profession and has the qualities which with added experience will doubtless enable him to discharge the duties of the position in a most satisfactory manner.

In connection with the selection of a legal adviser, Governor Morton has appointed Mr. Lincoln a member of the Statutory Revision Commission. This is a position second in importance to none in the State. As was recently noted in these columns, the work of the commission is of a most delicate nature, and requires not only ability of high order, but care and experience in the drafting of statutes. Governor Morton holds the resignations of Messrs. Linson and Magone, the other members of the commission, and will doubtless at an early day fill their places. It is to be hoped that more

than ordinary care will be taken in the selection of men thoroughly qualified for this important position. In addition to their duties in drafting statutes, they are called upon during a session of the Legislature to draft and revise statutes for members before introduction in either house as well as to examine bills after they have been introduced. Their duties and responsibilities have become greater every year during the existence of the commission, and provision should be made by the Legislature by which they may be compensated to such an extent as will enable the governor to select two of the most able lawyers in the State to carry on this work.

Governor Morton calls special attention in his message to the Legislature to the necessity of enacting laws so as to conform the statute law of the State to the revised Constitution which is now in force. In view of the many changes that must be made, it is important that the Legislature should give their earliest attention to the matters which are recommended by the governor and to such other changes in the statute law of the State as to them may seem proper and necessary. It is of great interest to many who have taken such intense interest in the changes made in the Constitution in relation to the courts, that the practical advance which was contemplated when the Constitution was adopted, should receive the hearty support and co-operation of the legislative and executive branches of the State government. We also desire to call the attention of Governor Morton and the Legislature to the fact that it is possible to call into service those justices of the Supreme Court who have retired because of the age limit and that these judicial officers should perform duties not only to do justice to the State which is paying them for services which are not rendered, but also to relieve the delay in litigation which exists in many counties in the State because of the small number of terms and the shortness of their duration, in which civil causes may be tried and completed. In this county the calendar is crowded with cases which the attorneys are anxious to try and which they are prevented from doing by the causes already suggested, as much, perhaps, as by the uncertainty as to when the case will be reached. Any justice of the Supreme Court who has

been retired because he has reached the age limit, and who is competent to serve, should not refuse or show any disinclination to perform all the services he can for the State and for its interests. In the past there has been an excuse that there was not sufficient judicial force to meet the demands of litigation. But this has been obviated, and it only remains for the Legislature to enact laws to make the constitutional provisions provided. Governor Morton has always been recognized as a practical business man, who has been most successful in his business relations, and we trust that after his attention has been called to the difficulties which at present exist in many parts of the State, that he will recommend additional changes and insist that they shall be enacted. In his message to the Legislature, Governor Morton says, in regard to the changes made necessary by the new Constitution:

"The principal matters in respect of which the amendments to the Constitution impose an immediate duty upon the Legislature seem to me to be the following:

"1. The new Judiciary Article (Article VI) requires the Legislature to divide the State into four judicial departments, in each one of which is to sit a branch of the new appellate division of the Supreme Court. The abolition of the criminal courts of Oyer and Terminer and Courts of Sessions, and of the civil Circuit Courts and of the Court of Common Pleas and the Superior Court in New York, the City Court of Brooklyn, and the Superior Court of Buffalo require a careful revision and modification of the great number of statutes, so as to adapt them to the new system. This is particularly important in regard to criminal jurisdiction. The transfer of the jurisdiction of the nine existing General Terms to the new appellate division, and the changes in the jurisdiction of the Court of Appeals and of the right of appeal to that court, require extensive changes in the statutes upon those subjects. In order to take over the business of these Superior City Courts, with their numerous clerks, offices and records, legislation will be necessary to enable the county clerks of the respective counties to undertake and carry on the business. The records of the Court of Common Pleas extend over a period of about 200 years, and are of great importance

and value, and should be carefully provided for. All of this work must be completed at this session of the Legislature, because the new courts are required to go into operation on the 1st of January, 1896. The necessity of early and sustained action on this subject is therefore apparent. It is of special importance that the division of the State into four judicial departments should be made at the earliest date possible, in order that I may discharge the duty which the Constitution imposes upon the governor, of designating the justices of the Supreme Court who shall constitute the appellate division in the several departments. It is important that these justices should be selected and assigned before the legislative session closes, so that they may consult together and advise the Legislature as to what action, on its part, is necessary for the successful inauguration of the new system. As the justices are to have the responsibility of making a practical working court, their advice and assistance should be had in respect to the perfection of the details, while there is still time for their views to receive practical and effective attention.

"2. Section 2 of Article XII, of the revised Constitution requires that the Legislature shall provide for the giving of public notice and opportunity for a public hearing, concerning every special city law, in every city to which it relates, before the mayor of such city accepts or refuses to accept the bill. Such provision seems to be prerequisite to the passing of special city laws, and as a number of new laws are by general consent urgently and speedily required for the city of New York, the provision for hearings before the mayor ought to be made by the Legislature at the earliest possible date. Provision is made in this section for the classification of cities into three legislative classes, on the basis of the latest official enumeration of their populations. Your attention is required to give this amendment its intended effect.

"3. The Penal Code of this State contains numerous and apparently sufficient provisions against gambling. Among these provisions, section 351 makes pool selling and bookmaking upon races criminal offences. By chapter 479 of the Laws of 1887 (commonly known as the Ives Pool bill), the Legislature exempted from the operation of the above mentioned section

the race tracks and grounds of incorporated racing associations during thirty days of each year, and thus permitted, upon those tracks and grounds alone, the acts which remain criminal in all other parts of the State. The revised Constitution, section 9 of Article I, adds to the old provision against lotteries a provision that neither pool-selling, bookmaking, nor any other kind of gambling, shall hereafter be authorized or allowed within this State, and requires the Legislature to pass appropriate laws to prevent offences against any of the provisions of the section. It is well understood that this provision is aimed at the race-track gambling permitted by the statute of 1887, above mentioned, and the Legislature, in obedience to the will of the people thus expressed, should, without delay, expunge the obnoxious law from the statute books.

"4. The provisions of law establishing civil service boards and examinations in this State have hitherto had only legislative and not constitutional sanction. The Court of Appeals has held that, in view of the express powers conferred by the Constitution upon the superintendent of public works and the superintendent of State prisons, the Legislature had no authority to subject the appointments made by those officers to civil service rules. It is believed that the civil service provision authorized in the revised Constitution as section 9 of Article V, obviates this difficulty and permits the Legislature to extend the civil service rules to the State prisons, the canals, and other public works of the State.

"5. Upon a separate submission of section 10 of Article VII the people have, by a majority of about 115,000, much larger than that cast for any other amendment, declared their will that the canals shall be improved in such manner as the Legislature shall provide by law.

"6. The new provision of section 1 of Article IX requires the Legislature to provide for the maintenance and support of a system of free common schools, wherein all the children of the State may be educated. That is now far from being the case, and the Legislature ought to take immediate steps to fulfil this mandate. Special investigation should be made to ascertain what children may be cut off from educa-

tional facilities by force of the new provision of section 4 of Article IX.

"7. Section 29 of Article III requires the Legislature to provide by law for the occupation and employment of prisoners in the State prisons, and as the same section prohibits a continuance of the present system of employment after the 1st of January, 1897, no time should be lost in considering how the Legislature shall obey this mandate.

"8. The prohibition against selling the Onondaga salt springs has been abrogated. These springs are a constant source of useless and, therefore, unjustifiable expense to the State, and the disposition to be made of them ought to be promptly considered and determined.

"9. Extensive improvements in the agricultural regions of the State are understood to be waiting only for the Legislature to give effect to the new provision in section 7 of Article I, which provides for the passage of general drainage laws, to which I make reference elsewhere.

"10. The new provisions contained in sections 11 to 15 of Article VIII require the Legislature to provide for a general system of visitation and inspection of charitable institutions, insane asylums and prisons, and for the regulation of public aid to charitable and correctional institutions, wholly or partly under private control. These requirements are aimed at grave existing abuses, and should be promptly complied with."

The 18th annual meeting of the New York State Bar Association will take place at Albany on Tuesday and Wednesday, January 15-16, 1895. The first meeting will be held in the Assembly Chamber at 8 o'clock on Tuesday evening and will be opened by the president's address, delivered by Tracey C. Becker of Buffalo, following which will be an address by the Hon. John F. Dillon of New York city, on "Property, its Rights and Duties in Our Legal and Social System," after which an informal reception will be tendered to Judge Dillon in the Assembly parlor. On Wednesday morning, January 16, the association will meet in the City hall at 10 o'clock. During the morning papers will be read by Rowland Cox on "The Law of Trade Marks;" by William B. Davenport of Brooklyn, on "Some Curious Incidents in the Work of a Public Administra-

tor," and by the Hon. Z. C. Lincoln of Little Valley, who has recently been appointed legal adviser to the governor and a member of the Statutory Revision Committee, on "Citizenship and Right of Suffrage." During the meeting in the morning there will also be a discussion by the members of the association on "What Legislation is Necessary to Carry Out the Provisions of the New Judiciary Article." After the morning session the association will entertain its members and guests at luncheon at the Fort Orange club. In the afternoon papers will be read by Ralph Stone, Esq., secretary of the Michigan Bar Association, on "The Work of Bar Associations;" by J. Newton Fiero, Esq., on "David Dudley Field and His Work;" by Emory P. Chase of Buffalo, on "Stenographers' Fees;" Almet F. Jenks, formerly corporation counsel of Brooklyn, on "The Liability of Municipal Corporations for Damages Caused by Contamination of Their Water Supply." The discussion in the afternoon will be devoted to the subject "Should the Code of Civil Procedure be Revised, Condensed and Simplified?" In the afternoon a reception will be tendered by the association to the judges of the Court of Appeals and justices of the Supreme Court at the Kenmore hotel. The papers, as well as the subjects of discussion at the meeting, should make it most attractive and interesting to those members who will be fortunate enough to be present, and it is hoped that many practical results will follow, especially in the simplification and revision of the Code of Civil Procedure, which is at present as unwieldy and tautological as any such instrument well could be.

Governor Morton has received over fifty resignations of notaries public who are anxious to vacate their offices so as to make use of passes which they have heretofore had. The secretary of State has also refused to sign the passes for the railroad commissioners on the ground that free transportation of any kind is denied to any public officer by section 5 of Article XIII of the new Constitution. The section under which this action has been taken is as follows:

"No public officer or person elected or appointed to a public office under the laws of this State shall, directly or indirectly, ask, demand, accept, receive or consent to receive, for his



own use or benefit or for the use or benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph or telephone rates from any person or corporation, or make use of the same for himself or in conjunction with another." The question at once arises as to whether a public officer who is a director, agent, or employee or any corporation can accept any pass or other similar privilege from the body corporate in which he is interested. The language used in the Constitution contains no exception in the case of such official, and the only ground on which a proposition that a director who is a public officer can accept a pass can be maintained is, that the pass or free transportation is part of the salary or compensation of the officer or employee of the railroad, or that the pass is used for a public purpose. It has been considered a privilege rather than the compensation of the director to use passes over his own road, and incidentally to receive certain considerations of a like kind from other roads. The spirit of the law, however, can be easily controverted and nullified by every corporation who will probably receive from its officer or employee money in return for his transportation, and who will afterwards repay the moneys so spent to the officer or employee as part of his salary. In view of this subterfuge, it seems almost unnecessary to discuss the proposition which is being discussed, for a determination of the question, if favorable to the director or employee, will simply prevent much annoyance and trouble to the corporation. Under a strict interpretation of the law, it does not seem possible that even the Hon. Chauncey M. Depew, president of the New York Central road and regent of the University of the State of New York, can accept any pass or free transportation over the New York Central road, or of any other company. But, like the present efforts to secure intact the gold surplus, it will be easy enough for Hon. Chauncey M. Depew to take money out of one pocket and receive it in another. There is no doubt that the idea of the members of the Constitutional Convention was to prevent the use of passes by State officers, and it was against such officers rather than against the directors and employees of the road that the measure was adopted.

"In view of the statute to which we have referred, the limitation of the provision commanding a public officer not to accept or receive a pass or free transportation 'for his own use or benefit' is significant. The office of the word 'own' when following a possessive pronoun, is to emphasize or intensify the idea of peculiar or personal interest. It suggests, what was undoubtedly the intention of the framers of this constitutional provision, that the practice of giving passes to public officers for their individual use, and to save them from personal expense, should be stopped, but the powers of the Legislature to provide for the necessary traveling and other expenses of public officers while engaged in public business should not be abridged. This provision of the Constitution must not only be construed in the light of existing statutes, but it will be presumed that it was drafted with full recognition of them. Section 168 of the general railroad law provided that neither the railroad commissioners, nor their secretary, clerks, agents, employees or experts should accept, receive or request any pass from any railroad in this State, for themselves or any other person. Section 169, on the other hand, declared that such officers, in the discharge of their official duties, should be transported over the railroads of this State free of charge upon passes signed by the secretary of state. In short, the statute prohibited the public officers named from accepting passes for their own use, but authorized them to use a pass issued by the secretary of state for the public use. So this provision of the constitution prohibits these as well as all other public officers from accepting free passes for their own use or benefit, but it does not prohibit them from accepting passes from the secretary of state providing for their transportation while engaged in public business, as it certainly would do so if it were intended to annul the provision of section 169 relating to that subject. Other reasons might be presented tending to show that the provisions of section 169 are not condemned by the section of the Constitution, relating to passes, but as the one given seems to be fully adequate, a further discussion will not be indulged."

One exception to the sweeping provisions of the Constitution prohibiting State officials from

using passes has been made by the decision of Judge Alton B. Parker, of Kingston, in granting the writ of mandamus compelling the secretary of state to issue passes to the State railroad commissioners and the employes of that department. The decision is based on the theory that while the Constitution prohibits a State official from accepting a pass "for his own use or benefit," chapter 353 of the Laws of 1882, authorizes the railroad commissioners and their employes to use passes issued by the secretary of State *for the public use*. Judge Parker's decision is as follows:

"By chapter 353 of the Laws of 1882, the Legislature created a board of railroad commissioners, and defined and regulated its powers and duties. In addition it assumed by that act the authority to assess upon the railroads of this State a sum not to exceed \$50,000 a year to defray the salaries of the commissioners and pay the necessary expenses of the board. By the same act it undertook to provide that, in addition to the \$50,000, the actual and necessary cost of transportation upon all railroads actually visited or inspected by the commissioners, their officers, clerks, experts and agents, in the course of a due performance of the duties enjoined by law, should be borne by the railroads so visited or inspected. To accomplish this result the Statute provided that in the discharge of the duties of their office they should be transported over the several railroads in the State of New York free of charge, upon passes signed by the secretary of state; they may employ or take with them experts or other agents whose services they may deem to be temporarily of importance, and who shall also be transported while on such duty, free of charge upon passes signed by the secretary of state. From the time of the appointment of the railroad commissioners under the act referred to, down to January 2, 1895, the commissioners have proceeded in the discharge of the duties by law commanded; the sums necessary to pay the expenses of the board, not exceeding \$50,000 a year, have been assessed upon the several railroads in this State by the comptroller and the assessments paid; the secretary of state has issued such passes in pursuance of the act as the railroad commissioners have requested, and the passes have been recog-

nized by the railroads affected by them. But the application made to the secretary of State January 2, 1895, to issue passes, in accordance with the statute, was refused, the reason assigned being that section 5 of Article XIII of the Constitution of the State of New York, which went into effect January 1, 1895, prohibits the issuing of such passes. It reads: 'No public officer, or person elected or appointed to a public office under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation or make use of the same himself or in conjunction with another.'

#### COVENANTS IN A LEASE FOR YEARS.

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- SEC. 1. Covenants usually inserted in the lease —
- on part of lessee.
  2. Same — Same — English rule.
  3. Same — Same — Same — Lord Eldon's view.
  4. Same — Same — Rule of property.
  5. Same — Same — Covenant to pay rent.
  6. Same — Same — Covenant to pay taxes.
  7. Same — Same — Covenant to insure premises.
  8. Same — Same — Covenant as to use of premises.
  9. Same — Same — Covenant not to assign or underlet.
  10. Same — Same — Covenant to deliver in good repair.
  11. Same — Same — Covenant against waste.
  12. Same — On part of assignee and sub-lessee.

§ 1. *Covenants usually inserted in the lease — on the part of lessee.*— The usual covenants on the part of the lessee are to pay rent, to pay taxes, to insure the premises, not to assign or underlet without leave, not to carry on an offensive trade, and to deliver up the premises and fixtures in good repair at the end of the term. Many of these covenants on the part of the lessee correspond to those on the part of the lessor above noticed. Thus the lessee may expressly covenant to keep the premises in repair, and whether he does or does not he is obliged by law to make tenant's repairs and to keep the leased premises wind and water tight.<sup>1</sup> Waste on the part of a

<sup>1</sup> Thorndyke v. Burrage, 111 Mass. 531; 1 Schoul. Pers. Prop. (2d ed.), § 31.

tenant, whether permissive or voluntary, will not be tolerated; yet the term "good repair" is a relative one and necessarily depends upon the age of the building, the purpose for which it is leased and occupied, and the like.<sup>1</sup>

On the part of the lessee there are several implied covenants such as to pay rent,<sup>2</sup> to make tenantable repairs, and to use the premises in a proper and tenant-like manner<sup>3</sup> and the words "yielding and paying" a stipulated sum raise a covenant to pay rent.<sup>4</sup> In a parol demise of land there is an implied covenant on the part of the lessee that at the expiration of the tenancy he will deliver up vacant possession of the premises to the landlord.<sup>5</sup> It is usual, however, to fix the liability of the lessee to repair by an express covenant.<sup>6</sup> Such a covenant, however, merely binds him to see that the premises do not suffer greater injury than the usual operation of nature to buildings of the age and condition of those on the demised premises; but an express and unconditional covenant to repair and keep in repair will bind the lessee to rebuild in case of destruction by fire or other accident;<sup>7</sup> the word "repair" being held equivalent to the word "rebuild."<sup>8</sup>

<sup>1</sup> Hart v. Windsor, 12 Mees. & W. 77. See Makin v. Watkinson, L. R., 6 Ex. 25.

<sup>2</sup> Lynch v. Onondaga Salt Co., 64 Barb. 558; Van Rensselaer v. Smith, 27 id. 104; Kimpton v. Walker, 9 Vt. 191, 198.

<sup>3</sup> Nave v. Berry, 22 Ala. 383; Lynch v. Onondaga Salt Co., 64 Barb. 558.

<sup>4</sup> Van Rensselaer v. Smith, 27 Barb. 104; Wolveridge v. Stewart, 3 Tyrw. 687; S. C., 1 Crompt. & M. 664; Iggudden v. May, 9 Ves. 390.

<sup>5</sup> Henderson v. Squire, 2 Best & S. 288.

<sup>6</sup> Stanley v. Towgood, 3 Bing. N. C. 4; S. C., 32 Eng. C. L. 13; Gutteridge v. Munyard, 7 Car. & P. 129; S. C., 32 Eng. C. L. 534.

<sup>7</sup> Phillips v. Stevens, 16 Mass. 238; Levy v. Dyess, 51 Miss. 501; S. C., 3 Cent. L. J. 221; Abby v. Billups, 35 Miss. 618; S. C., 72 Am. Dec. 143; Linn v. Ross, 10 Ohio, 412; S. C., 36 Am. Dec. 95; Hoy v. Holt, 91 Penn. St. 88; S. C., 36 Am. Rep. 659; Scott v. Scott, 18 Gratt. 150, 166; Ross v. Overton, 3 Call. 309; S. C., 2 Am. Dec. 552; Digby v. Atkinson, 4 Camp. 275; Monk v. Noyes, 1 Car. & P. 265; S. C., 12 Eng. C. L. 159; Brecknock v. Pritchard, 6 Durnf. & E. 750; Bullock v. Drommitt, id. 650. Destruction of premises by fire, and that the landlord has received the insurance money is no defense to the claim for rent. Hoy v. Holt, 90 Penn. St. 88; S. C., 36 Am. Dec. 659. See Bussman v. Gansler, 72 Penn. St. 285; Dyer v. Wightman, 66 id. 425; 427; Fisher v. Milliken, 8 id. 111, 122; Magaw v. Lambert, 3 id. 444.

<sup>8</sup> Flower v. Payne, 46 Miss. 32.

In the case of Scott v. Scott,<sup>9</sup> the court say that the rule as to covenants to pay in case of destruction has stood the test of time and innovation in England, and remains, I believe, to this day the law of that country. However it may have been changed and modified by adjudication or legislation in some of our sister States, if such be the fact, it has been and yet is the settled and approved law of our State. In Ross v. Overton,<sup>10</sup> the lessee of a mill having covenanted in addition to the rents reserved to make certain improvements and deliver the mill with such improvements at the end of his term in proper tenantable repair, and the mill during the lease having been destroyed by the ice, three arbitrators, to whom the matter was referred, awarded that the lessee should pay the rent, notwithstanding the destruction of the mill, and should perform the other covenants contained in the lease, and the Court of Appeals expressed an opinion that the arbitrators did not mistake the law.<sup>11</sup>

The generally accepted rule is that an express covenant to repair binds the lessee to make good any injury which human power can remedy; even though caused by storm, flood, fire, inevitable accident, or the act of a stranger.<sup>12</sup> An exception, in a covenant to repair, for "damage by the elements or the act of God," will include only those damages to which human agency in no way contributed.<sup>13</sup>

§ 2. *Same—Same—English rule.*—In the case of Hampshire v. Wickins,<sup>14</sup> the question as to what are "usual covenants" in a lease, came before the

<sup>9</sup> 18 Gratt. 166.

<sup>10</sup> 3 Call. 309; S. C., 2 Am. Dec. 552.

<sup>11</sup> See Maggart v. Hausbargar, 8 Leigh, 536.

<sup>12</sup> Leavitt v. Fletcher, 92 Mass. 119; Levy v. Dyess, 51 Miss. 501; S. C., 3 Cent. L. J. 221. See Wells v. Calnan, 107 Mass. 514, 518; S. C., 9 Am. Rep. 65; Kramer v. Cook, 78 Mass. 550; Bigelow v. Collamore, 59 id. 226, 231; Phillips v. Stevens, 16 id. 238; Fowler v. Bott, 6 id. 68; Allen v. Culver, 3 Den. 284, 294; Ingle v. Jones, 69 U. S. 7; bk. 17 (L. ed.), 762; Paradine v. Jane, Aleyn, 27; S. C., Style, 47; Bullock v. Dommitt, 6 Durnf. & E. 650; S. C., 3 Rev. Rep. 300; Green v. Eales, 2 Q. B. 255; S. C., 1 Gale & D. 468; Compton v. Allen, Style, 162.

<sup>13</sup> Polack v. Pioche, 35 Cal. 416; S. C., 95 Am. Dec. 115. See Turner v. Tuolumne Water Co., 25 Cal. 397, 403; Fish v. Chapman, 2 Ga. 349; S. C., 46 Am. Dec. 393; Ferguson v. Brent, 12 Md. 9; S. C., 71 Am. Dec. 582; Michaels v. New York Cent. R. Co., 30 N. Y. 564; S. C., 86 Am. Dec. 415; Merritt v. Earle, 29 N. Y. 115; S. C., 86 Am. Dec. 292; McArthur v. Sears, 21 Wend. 190; Ewart v. Street, 2 Bail. (S. C.) 157; Forward v. Pittard, 1 Durnf. & E. (1 T. R.) 27; S. C., 1 Rev. Rep. 142.

<sup>14</sup> 38 L. T. (N. S.) 408.

English High Court of Justice in a case where the defendant had entered into an agreement to take a lease for a dwelling-house, to contain "the usual covenants and provisos." The lease tendered to the defendant contained a covenant that the lessee would not, without the lessor's consent, "assign, underlet or part with the premises." The court held that a covenant not to assign was not a "usual covenant." The master of the rolls said: "This was decided by Lord Thurlow in *Henderson v. Hay*,<sup>15</sup> by Lord Eldon in *Church v. Brown*,<sup>16</sup> and more recently by the Court of Appeal in *Hodgkinson v. Crowe*,<sup>17</sup> and by Bacon, V. C., in the same case,<sup>18</sup> so that it cannot now be fairly disputed. It is true that a contrary decision of Romilly was cited—*Haines v. Burnett*—but that case appears to me to be opposed to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson v. Crowe*. In *Haines v. Burnett*, Lord Romilly, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee or on his making any arrangement for the benefit of his creditors. That was, in fact, nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual, and it is rather difficult, in looking at the case, to understand how it was decided. Lord Romilly seems to have thought that, in considering general covenants and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property; but I cannot find any evidence on that point mentioned in that report, and it would seem that the judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of Bacon, V. C., in *Hodgkinson v. Crowe*, I think it is conclusive against any judge being allowed to say from his own view that such a covenant ought to be introduced.<sup>19</sup>

§ 3. *Same—Same—Same—Lord Eldon's view.*—In *Church v. Brown*,<sup>19</sup> Lord Eldon says: "Before the case of *Henderson v. Hay*,<sup>20</sup> therefore, upon an agreement to grant a lease with nothing more than "proper covenants," I should have said they were

to be such covenants as were just as well known in such leases as the usual covenants under an agreement to convey an estate, and though the word 'incidental' is not very precise, I conceive Lord Thurlow's meaning to have been that the party had a right to those covenants that would be inserted in the execution of an agreement for a lease arising out of the general well-known practice as to such leases, and not contradicting the incidents of the estate belonging to a lessee, one of which is the right to have the estate without restraint beyond what is imposed upon it by operation of law, unless there is an express contract for more."

§ 4. *Same—Same—Rule of property.*—Lord Eldon says that the safest rule for property is that a person shall be taken to grant the interest in an estate which he proposes to convey, or the lease he proposes to make, and that nothing which flows out of that interest as an incident is to be done away by loose expressions to be constructed by facts more loose, that it is upon the party who has forborne to insert a covenant for his own benefit to show his title to it, and that it is safer to require the lessor to protect himself by express stipulation than for courts of equity to hold that contracting parties shall insert, not restraints expressed by the contract or implied by law, but such, more or less in number, as individual conveyancers shall from day to day prescribe as proper to be imposed upon the lessee, and that all those restraints so imposed from time to time are to be introduced as the aggregate of the agreement.<sup>21</sup>

§ 5. *Same—Same—Covenant to pay rent.*—A covenant to pay rent is necessarily implied from the nature of the relation of a tenancy for years, and the reservation in the lease of a stipulated sum.<sup>22</sup> Such implied covenant is separate and distinct from any expressed covenants contained in the lease.<sup>23</sup> In the absence of an express agreement the law implies a promise on the part of the lessee to pay a fair rent, but this obligation upon his part lasts only so long as he continues to occupy the premises, and he may, by assigning his term, discharge himself from all future responsibility; but if there is an express covenant on the part of the lessee to pay rent, he will continue to be bound by his contract although he assign over his lease.<sup>24</sup> For this reason a covenant to pay rent is always desirable, and found in all well-drawn leases, for the protection of

<sup>15</sup> 3 Brown C. C. 632.

<sup>16</sup> 15 Ves. 258; S. C., 10 Rev. Rep. 74.

<sup>17</sup> L. R., 10 Ch. 622; S. C., 14 Moak's Eng. 823; 88 L. T. (N. S.) 388.

<sup>18</sup> L. R., 19 Eq. 593; S. C., 33 L. T. (N. S.) 122.

<sup>19</sup> See *In re Lander Contact*, 3 Ch. 41; S. C., 61 L. J. Ch. 707; 67 L. T. 521; *Hampshire v. Wickens*, 7 Ch. Div. 555, 560; S. C., 23 Moak's Eng. 708, 711.

<sup>20</sup> 15 Ves. 258; S. C., 10 Rev. Rep. 74.

<sup>21</sup> 15 Ves. 264.

<sup>21</sup> *Church v. Brown*, 15 Ves. 258, 268; S. C., 10 Rev. Rep. 74.

<sup>22</sup> 1 Schoul. Pers. Prop. (2d ed.), § 31.

<sup>23</sup> *Van Rensselaer v. Smith*, 27 Barb. 104; *Royer v. Ake*, 9 Penn. St. 461; *Kimpton v. Walker*, 9 Vt. 191, 198.

<sup>24</sup> See *post*, § 9.

the landlord. Such a covenant runs with the land and binds not only the lessee but his assigns whether named or not.<sup>25</sup> Such covenants as are implied by law receive more liberal construction than express covenants. When a person assumes a liability and makes no provision for accident the law presumes him to take the risk upon himself, and he will be held to make good his contract although he is deprived of the benefits of the premises by inevitable accident. Thus we have already seen that a covenant to repair and keep in repair will bind the lessee to rebuild in case of destruction by fire or other accident;<sup>26</sup> and where there is no saving clause the lessee will be bound to continue paying rent after destruction of the buildings by fire or other casualty.<sup>27</sup> For this reason there is usually a proviso inserted to protect the lessee, which relieves him from the payment of rent where the building is destroyed by fire or other casualty, without any fault or neglect on his part.

§ 6. *Same—Same—Covenant to pay taxes.*—In the absence of any express covenant in the lease the lessor is bound to pay the taxes,<sup>28</sup> and if he fails to do so the lessee may for his own protection, do so when demanded, and charge the same to the account of rent,<sup>29</sup> and if the amount of taxes thus paid by the lessee exceeds the rent due; the excess may be recovered from the lessor as money paid to his use.<sup>30</sup> A covenant requiring the lessee to pay

taxes on the leased premises is frequently inserted in a lease. In such cases he becomes personally responsible for the taxes assessed against the premises, and on his failure to pay them, the lessor can recover the amount assessed, although he may not himself have paid such tax;<sup>31</sup> but a covenant to pay taxes of every name and kind that shall be assessed against the premises, will not obligate the lessee to pay assessments for benefits accruing from street improvements, and the like.<sup>32</sup> In those cases, however, where there are words evincing an intention of the parties to the lease to extend the liability, the lessee will be held liable for benefits.<sup>33</sup>

<sup>31</sup> *Rector, etc., of Trinity Church v. Higgins*, 48 N. Y. 532. See *Rector, etc., of Trinity Church v. Vanderbilt*, 98 id. 170, 174; *Sage v. Truslow*, 88 id. 240, 244. In the case of *Rector, etc., of Trinity Church v. Higgins*, *supra*, there was a covenant in a lease whereby the lessee agreed to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, and the court held the covenant broken by neglect to pay taxes or assessments duly imposed, holding that it is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee; that the lessor could therefore maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment. The court say that "the rule may be definitely drawn from numerous cases, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff will sustain an action where the defendant neglects or refuses to do such act." Citing *Gilbert v. Wiman*, 1 N. Y. 550; S. C., 49 Am. Dec. 359; *McGee v. Roen*, 4 Abb. Pr. 8; *Cady v. Allen*, 22 Barb. 888; *Churchill v. Hunt*, 3 Den. 321; *Aberdeen v. Blabkmar*, 6 Hill, 324; *Thomas v. Allen*, 1 id. 145; *Port v. Jackson*, 17 Johns. 289, 479; *Webb v. Pond*, 19 Wend. 423; *Mann v. Eckford's Exrs.*, 15 id. 502, 514; *Chance v. Hinman*, 8 id. 453; *Matter v. Negus*, 7 id. 499, 501.

<sup>32</sup> *Beals v. Providence Rubber Co.*, 11 R. I. 381; S. C., 9 Chic. Leg. N. 35. See *Harvard College v. Boston*, 104 Mass. 470, 482, 483; *People v. Mayor of Brooklyn*, 4 N. Y. 419, 432; S. C., 55 Am. Dec. 266; *In re College Street*, 8 R. I. 474; *Love v. Howard*, 6 id. 116; *Baker v. Greenhill*, 3 Ad. & E. (N. S.) 148; S. C., 43 Eng. O. L. 672; *Barrett v. Bedford*, 8 Durnf. & E. 602; *Southall v. Leadbetter*, 8 id. 458; *Jeffrey v. Neale*, L. R., 6 C. P. 240; *Tidswell v. Whitworth*, L. R., 2 C. P. 326.

<sup>33</sup> See *Blake v. Baker*, 115 Mass. 188; *Curtis v. Pierce*, id. 168; *Codman v. Johnson*, 104 id. 491.

<sup>25</sup> *Dolph v. White*, 12 N. Y. 296; *Main v. Featherers*, 21 Barb. 646; *Harmony Lodge v. White*, 30 Ohio St. 569; *Sutliff v. Atwood*, 15 id. 186, 194. In *Webb v. Russell Kenyon*, C. J., said: "It is not sufficient that a covenant is concerning the land; but in order to make it run with the land there must be privity of estate between the covenanting parties." In that case the covenant to pay rent was to one who, it was held, had no legal interest in the land, and it was held that the covenant was collateral. It is added: "Though a party may covenant with a stranger to pay certain rent, in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land." See *Dolph v. White*, 12 N. Y. 296, 301; *Bacon's Abr.*, tit. "Covenant, C.;" *Shep. Touch.* 176.

<sup>26</sup> See *ante*, § 1.

<sup>27</sup> *Coy v. Downie*, 14 Fla. 544; *Robinson v. L'Engle*, 13 id. 482, 496; *Helburn v. Moffard*, 7 Bush, 169; *Leavitt v. Fletcher*, 92 Mass. 121; *Fowler v. Payne*, 49 Miss. 32; *Witty v. Matthews*, 52 N. Y. 512; *Moffatt v. Smith*, 4 id. 126.

<sup>28</sup> *Prettyman v. Walston*, 34 Ill. 175, 191.

<sup>29</sup> See *Hunt v. Amidon*, 4 Hill, 345; S. C., 40 Am. Dec. 283.

<sup>30</sup> *Taylor v. Zamira*, 6 Taunt. 524; S. C., 1 Eng. O. L. 736.

§ 7. *Same—Same—Covenant to insure premises.*—

It is not infrequently the case that a covenant is inserted in the lease requiring that the lessee shall keep the premises insured in a given amount, and in case of loss to apply the proceeds to the rebuilding or repairing of the premises. Such a covenant is broken if the lessee permits the premises to remain uninsured for any time, however short.<sup>34</sup> And where such covenant requires the insurance to be taken out in the name of the lessor, an insurance taken in the name of the lessee will not constitute a compliance with the covenant.<sup>35</sup> In other cases the insurance is required to be taken out in the joint names of the lessor and the lessee, and in case of fire the insurance money to be applied in rebuilding or repairing the premises. When in this form the covenant becomes a real covenant and runs with the land; but a mere covenant to insure, which does not provide for the application of the money arising from the policy of insurance in case of fire, is merely a personal covenant, extending only to the covenantor and his personal representatives, and gives to the lessor no right to receive the insurance money from the insurer. In some States, however, it is provided by statute, that the insurance money in such cases shall be applied to repairing and rebuilding the premises injured or destroyed, and in these States such covenant is real and runs with the land.<sup>36</sup>

§ 8. *Same—Same—Covenant as to use of premises.*

—It is usual to insert in a lease a covenant restricting the uses to which the premises may be put. In some it is an affirmative covenant to use the premises for a particular purpose, while in others it is a negative covenant not to carry on a particular trade, or any trade that shall be offensive to the neighbors. Such a covenant is real and runs with the land, and its breach may work a forfeiture of the lease,<sup>37</sup> or a court of equity may enforce the covenant and by injunction regulate or restrain the use of the premises demised.<sup>38</sup> In the absence of a special provision or recital of use in the lease, there is no implied covenant to use the premises demised for a particular purpose;<sup>39</sup> but where there is a covenant to use the premises in a particular way, or for a particular purpose, this covenant will be specifically enforced.<sup>40</sup>

A covenant not to carry on certain specified trades will not be considered as prohibiting any trade not specified;<sup>41</sup> but a mere retail in the lease, of the purpose for which the premises are let has been held to constitute a covenant as to use. In those cases where the mode of occupation is fixed by the lease, or where the intention of the purpose is expressed therein so as to show the intention to confine the leased premises to a special use, then the lessee will be prohibited from converting the property to other purposes.<sup>42</sup> Should the lessee exercise a forbidden trade, or use the premises in a manner prohibited, by which the lease is forfeited, the mere fact that the lessor suffers the trade to be carried on, or passively permits the prohibited use, this does not amount to a waiver of the forfeiture; but should he permit the tenant to go on and make improvements upon the premises which are necessary in order to adapt them to the trade or use to which it is put, this will be evidence of his consent to the premises being so used and occupied.<sup>43</sup>

§ 9. *Same—Same—Covenant not to assign or underlet.*—One of the usual covenants inserted in a lease is that the lessor will not assign or sublet without the consent of the lessor. Such covenants, however, are not favored by law, because looked upon as prejudicial to the interests of commerce. They are strictly construed by the courts. This disfavor of restrictions being placed upon estates, either as to use or alienation, has led the courts to allow subletting where the lease simply prohibits assignment, and to allow an assignment where the lease simply prohibits sub-letting.<sup>44</sup> It has been said that a

<sup>41</sup> *Simons v. Farren*, 1 Bing. N. C. 126; S. C., 27 Eng. C. L. 572.

<sup>42</sup> *Maddox v. White*, 4 Md. 72; S. C., 59 Am. Dec. 67; *Steward v. Winters*, 4 Sandf. Ch. 587. See *Reed v. Lewis*, 74 Ind. 433; S. C., 39 Am. Rep. 88, 90.

<sup>43</sup> *Doe, d. Sheppard, v. Allen*, 3 Taunt. 78; S. C., 12 Rev. Rep. 597; *Griffin v. Tompkins*, 42 L. T. 359.

<sup>44</sup> *Parker v. Copeland*, 4 Mich. 528, 660; *Field v. Mills*, 33 M. J. L. 254; *Collins v. Hasbrouck*, 56 N. Y. 157; S. C., 15 Am. Rep. 407; *Lynde v. Hough*, 27 Barb. 415; *Jackson, ex d. Weldon, v. Harrison*, 17 Johns. 66; *Jackson, ex d. Stevens, v. Silvernail*, 15 id. 278; *Hargrave v. King*, 5 Ired. Eq. 430. In *Greenway v. Adams* (12 Ves. 395), it was held that a covenant not to sublet was violated by an assignment, and this opinion was spoken of approvingly by the Supreme Court of New Jersey in a *dictum* in the case of *Den, ex d. Bockouwer, v. Post* (25 N. J. L. 285, 291), but was disapproved in the subsequent case of *Field v. Mills* (33 id. 254). The general rule is that a right to sublet exists in the lessee in the absence of a stipulation to the contrary, and such sub-lessee may use the premises

<sup>34</sup> *Doe v. Shewin*, 3 Campb. 135.

<sup>35</sup> See *Sherwood v. Harral*, 39 Conn. 333; *Keteltas v. Coleman*, 2 E. D. Smith, 408.

<sup>36</sup> *Thomas v. Kapff*, 6 Gill. & J. 372; *Masury v. Southworth*, 9 Ohio St. 340.

<sup>37</sup> See *Brouwer v. Jones*, 28 Barb. 153.

<sup>38</sup> *Gillian v. Norton*, 33 How. Pr. 373; *Ambler v. Skinner*, 7 Robt. 561, 563; *Howard v. Ellis*, 4 Sandf. 369. See *Steward v. Winters*, 4 Sandf. Ch. 587.

<sup>39</sup> *Brugman v. Noyes*, 6 Wis. 1.

<sup>40</sup> *Steward v. Winters*, 4 Sandf. Ch. 587.

covenant not to assign is not broken by an involuntary alienation by operation of law,<sup>44</sup> or by deposit of the lease as security for money received, because this is not a parting with the lessee's interest.<sup>45</sup>

§ 10. *Same—Same—Covenant to deliver in good repair.*—As a general thing a lease contains a covenant on the part of the lessee to deliver up the premises at the end of the term, in as good repair and condition as they are in at the date of the lease, natural wear and tear and damage by the elements excepted. Under such a covenant the lessee will not be bound to put up new buildings in the place of those which have been destroyed by fire, and the like, unless there is a special covenant to repair and rebuild. Thus it is said by the Supreme Court of Mississippi in the case of *Levy v. Dyess*,<sup>46</sup> that a covenant to "re-deliver or restore the property in the same condition or plight," or other words of like import, does not bind the tenant to rebuild in case of casual consumption by fire; that such covenant amounts to an agreement simply to take ordinary reasonable care of the property, according to its nature, and to surrender possession at the expiration of the term.<sup>47</sup> Such a covenant does not

in any manner not inconsistent with the terms of the lease. *Crommelin v. Thiess*, 31 Ala. 412; S. C., 70 Am. Dec. 499. Compare *McBurney v. McIntyre*, 38 Ga. 261.

<sup>44</sup> *Smith v. Putnam*, 20 Mass. 221; *Jackson, ex d Schuyler, v. Corliass*, 7 Johns. 531; *Doe, d. Mitchinson, v. Carter*, 8 Durnf. & E. 57; S. C., 4 Rev. Rep. 586; *Croft v. Lumley*, 6 H. L. Cas. 672; S. C., 27 L. J. Q. B. 321.

<sup>45</sup> *Doe, ex d. Pitt, v. Hogg*, 4 Dow. & Ry. 226; S. C., 16 Eng. C. L. 196.

<sup>46</sup> *Levy v. Dyess*, 51 Miss. 501; S. C., 3 Cent. L. J. 221.

<sup>47</sup> "To repair and deliver up" has been said to bind the lessee to rebuild in case of loss by fire during the term. (*Nave v. Berry*, 22 Ala. 382.) "To deliver up" simply imposes an obligation against holding over. (*Nave v. Berry*, 22 Ala. 382.) "To surrender in good condition" renders the tenant liable for waste, through resulting from accident, occurring without his fault. (*Parrott v. Barney*, 2 Abb. 197.) "To keep the premises in a good state of repair" obligates the lessee to restore buildings destroyed by fire. (*David v. Ryan*, 47 Iowa, 642.) "To repair" obligates the lessee to rebuild in case of the destruction by fire or other casualty. (*Levy v. Dyess*, 51 Miss. 501; S. C., 3 Cent. L. J. 221.) "To uphold and repair" imposes loss by fire or other casualty upon the tenant. (*Levy v. Dyess*, 51 Miss. 501; S. C., 3 Cent. L. J. 221.) "To keep up all repairs" has reference only to doing ordinary repairs, and does not bind the lessee to insure against natural wear and decay. (*Polack v. Pioche*, 35 Cal. 416; S. C., 95 Am. Dec. 115.

require that the premises be put and left in better repair than they were at the date of the covenant.<sup>48</sup> A covenant to deliver up in good repair sometimes includes a stipulation to surrender all improvements made upon the premises by the lessee during the term; in such case every addition, alteration, annexation, or erection made by the lessee during the term, to render the premises more available, comfortable, profitable, or useful will be included.<sup>49</sup> In covenants to repair there is generally an exception made as to "damages by the elements or acts of Providence;" but such exceptions extend only to damages to which human agency does not in any way contribute.<sup>50</sup>

§ 11. *Same—Same—Covenant against waste.*—There is an implied covenant in every lease that the lessee shall use the premises demised in a husband-like manner and keep the buildings and other structures in repair, and his failure to do so renders him liable to an action for waste;<sup>51</sup> but there is no implied covenant on the part of the lessee to make other repairs upon the demised premises. If he undertakes to make repairs, however, by implied covenant he is bound to do so in a workmanlike manner.<sup>52</sup> Where the lessee has entered into an unqualified covenant to repair, he will be required to do so whatever may have caused the damage;<sup>53</sup> but where there is no such covenant and the tenant uses the premises devised in a good husband-like manner, he will not be liable to repair damages done either by the elements or by strangers without his fault.<sup>54</sup> But the lessor is entitled to an injunction.

<sup>48</sup> *West v. Hart*, 7 J. J. Marsh. 258. It is said in the case of *Thorndike v. Burrage* (111 Mass. 531), that the leaving of a cart-load of ashes, brickbats and rubbish by a tenant on quitting the demised premises is not a breach of his agreement to peaceably yield up the premises in good, tenantable repair.

<sup>49</sup> *French v. Mayor*, 16 How. Pr. 220.

<sup>50</sup> *Polack v. Pioche*, 35 Cal. 416; S. C., 95 Am. Dec. 115.

<sup>51</sup> *Nave v. Berry*, 22 Ala. 382; *Thorndike v. Burrage*, 111 Mass. 531, 532.

<sup>52</sup> *Estep v. Estep*, 22 Ind. 114; *Gill v. Middleton*, 105 Mass. 477, 478; S. C., 7 Am. Rep. 548; *Leavitt v. Fletcher*, 92 Mass. 121; *Elliott v. Aiken*, 45 N. H. 30, 36; *Doupe v. Genin*, 45 N. Y. 119; S. C., 6 Am. Rep. 47; *Post v. Vetter*, 2 E. D. Smith, 148; *Sheets v. Selden*, 74 U. S. 423; bk. 19 (L. ed.), 166; *Gott v. Gaudy*, 22 Eng. L. & Eq. 173.

<sup>53</sup> *Gibson v. Eller*, 13 Ind. 124, 128; *Leavitt v. Fletcher*, 92 Mass. 121; *Phillips v. Stevens*, 16 id. 228; *Abby v. Billups*, 35 Miss. 618; *Walton v. Waterhouse*, 2 Saund. 422.

<sup>54</sup> *Gibson v. Eller*, 13 Ind. 124, 128; *Leavitt v. Fletcher*, 92 Mass. 121; *Wells v. Castles*, 69 id. 323;



tion to restrain the lessee from committing any kind of waste.<sup>55</sup>

§ 12. *Same—On part of assignee and sub-lessee.*—Unless restrained by the terms of the lease a lessee may sub-lease the whole or any portion of the premises, or assign the whole or any portion of the term.<sup>56</sup> In the case of a sub-lease there is no privity of estate between the the lessor and the sub-lessee, consequently there is no liability on the part of the sub-lessee to pay to the lessor the rent reserved in the lease; his only liability is to the lessee, who in turn is responsible to the lessor.<sup>57</sup> But where there is a right on the part of the lessor to re-enter on the part of the lessor for non-payment of rent, a sub-lessee may pay his rent to the original lessor, in order to protect his possession.<sup>58</sup> But where there is an assignment of a portion or the whole of a term, a certain privity of estate subsists between the original lessor and the assignee, and the latter is liable on and for the covenants of the lease, which run with the land *pro tanto*.<sup>59</sup> This liability of the assignee of the lessee to pay to the lessor the rent reserved during the time the term remains vested in him, does not depend upon actual entry and possession,<sup>60</sup> he being held liable before entry

made,<sup>61</sup> particularly where the assignment is made by an instrument under seal;<sup>62</sup> but before such assignee will be liable to the lessor for the rent reserved he must, by virtue of the assignment, have either actual possession or an immediate right to the possession of the premises.<sup>63</sup> The purchaser at an execution sale of a lessee's interest in a lease is liable for the rent reserved to the lessor the same as one taking an assignment of the term from the lessee, and this whether he had possession or not.<sup>64</sup> Such assignee or purchaser of the term of a lease may discharge himself from all liability thereunder by assigning to a stranger, even though such stranger be a beggar, a married woman, a prisoner, or a person leaving the State, where the assignment is executed before his actual departure; and this is true even though made for the express purpose of avoiding the responsibility.<sup>65</sup>

The fact that a sub-lessee is not liable to the lessor for breach of covenants and rent, and that an assignee is, renders the distinction between a sub-leasing and an assignment an important one. The essential distinction between an assignment and a sub-leasing is simply this: If a lessee, by any instrument whatever, whether reserving conditions or not, parts with his entire interest he has made a complete assignment; if he has transferred his entire interest in a part of the premises he has made

Elliott v. Aiken, 45 N. H. 80, 86; Warner v. Hitchins, 5 Barb. 666; Post v. Vetter, 2 E. D. Smith, 148.

<sup>55</sup> Steward v. Winters, 4 Sandf. 587. See Maddox v. White, 4 Md. 79; S. C., 59 Am. Dec. 67, 70; Douglass v. Wiggins, 1 John. Ch. 485; Barrett v. Blagrove, 5 Ves. 555.

<sup>56</sup> See Den v. Post, 25 N. J. L. 285; Roberts v. Geis, 2 Daly, 535; Jackson ex d. Weldon v. Harrison, 17 Johns. 66, 70; Pike v. Eyre, 9 Barn. & C. 909; S. C., 17 Eng. C. L. 401; King v. Aldborough 1 East, 597.

<sup>57</sup> See Dartmouth College v. Clough, 8 N. H. 22; McFarlan v. Watson, 3 N. Y. 286; Jennings v. Alexander, 1 Hilt. 154; Harvey v. McGraw, 44 Tex. 412; Amsby v. Woodward, 9 Dowl. & R. 536.

<sup>58</sup> He may do this even though there be no demand, nor threat of legal proceedings. Peck v. Ingersoll, 7 N. Y. 528.

<sup>59</sup> Woodhull v. Rosenthal, 61 N. Y. 382, 391; Davis v. Morris, 36 id. 569; Doe v. Bateman, 2 Barn. & Ald. 168; Doe, d. Wyatt, v. Byron, 1 Man. Gr. & S. 623, 626; S. C., 50 Eng. C. L. 623, 626.

<sup>60</sup> There is some disagreement among the authorities upon this point, but the better rule is thought to be the one stated in the text. See Johnson v. Sherman, 15 Cal. 287; S. C., 76 Am. Dec. 481; Babcock v. Scoville, 56 Ill. 461; Simonds v. Turner, 120 Mass. 329; Sanders v. Partridge, 108 id. 556; Wall v. Hinds, 70 id. 256; S. C., 64 Am. Dec. 64; Felch v. Taylor, 80 id. 183, 189; Willi v. Dryden,

52 Mo. 319, 322; Smith v. Brinker, 17 id. 148; S. C., 57 Am. Dec. 265; Damainville v. Mann, 32 N. Y. 197; S. C., 88 Am. Dec. 324; Van Schaick v. Third Avenue R. Co., 8 Abb. Pr. 381; S. C., 30 Barb. 189; Tyler v. Heidorn, 46 Barb. 439, 452; Van Rensselaer v. Smith, 27 id. 154; Childs v. Clark, 3 Barb. Ch. 52; S. C., 49 Am. Dec. 164; Jackson v. Harsen, 7 Cow. 323; S. C., 17 Am. Dec. 517; Jackson, ex d. Van Schaick, v. Davis, 5 Cow. 123; S. C., 15 Am. Dec. 451; Journeay v. Brackley, 1 Hilt. 477; Bagley v. Freeman, id. 196; Wright v. Kelly, 4 Lans. 57, 60; Jackson, ex d. Williams, v. Miller, 6 Wend. 228; S. C., 21 Am. Dec. 816.

<sup>61</sup> Babcock v. Scoville, 56 Ill. 461. See Damainville v. Mann, 32 N. Y. 197; S. C., 88 Am. Dec. 324.

<sup>62</sup> See Sanders v. Partridge, 108 Mass. 556.

<sup>63</sup> See Hannen v. Ewalt, 18 Penn. St. 9; Wickersham v. Irwin, 14 id. 108; Thomas v. Connell, 5 id. 13.

<sup>64</sup> Smith v. Brinker, 17 Mo. 148; S. C., 57 Am. Dec. 265.

<sup>65</sup> Johnson v. Sherman, 15 Cal. 287; S. C., 76 Am. Dec. 481. See Van Schaick v. Third Avenue R. Co., 8 Abb. Pr. 381; S. C., 30 Barb. 189; Childs v. Clark, 3 Barb. Ch. 52; S. C., 49 Am. Dec. 164.

an assignment *pro tanto*. If he retains a reservation in himself, however small it may be, he has made a sub-lease."

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NEW YORK.

#### ANTI-TOXIC SERUM A SUBJECT-MATTER FOR A PATENT.

THE new treatment of diphtheria has been the occasion of such interest that it may be useful to deal with the matter from a legal point of view. There is good ground for saying that the process for obtaining this substance in its improved form is the subject of protection under our patent law. The protection applied for relates to methods for the production of the anti-toxic serum — the isolation of the essential elements, its purification, and probably concentration. The process of obtaining the anti-toxic serum seems to be: (1) Obtaining the micro-organism known as the diphtheria bacillus; (2) obtaining the toxin of diphtheria; (3) injection of the latter into, say, a horse; (4) after about three months a certain amount of blood is taken from the horse; (5) the serum is separated; (6) and further treated. With reference to step No. 1 the latest papers from Germany rather point to some doubt as to the particular bacillus which gives rise to diphtheria. Steps Nos. 2, 3 and 4 are explained by Dr. Rose in the *Fortnightly* of December in the following words: "The method of preparing anti-toxin is as follows: The animals which are to furnish the anti-toxic serum are rendered immune by the subcutaneous injection of the toxin of diphtheria. This toxin is formed when the virulent bacillus is grown in broth; after three or four weeks the culture is sufficiently rich in toxin to be used. The animals employed are horses in good health, previously shown to be free from glanders. The culture, filtered through a porcelain filter, yields a clear liquid with which the horse is inoculated by injection under the skin. Gradually by repeated injections, extending over two or three months, the horse is brought into a condition in which its serum possesses very high anti-toxic properties" (p. 881). Steps Nos. 5 and 6 form the subject of provisional

protection, but until completed further details can not be given. On December 8, Dr. Sims Woodhead gave an interesting lecture at the College of Physicians on the subject of the anti-toxic serum treatment. The audience was informed how the toxin was prepared, and that the horse was the animal usually used; but the manner in which the ultimate product was obtained was left to imagination. Perhaps Dr. Sims Woodhead took it for granted that what ought to be used is the blood serum, such as is served out by Dr. Roux. In Germany there are two firms which supply the article to the hospitals — namely, Farbwerke vormals Meister & Brüning and also Chemische Fabrik aus Actien vormals E. Schering. So long as the discovery is made by physicians, and the invention lies in the hands of eminent men of medical science, there would, of course, be little probability of their discoveries being patented in England so as to exclude the public from the possible benefits to be derived from the product. It will be found, however, that patents are being applied for by manufacturers, and sooner or later the question of the validity of the patent will come before the courts. In some European countries medicines and the like are not allowed to be patented. Take, by way of example, France, where pharmaceutical compounds and medicines of any kind cannot be patented. Rules of the same kind prevail in Sweden, Switzerland and other countries, while in Germany and Austria neither medicines nor foods can be patented. In the case of Germany and Austria they seem to allow fractional processes for obtaining either medicines or food stuffs. In Germany a patent may be sustained where the subject-matter is very fine by proving a "new technical effect," and possibly this principle will be applied when the inventors are applying for a German patent for their present discoveries. In England, however, there is no reservation in favour of the public of medicines and the like; in fact, many substances used by the medical profession form the subject-matter of a valid patent. For example, the preparation of salicylic acid from the carbolate of soda, and, coming to more recent times, anti-pyrine, salol and many other preparations, not only form the subject of patents, but the patentee's rights are respected. None of those patents have been discussed on the question of subject-matter; and perhaps the nearest case is the preparation of lanolin, decided during the present year to be the subject of valid letters patent. The Statute of Monopolies does not help us in the consideration of this question. The words "Any manner of new manufacture" have been held to include electrical and chemical inventions, whereas at the date of that statute there was practically no such thing as an electrical invention, and chemistry was practically

"Woodhull v. Rosenthal, 61 N. Y. 382, 391; Bedford v. Terhune, 30 id. 453, 454, 457; S. C., 86 Am. Dec. 394. See Collins v. Hasbrouck, 56 N. Y. 157, 163; S. C., 15 Am. Rep. 407; Constantine v. Wake, 1 Sweeney, 239, 251; Lloyd v. Cozens, 2 Ashm. 131, 138; Doe v. Bateman, 2 Barn. & Ald. 168; Pluck v. Digges, 5 Bligh. (N. S.) 81, 65; Palmer v. Edwards, 1 Doug. 187; Langford v. Selmes, 8 Kay & J. 226, 229; Hicks v. Dowling, 1 Ld. Raym. 99; Parmenter v. Webber, 8 Taunt. 593; S. C., 4 Eng. C. L. 298.

unknown in its industrial application. The present invention differs from all these, as the product is not so much the result of mechanical or chemical action, but is principally due to bacteriological action. Where, however, a new product is obtained it is certain that a new process has been invented. The serum is a complex body, and its composition is by no means simple. The extent of the new treatment is still under discussion, but there is no doubt that there are contained in the serum some active principles which are useful for the treatment of diphtheria. It is, at the same time, certain that the serum also contains matter which is detrimental and liable to cause trouble to the patient. Any process, therefore, which enables the good part to be retained and the injurious part to be rejected constitutes subject-matter for letters patent. Another important point of the invention lies in the concentration reducing the serum to one-tenth of its bulk. Assuming that the improved product possessed but a small part of the qualities attributed to it, there can be no doubt that letters patent would be sustained. Supposing that valid letters patent are eventually granted, there may be some curious cases of infringement. The patent grants the sole right to "make, use, exercise and vend." The person, therefore, who has been cured by infringing material is liable for the consequences of infringement. This question of infringement may bring into play a section of the Patent Act, 1883, hitherto neglected. Section 22 provides for a compulsory license in the event of the patentee refusing to grant licenses on reasonable terms, and "if the reasonable demands of the public cannot be supplied." This section of the act has been very little used, but the section has by no means been a dead letter, as there are instances where foreign manufacturers have taken measures to create works in England for the purpose of controlling the manufacture in their own hands, and of obviating the necessity of granting licenses under the section. — *Law Journal*.

**CARRIERS OF PASSENGERS — DAMAGES.** — Where plaintiff, a traveling salesman, received as compensation a certain salary, his railroad expenses, and a certain percentage of the amount of his sales, such percentage is not "profits" in the sense of that word as used in the decisions discussing the right to recover profits as such in actions for breach of contract; and, in an action for damages sustained from having received personal injuries, plaintiff may recover such percentage, and, in order to lay a foundation for such recovery, may show the extent and amount of his ordinary business. (*Rio Grande Western Ry. Co. v. Rubenstein* [Colo.], 38 Pac. Rep. 76.)

## AN IRISH LORD CHIEF JUSTICE ON AN IRISH CHIEF BARON.

A JUDICIAL HUMOURIST.

THE Right Hon. James Whiteside, who was lord chief justice of Ireland from 1866 till 1876, in an article written in 1830, and entitled "The Irish Exchequer as it was in 1829," gives the following description of the Irish Lord Chief Baron O'Grady of that time, who was afterward created Viscount Gaillamore. A person, says Mr. Whiteside, but indifferently skilled in the art of physiognomy might from his countenance form a tolerably accurate judgment as to the temper and character of Chief Baron O'Grady. Cynicism, it may be fairly concluded, forms the most prominent feature of his character. He seems to have laid it down as a rule, from which it would be criminal in the extreme to deviate, never to suffer the opportunity of saying a severe thing to escape, no matter how galling it may be to the feelings of the person against whom it is aimed. This cruel propensity renders him no great favorite with the junior bar, toward whom his manner is not unfrequently discouraging and repulsive. Thus, when a young barrister had resumed his seat, after having zealously labored for two hours to convince the court, Mr. Whiteside records that he heard the chief baron observe, in his customary drawling and uncourteous style, "Well, sir, all that may be very fine, but I confess I cannot understand it." In this point of view he was no respecter of persons, as the following anecdotes will sufficiently demonstrate. Mr. Crampton, an eminent King's counsel, who was afterward a judge, having in a law argument cited Palgrave's case with confidence, and relied upon it with great emphasis, the chief baron observed with his usual politeness: "Mr. Crampton, you have taken that case from some abridgment. Palgrave was neither the plaintiff nor the defendant, but the lawyer who conducted the cause, and who was remarkable for nothing but his ignorance, hence it was called Palgrave's case; and I dare say that, if ever this case should be cited hereafter as a precedent, it will be known by the appellation of Crampton's case." A scene which occurred with a different sort of person deserves to be commemorated. Sir William Stamer, a portly, consequential alderman of the venerated corporation of Dublin, a magistrate and terror of all evil-doers, when sitting as a foreman of a jury, interrupted the chief baron at a critical moment by vehemently protesting he could no longer endure the intensity of the cold, and begging permission to wear his hat. His lordship, casting an affectedly sympathizing glance on the half-frozen baronet, dryly replied, "Sir William, it is not usual for gentlemen to wear their hats in courts of justice, but if a wig would answer I am sure the members

of the bar will kindly accommodate you with a good fit." The alderman sat down confounded and abashed.

There is, says Mr. Whiteside, a class of shabby lawyers in Dublin whose practice is exclusively confined to the defense of criminals at Green street, the Irish Old Bailey. These gentlemen are sometimes clamorous and contumacious; the chief baron, however, had the happy knack of bringing them to a proper sense of their situation. One of these barristers having, on the trial of a pickpocket, been employed as counsel for the prosecution for lack of any other, assumed on this occasion an imperious air, and took special care to reiterate loudly and frequently for the information of his lordship that he was counsel for the Crown. The chief baron bore this patiently for a time, till at last, provoked by his pertinacity, when the pompous little gentleman, elated with the unwonted honor, again exclaimed he was counsel for the Crown, his lordship kindly remarked, "Yes, sir, and I believe sometimes for the half-crown, too." When presiding in the town of Mullingar, in the criminal court, two culprits were put on their trial for an atrocious burglary; a flaw being discovered in the indictment, an acquittal was directed, when counsel for the defense proud of his display of forensic skill, confidently demanded of his lordship to discharge his injured clients from the dock. "Oh, thank you," said the sagacious chief baron, "you will allow me, if you please, to get half an hour's start of your clients out of the town."

Mr. Whiteside gives some curious instances of the brevity of Chief Baron O'Grady's charges to juries. On the trial of a criminal for stealing stockings several witnesses deposed to his good character, after which his lordship charged the jury in this concise, or rather comic, strain: "Gentlemen of the jury, here is a most respectable young man, with an excellent character, who has stolen twelve pair of stockings, and you will find accordingly." Upon the trial of an action for debt to which the defendant had pleaded as a set-off a promissory note of somewhat long standing and an old broken-down gig which he had furnished the plaintiff, the following charge was spoken with infinite gravity by the learned chief baron: "Gentlemen of the jury, this is an action for debt to which the defendant has pleaded as a set-off two things—a promissory note, which has a long time to run, and a gig, which has but a short time to run. The case seems clear. You may find for the plaintiff."—*Law Times*.

Rent accruing after an assignment is not a debt entitled to share in the assets of the assigned estate. (*In re Wiman's Estate* [Penn.], 30 Atl. Rep. 389.)

## Abstracts of Recent Decisions.

**CONTRACT BY WIFE—SEPARATE ESTATE.**—Where a married man makes application for life insurance, and his wife, in the absence of the husband, agrees to take the policy on condition that it be made payable to her, and gives her note in payment of the first premium, her separate estate is charged with its payment. (*Mitchell v. Richmond* [Pa.], 30 Atl. Rep. 486.)

**CORPORATION — FRANCHISE TAX — RECEIVER.**—Where a receiver has been appointed for an insolvent corporation, and has taken possession of its assets, and exercises its franchises, he is a necessary party to a petition by the State for an injunction to restrain the further exercise of any franchise or transaction of any business of the company by him because of non-payment of the State franchise tax. (*In re George Mather's Sons Co.* [N. J.], 30 Atl. Rep. 321.)

**CRIMINAL LAW—BAIL.—RECOGNIZANCE.**—It is no defense to a recognizance that it was taken and acknowledged before the clerk of the district court, where this was done by order of the district judge, made at the request of the accused, and to secure his speedy discharge. (*Hunt v. United States*, U. S. C. C. of App., 63 Fed. Rep. 568.)

**DECEIT—DAMAGES.**—Where defendant sold plaintiff a stallion by means of false representations as to his breeding abilities, plaintiff, on recovering a verdict in an action for damages, can recover the cost of keeping the stallion a reasonable time for the purpose of testing him. (*Peak v. Frost* [Mass.], 38 Pac. Rep. 518.)

**DEED — CONSTRUCTION.**—Where land is conveyed to a trustee for the sole and separate use of a married woman, giving her full power to sell and convey the property, and it is provided that, in case she dies without disposing of the property by deed or will, the trust shall cease and determine, and the property shall revert to and vest in her husband, held that, on the death of the wife, the property being undisposed of, an equitable fee-simple title to the land vested in the husband. (*Yore v. Yore* [U. S. C. C., Mo.], 63 Fed. Rep. 645.)

**EASEMENT—DRAINAGE.**—A deed to part of a tract of land, reserving to the grantor, his heirs and assigns, the right to use a certain drain across the premises, creates an easement of drainage over the land conveyed. (*Jones v. Adams* [Mass.], 38 N. E. Rep. 437.)

**EQUITY—JURISDICTION.**—Equity will not take jurisdiction of an action to recover a simple debt on the ground that a pretended payment thereof was fraudulent. (*Cary & Moen Co. v. Moen* [Mass.], 38 N. E. Rep. 505.)

**EVIDENCE—NOTE—LIABILITY OF INDORSER.**—On an issue whether an indorser of a note indorsed with the intent to give credit to the note so as to render her liable to the payee, a letter from her to the payee, in which she acknowledges herself to be an indorser, and waives notice of demand, is admissible. (*State Trust Co. v. Owen Paper Co.* [Mass.], 38 N. E. Rep. 438.)

**EXPERT EVIDENCE.**—An expert witness may testify as to whether a person standing on the floor can detect any oscillation in a shaft 2 15-16 inches in diameter, and 11 feet above the floor, due to its not running true. (*Ouillette v. Overman Wheel Co.* [Mass.], 38 N. E. Rep. 511.)

**GIFT—WILL.**—A paper reciting that the signer gives certain property to another cannot operate as a present gift, it never having been delivered, but being in the donor's possession at time of death. (*Tozer v. Jackson* [Penn.], 30 Alt. Rep. 400.)

**HUSBAND AND WIFE—MORTGAGE OF COMMUNITY PROPERTY.**—A husband and wife removed from their community land, on which they had given a mortgage, to another State, where they separated. The wife remained out of the State, but the husband returned to the land. Afterward there was a decree foreclosing the mortgage, and the return of the sheriff showed that the service of the summons was made on the husband personally, and on the wife by delivering a copy to the husband at her usual place of abode. *Held*, that the court had jurisdiction of the parties, and such decree was binding on the wife. (*Johnson v. Richmond Beach Imp. Co.*, U. S. Cir. Ct. [Wash.], 63 Fed. Rep. 493.)

**INJUNCTION AGAINST TRESPASS.**—Equity will not interfere to prevent a trespass where the legal rights of the parties have not been settled, nor where it does not appear that the injury to the inheritance will be irreparable, nor that the defendant is insolvent, but will leave them to their remedy at law. (*Worthington v. Moon* [N. J.], 30 Atl. Rep. 251.)

**INSURANCE — LIGHTNING AND WIND.**—Under a policy covering direct loss from lightning, but excluding loss from wind, there can be no recovery for damage by wind, though, but for the weakening of the building by lightning, it would not have been blown down. (*Beakes v. Phoenix Ins. Co. of Hartford* [N. Y.], 38 N. E. Rep. 453.)

**LANDLORD — DANGEROUS PREMISES.**—In an action against a landlord for injuries to a child by the breaking of a platform used for hanging out washing, where it appeared that the platform was in the same condition when the accident occurred as when plaintiff's father hired the house as it was, and that its defects could have been discovered by him by exercising reasonable care, plaintiff cannot recover. (*Moynihan v. Allyn* [Mass.], 38 N. E. Rep. 497.)

**LIEN FOR CROP SUPPLIES—ESTOPPEL.**—One who contracts under seal to pay to another the value of supplies furnished for the cultivation and handling of his crops, giving a lien on the crops for the payment thereof, is estopped, in an action to enforce the lien, to deny that cotton furnished under the contract was converted into money, and used in the cultivation of such crops. (*Gaston v. Branderburg* [S. Car.], 20 S. E. Rep. 157.)

**LIFE INSURANCE — RECOVERY OF PREMIUMS.**—Where a policy was issued by defendant on the life of plaintiff's husband, without his knowledge, but on the solicitation of defendant's agent, and in a manner contrary to defendant's rules, if plaintiff was innocent of any fraud, and was induced by the fraudulent representation of the agent to make the application, plaintiff may rescind the contract on discovering the fraud, and recover the premiums paid. (*Fisher v. Metropolitan Ins. Co.* [Mass.], 38 N. E. Rep. 503.)

**MASTER AND SERVANT — NEGLIGENCE OF CO-EMPLOYEE—SUPERINTENDENT.**—A railroad employe doing hand service in company with five or six other men, and drawing the same wages, receiving orders from a general superintendent of the work, or, in his absence, from a foreman, and, during the absence of the superintendent, giving his fellow laborers directions as to their common work, is not solely or principally a superintendent. (*Dowd v. Boston & A. R. Co.* [Mass.], 38 N. E. Rep. 440.)

**MORTGAGE — FORECLOSURE — FIXTURES.**—A mortgage by the lessee of the leasehold covers fixtures attached at the time of the execution of the mortgage. (*San Francisco Breweries v. Schurtz* [Cal.], 38 Pac. Rep. 92.)

**NEGLECT—CONTRIBUTORY.**—The negligence of a husband who is driving his wife over a railroad crossing, where she is injured, cannot be imputed to the wife. (*Lake Shore & M. S. Ry. Co. v. McIntosh* [Ind.], 38 N. E. Rep. 476.)

**NEGOTIABLE INSTRUMENT—NOTE—EXECUTION.**—In an action on a note, the making of which is denied, the fact that the payee had no money to loan cannot be shown by his "reputation" for being "hard up" at the time it purported to have been given. (*Bliss v. Johnson* [Mass.], 38 N. E. Rep. 446.)

**NEW TRIAL—MISCONDUCT OF JUROR.**—Proof that while a case was pending, and before the testimony was concluded or the charge given, one of the jurors privately measured the distance testified to in the case, and told several persons that he had made up his mind, and would hold out for damages, is ground for setting aside the verdict. (*Ewers' Adm'r v. National Imp. Co.*, U. S. C. C. [Va.], 63 Fed. Rep. 562.)

# The Albany Law Journal.

ALBANY, JANUARY 12, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE paper on the proposed revision of the Code of Civil Procedure relative to *certiorari*, *mandamus* and prohibition which is printed in this issue of the JOURNAL, from the pen of J. Newton Fiero, Esq., shows the absolute need of simplification and remodelling of the Code so as to make it a practical, concise and intelligent instrument rather than the unwieldy and complicated work that is now graced by the name of the Code of Civil Procedure. Though attention is called only to these three subjects, it is possible to see what advance can be made in a practical line and how the Code which at present permits legal pit-falls and foolish requirements of no intrinsic value can be made a practical and effective means to bring far better results because there will be less chance of the lawyers avoiding the issue of a cause by raising some petty technicality. Sections 1991-2007 of the Code at present apply to State writs; sections 2067-2090 twenty-four sections in all, to the writ of *mandamus* especially. These twenty-four sections are reduced by Mr. Fiero to five, while sections 2091-2102 — twelve sections — relating to prohibition are reduced to four in number, and sections 2120-2148 — twenty-nine sections — are reduced to eight in number. Such a reduction of the sections of the present Code seems almost impossible without a careful examination of the proposed work, and to many it might seem that there was an inclination in such a revision to make practice assume a most common-place and machine-like method; but when a proper course of re-enacting the rules of procedure is started it is only right to give the most practical methods and business-like arrangements to the rules which must govern procedure in this State. There is, no doubt, an almost unconscious feeling on the part of many lawyers that it is an improper indignity to clothe

legal procedure in the ordinary fashion of business regularity, but such a theory should find its speedy death in the desire of the profession to make the law an aid rather than a hindrance to business activity. The American correspondence of the *Law Times*, speaking on this subject, says: "The New York State Bar Association, which is one of the most influential of the State associations of lawyers, meets in the early part of next month. One of the most interesting matters which will come before it, is a suggestion by several well-known lawyers that the Legislature be asked to provide for a revision of the Code of Civil Procedure under which legal proceedings are now carried on. The present Code is bulky, and it is expressed in verbose and sometimes unintelligible terms. An earlier Code of Procedure, of which David Dudley Field was the author, was more plainly and tersely expressed. Mr. Field was, next after the late Justice Stephen, perhaps the best equipped codifier in the world. He possessed a remarkable faculty for condensation. The author of the present New York Code of Civil Procedure had, on the contrary, a loose and inelegant style, and it has required years of study and hundreds of decisions by the court to construe the present Code. A revision, if it were carried out by capable lawyers who possessed a good knowledge of practice, and a clear and concise style of expression, should be popular among lawyers."

There seems to be no doubt but that the present Code could be reduced to about one-half its present size and should be a work setting forth precisely and clearly the rules which it purports to lay down, that it could do away with much of the unnecessary red tape and save the time and energy not alone of the lawyers and their clients, but of those who refuse to become their clients on account of their dread of endless litigation. Face the matter squarely, appreciate the way in which some people — perhaps properly — regard the legal profession, and let it be the duty of every lawyer to ably assist and not to unnecessarily hinder a revision which will inspire confidence in the people of the legal profession.

One of the most peculiar cases which has arisen in a number of years is that of State v.

Hall, which has for a second time been considered by the Supreme Court of North Carolina, the opinion being filed on the 29th day of December, 1894. The defendant, standing on the North Carolina side of the boundary between that State and Tennessee, fired and killed a person over the line on the Tennessee side. He was tried and convicted of murder in North Carolina, but on appeal the conviction was reversed, on the ground that, "in contemplation of law," defendant was in Tennessee when the killing was done. On his discharge he was again arrested, and held as a fugitive from justice. The trial judge refused to discharge him, and in the determination under discussion the Supreme Court, by a majority of one, decided that the defendant must be discharged, because, not having been in Tennessee at the time of the killing, he cannot be a fugitive from justice. Justice Clark dissents, in a very able opinion, in which Judge McRae concurs. Judge Clark takes the position that, "in contemplation of law," the defendant was in Tennessee at the time of the killing, so that he cannot be tried in North Carolina. In the same contemplation of law he must be a fugitive from justice if he cannot be found in Tennessee, but is in North Carolina. In his opinion Judge Clark says: "If a mob occupying the Jersey side of the Hudson should shell the city of New York, or from the opposite side of the Delaware should cannonade Philadelphia, under the decision of the court they would be liable to no punishment in New Jersey because, "in contemplation of law," the mobs were in New York and Pennsylvania. But if it is true, as contended by counsel, that the members of the mob cannot be extradited because the mob never was in those cities, it would be a singular state of things, and would place those cities, as well as Savannah, Memphis, St. Louis, Louisville, Cincinnati and hundreds of other border towns at the mercy of any mob which might assemble with weapons of long range across the State line. Civilized man must recoil from the practical ruling that the territory adjacent to the State boundaries is a 'no man's land,' and that murder is privileged if committed across a State line." Both dissenting judges believe that, as murder has been committed, if the murderer cannot be tried in North Carolina, he should be delivered to the authorities of Tennessee to be

tried; that extradition is not a criminal, but a remedial, statute, and should be liberally construed to effect the object intended, which is that an offender should not escape trial because of not being found in the State where he committed the crime when he can be found in another State of the Union. It would appear that if the court held that the murder was committed in Tennessee, that it was of no importance where the defendant was, since the mere shooting of a weapon was not a crime, but the effect of such an act of the defendant on another was a felony, and as the result occurred in Tennessee, the prisoner was a fugitive from justice in evading the provisions of the law in Tennessee, though perhaps he had never actually been within that State. Clearly, the crime was committed in one State or the other, and should be punished according to the law of the place whose statutes were transgressed.

A petition has been signed by all the leading lawyers of Dutchess county, and will be presented to Governor Morton, asking him to assign ex-Judge Joseph F. Barnett of Poughkeepsie to hold Special Terms every Saturday, and to sit at Chambers during the other days of the week, under the provisions of the new Constitution which provide that any justice of the Supreme Court whose office is abridged by reason of having reached the age of limitation of seventy years may, with his consent, be assigned by the governor from time to time to any duty in the Supreme Court during the time his compensation is continued. Judge Barnett's last term commenced on January 1, 1886, and he was elected for a term of fourteen years, and therefore is available for five years to come. The judge has expressed his willingness to be assigned to any duty in the county of Dutchess, and as it seems that Governor Morton has decided not to appoint the additional judges, it is probable that the governor will seize the opportunity and add an extra justice for the work in the Supreme Court. In other parts of the State it is also desirable that similar assignments should be made, especially in counties like Albany, where the circuit calendar has been crowded with cases which have been pending for years, and which ought, in justice to the parties to the suit, to be terminated.



One of the most influential newspapers of the present time has seen fit to attack those persons who desire to have the constitutionality of the income tax determined by the Supreme Court of the United States. From the beginning we have known that the suit, which was started to restrain the collector of internal revenue from collecting the tax, was expressly prohibited by a statute of the United States, but the payment of the tax under protest and a proper suit to recover the same, can easily be started to determine the question whether class taxation is permissible under the Constitution of the United States. In the article which was printed in this journal in the last issue, the writer sought to show that the tax was not laid according to the rules of uniformity, as the Constitution requires all excises to be laid, and that the defect of the measure in this respect could be shown in many ways. Before this article had appeared all other writers had attempted to show that the tax was a direct tax, although they cited and tried to distinguish the case of *Springer v. United States* from the existing law. The weight of precedent seems to be that only two taxes are considered by the Supreme Court of the United States to be direct taxes, and these are a capitation, or poll tax, and a tax on property. This theory was taken by the Supreme Court of the United States, though nearly all political economists of this and other countries had always advanced the theory that an income tax was a direct tax on property. It was also compatible with the idea that a direct tax falls on the person paying the same, while an indirect tax came from another than the one who gave money to the officer appointed to collect it. It was, therefore, the privilege of this journal to first print an article in which it was maintained that the income tax had to be considered an excise owing to the many determinations of the Supreme Court to that effect, and that as an excise it was not laid according to the rule of uniformity. The *Forum* for January contains an article by David A. Wells, Esq., of Connecticut, in which that eminent lawyer takes the same position as Amasa J. Parker, Jr., Esq., of this city did in the article to which we have referred. Mr. Wells discusses at length and in a most able manner the question of laying a tax according to the constitutional requirements of

uniformity. He says: "To appreciate and understand the involved issue, it is essential to obtain in the first instance a clear view of the incidence of an income tax. Upon what does such a tax fall? One American writer of repute on economic subjects assumes 'faculty,' or the native or acquired power of production, to be an equitable basis for taxation; and his answer might be that it falls on 'faculty.' But 'faculty' is not an entity, and a tax to be productive must be assessed on something that is material or an entity. A little reflection must satisfy us that an income tax is always a tax on property, for in default of any property there will be no income or basis for taxation; wages, salaries, interest, rents, gains, or profits in business, as elements of income, being simply terms characterizing the different manifestations or forms of property. It may also be regarded as an economic axiom that when a government taxes the income of property, it in reality taxes the property itself. In England and on the continent of Europe land is taxed on its yearly revenue, or income value and these taxes are always considered as land taxes. Alexander Hamilton, in discussing the taxation of incomes derived from property goes even further, and in asking the question, 'What is property but a fiction without the beneficial use of it?' leads to the inference that property, and the income derived from it, are substantially one and the same thing. With his brief exposition of the true and sole objective of an income tax, attention is next asked to the eighth section of the first article of the Federal Constitution, which reads as follows: 'The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States.*' We have therefore a clear and imperative constitutional mandate as to the manner in which the Federal government must assess an income tax in common with all other duties and excises; and the question of next importance that presents itself is, Do the provisions for assessing the present income tax conform to such mandate? And the answer turns to the definition, or interpretation, of the term 'uniform' in its application to taxation. The framing of such a definition has

not been free from difficulty, and has often come up before the court for determination. The late Mr. Justice Miller, in his lectures on the Constitution, discusses it at some length, and states his conclusions as follows: 'A tax is uniform within the meaning of the constitutional requirement, if it is made to bear the same percentage all over the United States,'—and again, 'When they' (the statutes) 'use the words 'taxes must be uniform,' they mean uniform with regard to the subject of the tax; \* \* \* that is, different articles may be taxed at different amounts, provided that the rate is uniform on the same class everywhere, with all people and at all times.' To complete this argument, it only remains to consider what is meant by property of the same class. The answer to this is, obviously, property which immediately or directly competes in open market. The force of competition is not dependent upon the quantity owned or produced by few or many persons, but upon the aggregate quantity of similar property offered in market, whether produced or owned by few or many persons. On the ground of eminent judicial authority and common sense, territorial uniformity by taxation must therefore imply and involve absolute uniformity and equality of taxation on like values and quantities. If an income tax is laid at the same rate or percentage upon all incomes, there would be no question as to its uniformity and compliance with the constitutional provisions. On the other hand, if such a tax is laid as the present income tax law proposes, with discriminating incidence or with different rates or percentages on different incomes, there would seem to be no ground for assuming that it was invested with uniformity, or was in compliance with the constitutional mandate. Let us suppose, for illustration, three farms designated as A, B and C, owned by three persons, producing the same products, or the same class of products—wheat, corn, potatoes and the like—and returning a profit or income to their respective owners from the sale of these products under the same competitive conditions. Let us suppose further that the profit or income from the farms A and B is in each case \$4,000; while the profit or income from farm C, owing to a greater area of land cultivated, or greater energy and skill on the part of the owner, is \$8,000. Under the present discriminating in-

come tax the profits or income of the two farms, A and B, and of two persons, under an exemption of \$4,000, would be free from all income taxation; while the profit of the competitive farm C, producing the same income as the other two farms, would be subject to a tax burden, on half its income or profit, of two per cent, if, as assumed, the farm happens to be in the hands of a single owner. The aggregate of the value or income of the property is the same in both cases, but the incidence of taxation is made dependent upon the circumstance of making the assessment upon two persons rather than one. This is not equality of burden on competing property, or on immediate competitors, but may be fairly characterized as robbery. Under the operation of natural laws, larger quantities will be owned and produced in one State than in another. Colorado and Texas have large herds of cattle, Illinois has large cornfields and large distilleries, Louisiana large sugar plantations, and New England large factories, owned by single persons. Two States may, and in some instances do, have nearly equal *per capita* wealth in the aggregate; but in the one the wealth may be made up of capital invested in numerous small industries adapted to soil and climate, while in the other, owing to different natural conditions, there may be great concentration of capital in a few hands and in few industries. Thus, in the case of the income tax enacted during the war period, seven States in the year 1869—Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Illinois, and California—possessed forty per cent of the assessed property of the United States, and just about forty per cent of the population. But at the same time these same seven States paid fully three-fourths of the entire income tax levied by the Federal government upon the people of the whole country; or, to put it differently, the States which had sixty per cent of the wealth and population of the country paid only about one-fourth of the income tax. There is another clause of the Federal Constitution which is pertinent to this subject, namely, Article V, which provides that private property shall not be taken for public use without just compensation. It must be conceded that this is a limitation on the power of Congress. There must be a line between the taking of private prop-

erty for public use and taxation ; but how can that line be drawn except by the rule that taxation means uniformity of burden on competing avocations and competing property? A decision of the Supreme Court of New Jersey, some years since, seems to have a direct bearing upon the unconstitutionality of discriminating burdens, on the same class of persons or property. Thus the New Jersey court said : 'A tax upon the person or property of A, B, and C individually, whether designated by name or any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation.' (36 N. J., p. 66, 1872). A word in conclusion on the subject of exemptions, which all modern systems of income taxation have recognized to the extent of discriminating in favor of persons in receipt of comparatively small incomes, and which, being effective in producing discrimination and inequality in taxation, may be regarded as constitutionally illegal: An exemption is freedom from a burden or service to which others are liable ; but an exemption for a public purpose or a valid consideration is not an exemption except in name, for the valid and full consideration, or the public purpose promoted, is received in lieu of the tax. Nor is an exemption from taxation a discriminating burden on those who pay an income tax, provided the person or institution benefited by the exemption is a pauper, or a public charitable institution; for then there is consideration for the exemption, and it is justified as a matter of economy, and to prevent an expensive circuitry of action in levying the tax with the sole purpose of giving it back to the intended beneficiary of the government. The avoidance of this unnecessary circuitry of action is not, moreover, an injury but a gain to those who pay the tax. It cannot, however, be seriously claimed that a man having \$100,000 of productive capital, and receiving from it \$4,000 of annual income, is entitled to receive support from the government as a public pauper. The United States Supreme Court, in the case of Loan Association

v. Topeka, held that our government, State or national, cannot impose taxes for the purpose of fostering any *private* business or enterprise. Taxes can be imposed only for public purposes; and, when they are imposed for any other purpose, the government acts the part of a highwayman and takes forcibly the property of A and gives it to B. In short, there is the same reason why all exemptions of like property from taxation should be based solely on the ground of a public purpose, as that all taxes collected should be for a public purpose. Finally, the principle involved in this question of discriminating income taxation is one that affects the foundation and continued existence of every free government, namely, the equality of all men before the law. Any exemption whatever, under an income tax, be it small or great, except to the absolutely indigent, is purely arbitrary; and the principle once allowed may be carried to any extent. Any exemption of any portion of the same class of property or incomes is an act of charity which every patriotic American citizen ought to reject upon principle and with scorn, except under circumstances of great want and destitution. Equality and manhood, therefore, demand and require uniformity of burden in whatever is the subject of taxation."

Mr. Wells certainly expresses most clearly and concisely the true way in which taxes should be laid according to the rule of uniformity, and demonstrates to our satisfaction that the income tax is one which taxes one class and exempts another. Even in the case of *Springer v. United States* the Supreme Court neither had its attention called to nor determined whether the income tax of 1864 was laid according to the rule of uniformity, and merely said in the fewest words that the tax is not a direct one, though it may, perhaps, by implication hold that the tax of 1864 was an excise.

But referring again to the newspaper which has been attacking all the writers against the constitutionality of the present income law, it might be well to call its attention to the fact that in the eyes of the law every individual is equal and that each is presumed to derive the same beneficial results from the government and laws of the United States and of each State. Can it be possible that such an emi-

nent journal should in the slightest way endorse the most socialistic measure which was ever enacted in this country, and which heretofore has been justified only when war or some other emergency made it necessary? Can it so far cater to the socialistic element of this country as to condemn a man because he dare say that this statute is unconstitutional and is not worthy to be recognized by the people of this country? Such journalism utters its own greatest condemnation.

The opposition to the income tax, in which those people are exempt whose return from property is less than a specified sum, is not one which has recently arisen, nor one which the present generation only have taken an interest. The late Judge Amasa J. Parker, of this city, whose grandson recently wrote an article on the unconstitutionality of the income tax, was anxious that no such unjust law should be placed on the statute books. In a letter dated January 30, 1884, when a similar act was contemplated, Judge Parker wrote a letter, which was published in the Albany papers, and was reprinted in many of the leading journals at the time. It is interesting to note the sentiments of one man at that time, and we print his views, which are as follows:

"The suggestion of another income tax meets with little favor. It will have even fewer friends when the subject is fully examined and considered. The late income tax was the most odious tax ever levied in this country. It was tolerated and submitted to only as a war measure. It is only in the alarms of war that the laws are silent. Even when proposed *pro rata* on all incomes, which would be its least objectionable form, an income tax would be the most unpopular of measures. But it is proposed to tax large incomes only—that those whose incomes exceed \$10,000 shall pay the taxes. This would be a gross violation of the principles on which our government was founded, which impose burdens upon all alike. If poll taxes are to be paid, they fall upon every voter. Taxes on property are to be paid *pro rata*, wherever the property is found, regardless of ownership. Taxation goes without representation. Equality of political right and duty is democratic and is equity. With

these primary and foundation rules adhered to, we are safe. Destroy equality as to one right or one duty, and you strike a fatal blow at all. It is said discriminating income taxes are levied in some of the monarchies of the old world. Be it so. There might may make right. But what may be enforced in Russia, and even in England, would never do for America. There is no more justice in making the man whose income is \$10,000 pay the taxes for his less wealthy neighbors, whose respective incomes range from \$1,000 to \$9,000, than there would be in making him pay for the rents for their houses or the food for their tables. With just as much propriety, you may enact a law which would subject every house and every farm worth over \$10,000 to a tax and free all other houses and farms from taxation. All citizens owe the duty of supporting the government which protects their persons and their property. The tax is a debt due from a citizen, and you may as well compel his neighbor to pay any other debt he owes as that which he owes to the government. Whether the incomes taxed be \$1,000 or \$10,000, is not material. The proposition to tax part, and not all is rank communism. It can never meet with favor in this country, and could not be enforced without undermining the social fabric and destroying all equality of right. But it is said we tax corporations. Certainly we do so, and with right. They are the creatures of legislation, and hold their franchises under an express reservation which makes them subject to any conditions the legislative power may think proper to impose. The tax they pay is the compensation for the exclusive privileges conferred. The natural citizen holds by no such tenure. His patent of nobility and equality cannot be questioned. No condition can be imposed on him that is not imposed on his neighbors. All start equal in the pursuits of life, and it will neither tend to the encouragement of industry and thrift, nor promote the happiness of the people, to make any artificial distinctions among them. All that is desirable, and all that there is the right to enforce is, to make all property, whether great or small, and wherever it shall be found, pay its just and *pro rata* share of the public burdens."

**PROPOSED REVISION OF THE CODE OF CIVIL PROCEDURE RELATIVE TO CERTIORARI, MANDAMUS AND PROHIBITION.**

BY J. NEWTON FIERO.

**T**HE following proposed revision is simply a suggestion of what may be accomplished by way of condensation and simplification of the Code of Civil Procedure.

It was the intention of the author that these suggestions should form part of the article on this subject which was submitted to the Committee on Law Reform of the State Bar Association and, by its direction and order of the Executive Committee, printed for distribution. It was, however, impossible to take up the matter so as to accomplish this result, and the work has now been much too hastily done to form even a basis for completed work on the lines marked out. Manifestly, a revision intended for enactment should be made with great care and be subjected to much more careful examination by the draftsman, before being presented to the profession of the State for criticism, than has been possible in the time devoted to the subject. It seemed proper, however, that something of this character should be presented as an indication of what is deemed desirable and necessary, and this draft will serve to show the views of the author as to the method which may be adopted in a revision. He expressly disavows any claim to perfection in matters of detail.

The titles *Mandamus*, *Prohibition* and *Certiorari* have been selected, both because of the great apparent necessity of, and opportunity for, condensation and simplification, and by reason of the fact that the author has, both in actual practice and in collation of authorities for publication, as also in presenting the subject in the lecture room, had the defects of the present Code as to these topics brought forcibly to his attention. The revision proposed is based upon the original statutes, the notes of the revisers to the present Code, the very careful and comprehensive work of the commission originally appointed to draft a Code of Procedure as finally reported in 1858, and the Codes and Statutes of California, Kansas, Iowa, Connecticut and Massachusetts, and Rules together with the act regulating Procedure in England, as well as upon the reported decisions, and is an attempt to adapt the procedure on these topics to present conditions and demands. The California Code is based upon that reported to the Legislature of this State by David Dudley Field and his associates, and contains forty-eight sections on these subjects as against eighty-two in the Throop Code. Iowa has nine sections on *Certiorari*, the Throop Code twenty-nine; thirteen on *Mandamus*, Throop Code twenty-four. The Code of Procedure of Louisiana has, however,

afforded more assistance than any other statute, and this revision bears closer resemblance to that act, since the Louisiana statute dispenses with a writ in these proceedings and provides for an order as in the articles here presented.

*Mandamus*, *Certiorari* and *Prohibition* have much in common, arising from the fact that the three writs are used for the purpose of directing, controlling or reviewing the action of inferior tribunals. In this respect they are unlike the writ of *Habeas Corpus*, which is principally used to inquire into the cause of detention of a citizen. So far as *Habeas Corpus* is used to bring up a person to testify, its object can be better and more easily accomplished by a simple provision giving this power to a court of record; and where the prisoner is sought to be examined as a witness in a court not of record, by giving the Supreme Court power to make a proper order on due proof.

The use of the writ in *mandamus*, *prohibition* and *certiorari* is a relic of the former practice. No good purpose is served by it, since the order must be first granted, and the writ must follow the order. An order is quite as capable of being enforced as a writ, and trouble and expense will be saved by making the order take the place of the writ.

*Habeas Corpus* is unlike the other topics in every respect, except the use of a writ, and requires entirely distinct and separate treatment. It is not clear but that the writ should be retained in that single case on account of its associations and the place it holds in the minds of English-speaking people. In any event, it requires a separate article, and is in no way affected by the proposed revision, which abolishes the writ of assessment of damages because proceedings for condemnation under right of eminent domain are much more useful and convenient. Only one reported case exists under the provisions of Revised Statutes on which this article is founded, and it is doubtful whether this article has ever been called into practical application. This, with the omission of the two articles treating of *habeas corpus*, leaves four articles in title treated, instead of seven. The number of sections in the articles treated is eighty-two, in the proposed revision the subjects are treated in twenty-six sections.

#### CONDENSATION.

The topics treated illustrate very fully the defects of the Code of Procedure. In the present Code *mandamus*, *prohibition* and *certiorari* with *habeas corpus*, are treated in a general way under article I, but little pains seems to have been taken to group the features common to all. The sections of this article are 1991 to 2007, but sections 2000 to 2006, that is seven of seventeen sections, treat only of a single topic, and should not form part of the title

treating of those matters, while on the other hand the subjects, "Service of Papers," "Appeals," "Costs" and "Stay of Proceedings," as well as provisions as to courts having jurisdiction of the proceedings, all common to the three subjects, are treated separately under the different articles. This much for condensation, which means also convenience.

#### SIMPLIFICATION.

The manner of entitling proceedings in the name of the people on the relation of the party in interest serves no purpose except to confuse one in looking through a table of cases, when it is always puzzling to find a case entitled in this manner. The theory of high prerogative writs no longer exists, and they need not run in the name of either the king or the people.

The practice of making a court or tribunal a party to a proceeding, and treating it as such to the exclusion of the real party in interest, who can only appear by the courtesy of the nominal defendant, is indefensible and contrary to the modern theory of making the real party the party to the record.

The use of an alternative and peremptory writ of *mandamus* only serves to confuse and annoy. So much for simplicity.

#### UNIFORMITY.

The method of framing an issue both in *mandamus* and prohibition is very different under the present practice from that in an action. No reason exists therefor. Nor is there any reason why all three of these proceedings should not be instituted in the same manner by petition and order thereon, on notice provided for by a single set of rules instead of a separate provision for each proceeding. In the same manner all appeals should be taken in the same way, and the three provisions as to costs, which are substantially, although not exactly alike, to be put in one. So much for uniformity.

#### OBJECT TO BE ATTAINED.

The object sought to be attained is the formulating of a simple rule covering as many cases as possible in the most direct language. It is believed that the practitioner will proceed with less labor and annoyance, and the client suffer less from useless litigation and costs, by framing general rules of this character and enforcing a liberal spirit of practice than is possible by attempting to define the procedure in minute and troublesome detail.

By the method proposed, the practice is attempted to be assimilated to that in other special proceedings, so that the hearing is as upon an ordinary application on notice. Where an issue is framed it must be disposed of as in an action.

It should be added that there has been no opportunity to submit these suggestions to any member

of the Committee or the Association, and that they have, therefore, no authority other than the personal views of the author of the paper.

Again calling attention to the fact that this is not a completed work, but a suggestion only of what may be accomplished, it is respectfully submitted.

January 5, 1895.

### PROPOSED REVISION OF PART OF TITLE II, CHAPTER XVI, CODE OF CIVIL PROCEDURE.

Sections 1991 to 2007-2007 to 2148.

ARTICLE I.—*Provisions Applicable to Mandamus, Prohibition and Certiorari* (Sections 1991 to 2007, present Article I) numbered sections 1 to 7 in proposed revision.

ARTICLE II.—*Mandamus* (Sections 2007 to 2090, present Article IV) numbered sections 1 to 6 in proposed revision.

ARTICLE III.—*Prohibition* (Sections 2091 to 2102, present Article V) numbered sections 1 to 4 in proposed revision.

ARTICLE IV.—*Certiorari* (Sections 2120 to 2148, present Article VII) numbered sections 1 to 9 in proposed revision.

### ARTICLE I.—ARTICLE I OF TITLE II, CHAPTER XVI.

(Sections 1991 to 2007 of present Code.)

#### PROVISIONS APPLICABLE TO MANDAMUS, PROHIBITION AND CERTIORARI.

- SEC. 1. State writs abolished.
2. Proceedings, how entitled and commenced.
3. When and where order granted.
4. Where hearing had.
5. Service of papers instituting proceedings.
6. Provisions of order.
7. Costs.
8. Appeals and stay of proceedings.
9. How order enforced.
10. Definition.

SECTION 1. *State writs abolished.* Special proceedings in the nature of *mandamus*, prohibition and *certiorari* shall hereafter be instituted and carried on by order of the court, as hereinafter provided, without the issue of a writ. (Substituted for section 1991.)

[The object of this section is to abolish the unnecessary formality attendant upon the issue of a writ by the clerk of the court embodying the terms of the order and affixing a seal thereto. The writ only has vitality by virtue of the order and must follow its terms. The granting and service of the order, therefore, accomplishes everything that can possibly be done by the use of the writ.]

Section 1992 is rendered superfluous by this pro-

vision, since it only relates to the formality attendant upon affixing the seal of the court.

The writ of assessment of damages (sections 2103 to 2119) is omitted as being of no value whatever. In the notes of the revisers of the Code of Civil Procedure it was stated that only a single reported case was in existence upon the question involved. The proceedings for condemnation of lands under the right of eminent domain render all the provisions with regard to the assessment of damages entirely superfluous.

The writ of *certiorari* to bring up a person to testify, which is provided for under the article with reference to *habeas corpus*, seems to be entirely unnecessary as it is difficult to imagine a case in which the writ of *habeas corpus* would not be effective or where a statutory provision could not be enacted which would answer every purpose of the writ of *certiorari* to inquire into the cause of detention.

The writ of *habeas corpus* to inquire into cause of detention requires special provisions, and its revision is not now attended.]

**SECTION 2. Proceedings, how entitled and commenced.**—Where the people are actually interested as a party, such proceedings may be carried on by the attorney-general or a district attorney, and in such case shall be entitled in the name of the people against the real party in interest; in all other cases the proceeding shall be entitled in the names of the parties in interest only, and not in the name of the people or of any inferior tribunal against which the order may be granted. Such proceedings shall be commenced by a verified petition with such other proof as may be necessary to set out the facts to entitle a party to the order. The papers shall be entitled in the Supreme Court, with the addition of the name of the county in which it is desired the papers in the proceeding shall be filed. The county so designated may be changed by direction of the court. (Section 1993 and 1994.)

[Section 1994 is rendered superfluous by the provision in section 2 providing that the proceedings shall be entitled in the name of the real party in interest, and that the name of the people shall no longer be used except where they are actually interested.

Section 1995 is superfluous, since the right to appear by attorney is well recognized and the provision for a return is unnecessary except as to *certiorari*, where it is provided for.]

**SECTION 3. When and where order granted.**—An order instituting such a proceeding can be granted only upon notice to the tribunal and the parties sought to be affected. Its allowance is in the sound discretion of the court. It can only be granted at Special Term held in the judicial district embracing the county in which the proceeding is carried

on, except in case of a *mandamus* or prohibition against a Special Term or justice of the Supreme Court, in which case the order can only be granted by the appellate division of the Supreme Court. In case such appellate division in the judicial department where proceeding is pending is not in session, it may be granted in any other department where such division is in session, but not otherwise. (Field's Code 1853, section 1258, new; Sections 2068, 2069, 2092, 2093, 2123 and 2224.)

**SECTION 4. Where hearing had.**—Except in cases provided for in last section, *mandamus* and prohibition must be heard at Special Term. *Certiorari* must be heard in appellate division of the Supreme Court when not otherwise provided by statute. (These exceptions are necessary by reason of numerous special statutes relating to different subjects which on fuller examination might possibly be collated.)

**SECTION 5. Service of papers instituting proceedings.**—Notice of application for an order instituting any such proceeding, together with the moving papers, also the order instituting the same, shall be personally served both upon the party or parties and the inferior tribunal to be affected thereby, in the same manner as a summons in the Supreme Court; but service may be made upon a court or judge by filing the order with its clerk. When served upon a board or body other than a corporation, service may be made upon a majority of its members unless the board or body was created by law and has a chairman or other presiding officer appointed pursuant to law, in which case service upon him is sufficient. (New and in place of sections 1999, 2071, 2095 and 2180.)

**SECTION 6. Provisions of order.**—The order instituting such a proceeding may fix the time within which the act directed to be done shall be performed. In case no such time is fixed such act shall be done within twenty days after service of the order directing the same. (2072, 2074, 2098, 2132).

[These sections relate to time within which return must be filed, and are substantially alike.]

**SECTION 7. Costs.**—Cost may be allowed where no trial is had, not exceeding fifty dollars and disbursements to the prevailing party. On a trial of an issue of fact, costs shall be allowed as in an action. (Sections 2066, 2100, 2143).

Section 2007, which provides for punishment for contempt for non-payment of costs in this proceeding does not seem to be founded upon any good reason, and is therefore omitted.

**SECTION 8. Appeals and stay of proceedings.**—Appeals must be taken in all cases as from final orders in a special proceeding. Proceedings may be stayed at any stage thereof in a proper case by



the court or a judge thereof on filing security, or on such terms as justice may require, but the execution of an order granted by the appellate division can only be stayed by such division or a judge thereof. (Sections 2087, 2101, 2127, 2128, 2131.)

[Section 1996, as to the allowance of the writ, is rendered unnecessary by abolishing the writ.

Section 1997 to the effect that the final determination shall be styled a final order and that provisions of the Code relating to amendments, motions, etc., are applicable hereto, should be provided for by a section applicable to all special proceedings, and therefore omitted here.

Sections 2000, 2001, 2002, 2003, 2004 and 2006 relate only to *habeas corpus*, and belong properly under the article treating of that subject.

Section 2005 relates entirely to *certiorari* and is provided for under that title.]

SECTION 9. *How order enforced.*—Orders of the court herein provided for may be enforced by proceedings for contempt. (Section 2090.)

SECTION 10. *Definition.*—The term "inferior tribunal," as used in this article, includes every court, board, corporation, officer, person, or aggregation of persons whose action may be affected by these proceedings. (Section 2146.)

[Section 2124 is omitted, as any court of record has or should have, by other provisions of the Code, power to require an inferior tribunal to amend a record sent up to it, where justice requires that the defect should be supplied.]

## ARTICLE II.—ARTICLE IV, TITLE II, CHAPTER XVI.

(Sections 2067-2090.)

### MANDAMUS.

- SEC. 1. Mandamus, when granted.
2. Demurrer.
3. Issue of fact, how disposed of.
4. Provisions of the order of mandamus.
5. When plaintiff shall recover damages.

SECTION 1. *Mandamus, when granted.*—A *mandamus* may issue to an inferior tribunal to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. It will not issue where there is an adequate remedy in ordinary course of procedure, nor will it control judicial discretion. (New, follows Field Code 1853, section 1278.)

[Section 2067 is omitted, since there is no occasion for two kind of *mandamus*, and as provision is made for an order only upon notice, this section becomes obsolete.

Very great confusion has arisen from the use of the term "alternative *mandamus*," which signifies in one connection, as in the section 2067, a writ in the nature of an order to show cause directing a party to perform an act or to show cause at a special

term, at a time fixed, why the direction of the writ should not be obeyed; it is used in a different sense where upon the hearing an issue of fact is raised by the defendant. In that case an alternative writ issues which is in the nature of a complaint or pleading to which answer must be made and upon which an issue is framed. It is proposed to abolish both kinds of alternative *mandamus* and to leave only existing in practice an order taking the place of what is now termed a peremptory *mandamus* and to allow this to be issued only upon notice as in the next section. It thus takes the place of the alternative writ in the first instance, and provision is made that the petition upon which the proceedings are instituted shall take the place of the alternative writ for the purpose of framing the issue, and that an answer shall be made to the petition. As the alternative writ is a mere order to show cause, it could issue without notice. Hence, in abolishing this writ and substituting therefor notice of motion or order to show cause, the provision that the writ may issue without notice necessarily becomes obsolete. Section 2071 is repealed for the reason given for abolishing the alternative writ, and for the further reason that provision is made for the service of papers in the preceding article.]

SECTION 2. *Demurrer.*—The defendant may demur to the facts set forth in the moving papers and raise an issue of law to be determined by the court. Such demurrer may be taken in like cases and in the same form as a demurrer to a complaint, and the court shall determine whether the *mandamus* shall be granted or denied. (Section 2076 in part. The remainder of 2076 relates to an alternative *mandamus* and the issue to be framed upon it.)

SECTION 3. *Issue of fact, how disposed of.*—The defendant may raise an issue of fact by an answer to the petition upon which the proceeding is based, and by affidavits in addition thereto, which issue may be determined by the court as on a motion, or tried by a jury if the court so directs and the trial court shall thereupon grant, or refuse, the order of *mandamus*. In case of proceedings instituted in the appellate division of the Supreme Court, the issue framed may be sent to the trial court for hearing, and the trial court shall certify the result of the trial of the issue of fact to the appellate division for its action thereon. In all such cases the place of trial shall be that named in the title of the proceeding, unless otherwise order by the court. (Sections 2073, 2074, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084 and 2085.)

[The substitution of an answer for the return renders the sections referred to unnecessary. As a return is never made in actual practice, as the defendant either performs the act required or appeals, these provisions are superfluous.]

**SECTION 4. *Provisions of the order of mandamus.***—The order granting a *mandamus* shall prescribe the time and manner in which the act to be done shall be performed. (Sections 2072 and 2074.)

**SECTION 5. *When plaintiff shall recover damages.***—If, after trial of an issue, the court finds the plaintiff entitled to a *mandamus*, he shall, in an action brought for that purpose, recover the damages which he has sustained. (Sections 2083, 2088.)

[Section 2086 is covered by the general provision as to costs; 2087 by the general provision as to appeals; 2089 by general provision as to stay of proceedings and powers of the court to enlarge time, and 2090 by the general provision that the order may be enforced by proceedings for contempt.]

### ARTICLE III.—ARTICLE V OF TITLE II, CHAPTER XVI.

(Sections 2091-2102.)

#### PROHIBITION.

- SEC. 1.** Stay of proceedings may be granted.  
2. Application, how opposed.  
3. Order, when granted and effect.  
4. When issues triable by jury.

[Section 2091 repealed, since there seems to be no occasion for two kinds of writ, for reasons given under Article I. An order staying proceedings, accompanying the application for an absolute writ, seems the simpler and more convenient.

Sections 2092 and 2093 are embodied in the general provisions relative to this class of proceedings, and do not need to be repeated.]

**SECTION 1. *Stay of proceedings may be granted.***—The moving papers on application for an order of prohibition may be accompanied in a proper case by an order staying proceedings on the part of the tribunal whose action is sought to be affected, and also the party in the action or proceeding with respect to the particular matter or thing described therein, until the further direction of the court. (Section 2094.)

[Section 2095 is omitted, as manner of service is provided for in Article II.]

**SECTION 2. *Application, how opposed.***—The application for the order may be opposed by a return of the proceedings had, certified by the court or judge to whom the motion papers are directed, and by affidavits and papers, as upon a motion, and all legal objections may be taken upon such hearing. No motion to quash the proceedings is necessary or proper. (Sections 2096 and 2097.)

[Punishment for failure, etc., under general provisions, Art. I.]

**SECTION 3. *Order, when granted and effect.***—Where no question of fact arises, the court may grant or refuse the order. Where the party in interest appears to oppose the application, notice of sub-

sequent proceedings other than of orders affecting its action need not be given to the tribunal prohibited unless otherwise directed by the court. (Section 2098.)

**SECTION 4. *When issues triable by jury.***—The plaintiff may contradict, by affidavit, any allegation of new matter made in the return, and, where issues of fact arise upon the hearing, the court may determine them or direct the trial of any question of fact by a jury, in like manner and with like effect as where the order is made for the trial by a jury of issues of fact joined in an action triable by the court. Where such direction is given, proceedings must be the same as upon the trial of issues so joined in an action, and thereupon the trial court must grant or refuse the order. Where the proceeding is pending in the appellate division of the Supreme Court, such trial may be ordered in the county where the papers are to be filed, and the proceedings thereon shall be certified to such appellate division by the court at which the trial is had. (Section 2099.)

[Section 2100, provisions as to costs are contained in the general provisions as to this proceeding.

Section 2101, general provisions for appeals in this class of proceedings provide for appeals in this case.

Section 2102, provision for stay of proceedings is regulated by general provisions. See Article I.]

### ARTICLE IV.—ARTICLE VII OF TITLE II, CHAPTER XVI.

(Sections 2120-2143.)

#### CERTIORARI.

- SEC. 1.** When certiorari granted.  
2. When certiorari will not be granted.  
3. Limitation of time for review.  
4. Return on certiorari.  
5. Hearing on return.  
6. Questions to be determined.  
7. Final order upon the hearing.  
8. Limitation of article.

**SECTION 1. *When certiorari granted.***—An order may be granted by the Supreme Court requiring an inferior tribunal to make return of its proceedings for the purpose of review in one of the following cases only:

1. Where the right to such review is now, or shall hereafter be, given by statute.  
2. Where such review could be had at common law and has not been taken away by statute.

(Sections 2120, 2123.)

[Section 2121 is rendered unnecessary by the provisions of section 2, which expressly limits cases in which a *certiorari* can be granted. It would be difficult, if not dangerous, to attempt to regulate the specific cases in which the writ can issue. The wiser course seems to leave this section as it now stands.]

**SECTION 2. When certiorari will be granted.**—An order of *certiorari* will not be granted:

1. To review a determination which does not finally decide the rights of the parties with reference to the matter to be reviewed.

2. Where an adequate remedy exists by appeal either to a court, or some other body, officer, board or tribunal.

3. Where provision is made by law for a rehearing before the body, officer or tribunal making the determination, except from the decision upon such rehearing, or where the time within which a rehearing can be had has expired.

(Section 2122 substantially as now.)

**SECTION 3. Limitation of time for review.**—Notice of application for an order for such review must be served in the manner prescribed in Article I of this title within four months after the decision to be reviewed becomes final and binding upon the party seeking the review. (Section 2125.)

[Section 2126 should not be continued. If such a determination had been properly made below by any body, board or tribunal having jurisdiction, four months would seem to be sufficient time in which relief could be had, and a provision granting twenty months, and that the General Term may act, is anomalous and would seem to have been introduced originally for some special purpose.

Sections 2127 and 2128 provided for by Article I.

Absence of notice prevents time running against the appeal. No injury can result from serving notice in all cases.

Section 2129 becomes obsolete by the provision for order, in place of writ.

Section 2130, as to mode of service, is provided for under Article I. This is also true of section 2131.]

**SECTION 4. Return on certiorari.**—The inferior tribunal, directed to make return of its proceedings for review, shall certify a transcript of the record, or proceedings, and a statement of such other matters as may be required by the order, and file the same with the clerk of the county where the proceeding is pending, and serve a copy upon the plaintiff within twenty days after service of the order. The plaintiff shall pay the person required to make such return two dollars, and also ten cents additional for each folio of such return. The time to make such return may be extended in like manner as time to plead in an action. The court may, on notice, require a further, or amended, return. A return shall be made in case of expiration of term of office in same manner as if the party required to make it were still in office. In case of death, or disability, of party or person by whom return should be made, the court may make such direction as may be proper for bringing before the court the facts required by

the] order for review. (Sections 2132, 2133, 2134, 2135, 2136, 2139.)

[This section very much simplifies the matter of return to the writ of *certiorari*, renders it much more convenient and fully as effective as the former provisions. There is no reason for making a writ of *certiorari*, or order for *certiorari*, returnable at the office of the clerk of the court. The object is to procure the filing of a return which may be directed to be done within that time, as in the proposed section, and, in case it is not done, proceedings may be had, as provided in Article I, as for a contempt. This will insure, more fully than the other, that the order granted shall be obeyed.]

[Section 2137 becomes obsolete by reason of the provision that the real party in interest shall have notice in the first instance and be made a party to the proceeding.]

**SECTION 5. Hearing upon return.**—The matter must be heard in the Supreme Court upon the return and papers upon which it was directed to be made, or upon the papers substituted for the return by order of the court in case of inability to procure a return. (Section 2138.)

**SECTION 6. Questions to be determined.**—The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

2. Whether the authority conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it, or him, to make the determination.

3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of the jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence. (Section 2140 as in Code.)

**SECTION 7. Final order upon the hearing.**—The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying the determination reviewed as to any or all of the parties, and, in a proper case, may enforce restitution in like manner, and with like effect and subject to the same conditions as when a judgment is reversed upon appeal. (Sections 2141 and 2142).

[Section 2143, as to costs, provided for in Article I.

Sections 2144 and 2145 have no place here, as there should be a rule requiring that in all special proceedings a roll be made up similar to a judgment-roll in an action.]

(2146 is embodied in Article 1.)

SECTION 8. *Limitation of article.* — Where a *certiorari* is given by statute and the method of procedure expressly authorized, this title shall not be construed to prescribe a different regulation, except to dispense with the issue of a writ, nor shall this title apply to a criminal proceeding other than a criminal contempt of court. (Sections 2147-2148.) This exception is necessary until such time as the special provisions can be made to conform to this title.

In tax cases provision is made for *certiorari* to be heard at Special Term. Chap. 269, Laws 1880.

### SHOULD THE CODE OF PROCEDURE BE REVISED, CONDENSED AND SIMPLIFIED?

BY AUSTIN ABBOTT, NEW YORK CITY.

THE New York Code is not an isolated statute, but it is the expression for New York of the general movement of the passing half century in favor of a more simple and direct procedure than the old systems.

In consequence of its adoption similar expressions in the Code and Practice acts of twenty or thirty other States have given somewhat varying form to the same substantive legislation.

The Legislatures of all these States may be regarded for the present purpose as so many experiment stations in legislation trying the new system with such modifications as divers views of expediency have suggested; and in all these States amendments have been made from time to time to promote the working of the system. In New York, such amendments have been carried out to an extent of addition and with minutia of detail (the result rather of individual personal views than of any general consensus of opinion), which have had the effect, very much, to impair the resemblance of the New York statute to what the original Code was, and to those which have been modeled upon it in other States.

Making due allowance for the personal peculiarities thus introduced into the New York statute, it may be said that the Code and Practice Acts of all these States bear a family resemblance, and the chief fundamental principles of the new procedure are established by concurrence in substance and a degree of uniformity of expression in numerous States.

To give a single illustration of this: Sections 539, 540, 541, which together form one of the cornerstones to the New York Code now and as originally

introduced, have been adopted *verbatim* in New Jersey, although that State has no Code of Procedure.

The judicial experience of the courts and profession under these varied forms of statute, introducing the same substantial improvements, have much in common, and this fact ought not to be disregarded or overlooked in any State in which the improvement of administration of justice is, as it ought every where to be, the controlling consideration in revision.

Revision, therefore, ought not to be undertaken for its own sake nor merely for the purpose of reducing the bulk of our statute, though that is a very desirable object. We should avail ourselves of the aid afforded by a co-ordination of the great principles of the original Code, in the light of its adoption more or less modified, in other States, and its practical working in this and other States, and in the light of the kindred measures such as the Massachusetts and Connecticut Practice acts in States that are not regarded as having adopted the Code practice.

The great fundamental features of the new procedure should receive the first and broadest attention with a view of making the best possible system of those principles without departing unnecessarily from the form in which they have already been adopted throughout the greater part of the country.

Careful attention should be given to additions which have been made in a sufficient number of the States to demonstrate their importance. Such, for instance, as the requiring exhibits mentioned in the pleading to be annexed or filed as a substitute for special application for discovery, etc. (a feature which has been in some form adopted in twenty States); and such as the feature of many codes requiring sworn denials in order to put in issue the existence of a written instrument pleaded, even though the complaint be not sworn to (a principle of which has been adopted to some extent in thirty-one States). Other features, the usefulness of which has been tested by the experience of a number of States, should also be considered.

The great fundamental principles of the new procedure having been thus surveyed, the revision and pruning of details in our own statute could proceed wisely with much greater condensation than otherwise would be safe, and the result, I believe, would be far more beneficial to the practitioner and to the courts than any method of dealing with the subject as if it were simply a matter of legal legislation without that light from general experience which will demonstrate the usefulness and importance of those parts of our statute which are fundamental, and will aid in determining wisely upon the revision or repeal of numerous detailed regulations

which have been fastened upon our Code by a narrow view of the new procedure.

Such a revision would bring our statute up to the best methods of procedure extant, would make it a new model to be followed by legislation in other States, as it was originally, and would afford the best possible basis for the proposed Code of Federal Procedure.

Since writing the above, I have examined in some detail an admirable collection of "Code References," which forms a sort of harmony of the Codes of Procedure, prepared by Edwin E. Bryant, Dean of the Law Faculty of the University of Wisconsin, and contained in his volume in the students' series entitled "Bryant's Code Pleading," just published by Little, Brown & Co. This table will suggest how much light the experience of other States can throw in any intelligent effort to recast our own Code.

### Abstracts of Recent Decisions.

**FEDERAL COURTS.**—The fact that a judgment in the State court in an action involving a contest between mining claims is *res judicata* of the questions litigated in an action removed to the Federal Court does not deprive such court of jurisdiction, as a contest between mining claims necessarily involves a consideration of the laws of the United States as to the location and to the effect of end lines and side lines on the rights to the mineral veins and lodes, and as the evidence whereby these things are proved, whether direct or through estoppel by some act of the party, or by a judgment of a court, does not remove consideration of the laws as elements of decision. (Consolidated Wyoming Coal Min. Co. v. Champion Min. Co., U. S. C. C. [Wyo.], 62 Fed. Rep. 945.)

**MUNICIPAL CORPORATION — DEFECTIVE SIDEWALKS.**—In an action for injuries caused by a defective sidewalk, evidence of the general condition of sidewalks in the vicinity of the accident is admissible to show notice. (City of Belton v. Turner [Tex.], 27 S. Rep. 831.)

**EMINENT DOMAIN.**—Under the general railroad law, an application to condemn the lands of a corporation chartered for the purpose of facilitating transportation will be deemed an application to condemn such lands for the purpose of crossing only, unless it avers that the lands are not necessary for the purposes of the franchises of the present owner. (State v. National Docks & N. J. Junction Connecting R. Co. [N. J.], 30 Atl. Rep. 183.)

**FEDERAL COURTS — JURISDICTION — DISBARMENT IN STATE COURTS.**—A Federal court has no jurisdiction of an action for damages for conspiracy to disbar an attorney from practice in State courts, his

right to practice in Federal courts not being affected thereby, though the disbarment was for statements in a Federal courts. (Green v. Elbert, U. S. Cir. Ct. of App., 63 Fed. Rep. 308.)

**INSURANCE—POLICY.**—In an action on a second fire insurance policy, issued by defendant on the same property, the answer alleged that such policy was intended as a renewal of the first policy, which had been paid; and that the risk of a second insurance for \$1,000, for which the action was brought, was never in fact taken or assumed by defendant. *Held*, that such answer did not constitute a counterclaim which would be taken as true in the absence of a denial. (Walker v. American Cent. Ins. Co. [N. Y.], 38 N. E. Rep. 106.)

**RAILROAD COMPANIES—ACCIDENT AT CROSSING—NEGLIGENCE.**—A railroad company is bound, independently of statute, to take reasonable and proper means of notifying the public of the approach of its trains to a public crossing after night; and it is a breach of this duty to back a train of flat cars over a crossing in the suburbs of a city, without having on it any brakeman, or any light or other signal of its approach. (Chicago, R. I. & P. Ry. Co. v. Sharp, U. S. C. C. of App., 63 Fed. Rep. 532.)

**RELIGIOUS SOCIETIES—EVANGELICAL ASSOCIATION.**—The laws of an ecclesiastical body will be recognized and enforced by the civil courts if not in conflict with the Constitution or the laws of the State. (Krecker v. Shirey [Pa.], 30 Atl. Rep. 440.)

**SEDUCTION OF WIFE—ELEMENTS OF DAMAGE.**—In an action for seduction of a wife, a charge that there is no fixed rule for determining plaintiff's compensation, but that the jury must consider the social relations of the parties, the apparent affection of the husband and wife, the actual misconduct of defendant, the pecuniary situation of the parties, and the mental sufferings of the plaintiff, is proper. (Mathies v. Mazet [Pa.], 30 Atl. Rep. 434.)

**WILLS—EXECUTION.**—The validity of the execution of a will is determined by the law in force at testator's death. (Langley v. Langley [R. I.], 30 Atl. Rep. 465.)

**WITNESS—CREDIBILITY—INSTRUCTIONS.**—Where a witness' testimony on several trials was conflicting, and he, being confronted with portions of his testimony in the former trials, stated that part of such former testimony was untrue, and that he could not remember as to the rest, it is invading the province of the jury to charge that it is their duty to reconcile the testimony, if possible; that the law does not presume a witness testifies falsely; and that it is better to assume that a witness has made a mistake rather than that he has lied. (Isely v. Illinois Cent. R. Co. [Wis.], 60 N. W. Rep. 794.)

## New Books and New Editions.

### BENDER'S LAWYERS' DIARY AND DIRECTORY, 1895.

We take pleasure in announcing that this annual diary has again appeared which contains so much necessary information of the courts, judges and lawyers of the State. The work contains a full list of the officers of the Federal government, New York State government, the County Judges, District Attorneys, County Treasurers, County Clerks and Sheriffs, with Article VI of the New York State Constitution, the Judges of the United States courts, with the terms of the courts, the appointments for the Supreme Court of the State of New York, with a diary which contains under each day of the year the sittings of the court for the time. The legal directory is most full and complete and the names and addresses of the members of the bar of New York and Kings Counties have been added, which will add greatly to the value of the work. The names of the members of the bar of each county are given in full, and this feature will prove of great value to many who have been anxious to obtain such a work. The book is compiled by Irving Boardman, of Elmira, N. Y. Published by Matthew Bender, 511-513 Broadway, Albany, N. Y.

### BIRDSEY'S CHRONOLOGICAL TABLE OF NEW YORK STATUTES. SUPPLEMENT TO JANUARY 1, 1895.

By CLARENCE F. BIRDSEY, OF NEW YORK BAR.

This work is designed to show the changes in the statute law, made by the enactments of the State Legislature subsequent to 1886, prior to which time reference must be made to the two former volumes of chronological tables of statutes which were published in 1887. The author most properly states that the work is not intended to give his ideal of the method to be pursued in revising and treating our statutes, but only takes the legislation of the State as it is, and is designed to give in as simple and inexpensive manner as possible, a book to be used in unravelling the terrible snarl in which our statute law has become involved. The work is arranged showing the changes made by the laws of 1887 and subsequent years, including 1894, which have amended the statute law prior to 1887. The laws amended are, therefore, arranged under the date of the year in which they were passed and the chapter and year of the law which amend the original law is added, so that the person using the table of statutes can easily see whether the law which he is examining has been changed. The book is absolutely necessary in connection with Birdseye's statutes, and is also most useful in connection with the two former volumes which the author published

in ascertaining whether any statute has been amended or not. Published by Baker, Voorhis & Co., 66 Nassau Street, New York City.

### THE RULES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Annotated by Edmund H. Smith. The second edition of the Court of Appeals practice just published has been received and is a most complete work on the rules of the court and the recent changes made in them by the court of last resort. The book contains the order adopting rules and the order amending them. The changes made by the appointment of the State Board of Examiners are thoroughly shown, together with the scope of the examinations and the times and places of holding the same, with a most complete chapter on the instructions of the Regents of the University to law students, showing the necessary requirements to be passed before the student files his certificate of clerkship. Following this is a very complete index and a voluminous table of citations with the sections of the United States and New York State Constitutions which bear on the subject under discussion, the statute laws relating to the rules, and the sections of the Code of Civil and Criminal Procedure which have reference to this matter. The work has been most carefully compiled and contains all that is necessary in regard to the subject of the book. It is well bound, printed in clear type, and on good paper. Published by Banks & Bros., New York and Albany, 1895.

## Notes.

THE Chicago judge who has recently decided that a pickpocket is not punishable for being caught with his hand in another man's pocket because there was nothing in the pocket to steal was remarkably considerate after all. He might have ordered the man whose pockets made all the trouble under arrest for false pretenses.—*Lockport Sun*.

The economical persons who save money by sending cypher cablegrams must not expect anything more than nominal damages in case of failure in transmission. In *Western Union Tel. Co. v. Wilson* (32 Flor. 527; 37 Am. St. Rep. 125), the dispatch ran: "Dobell, Liverpool: Gladfulness—shipment—rosa—bonheur—luciform—banewort—margin," and really related to an authority to sell lumber, but the court said it "contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the 'Horse Fair' painting by the great artist Rosa Bonheur, named in message, or whether it related to a matter of dollars and cents." This case contains a valuable list of authorities, pro and con.—*Legal Adviser*.

Judge Underwood of Georgia, like other judges, sometimes gave charges to juries which were not the product of reflection. On one occasion he was presiding at Calhoun, in the Cherokee circuit, for a brother judge, his own circuit being the Rome circuit. A case of some little consequence was being tried before him, Col. E. J. Kiker representing the plaintiff. The judge adopted fully Col. Kiker's view of the case, and so charged the jury. The jury, however, took a different view and returned a verdict squarely in the teeth of the charge. Brother Kiker immediately moved for a new trial, of course having the greatest confidence that it would be granted. Several days thereafter, the motion having been perfected, it was assigned for argument, and Brother Kiker arose and read his motion for new trial, basing it entirely upon the fact that the jury had found contrary to the judge's charge. Said Judge Underwood after the charge was read, "Brother Kiker, did I charge that?" "Yes, sir, you did, and you have so certified, and the jury found for the defendant," said Col. Kiker gleefully and triumphantly, thinking there was nothing to do but take an order setting aside the verdict. "Well then, Brother Kiker," said the judge, "if I charged that in this case, and the jury found against it, all I have got to say is, that that jury had more sense than I did, and I congratulate them that their good sense went to such an extent as to prevent them being misled by the court into a wrong verdict. I don't care to hear from the other side, I overrule the motion for new trial." — *Green Bag*.

The Texas rule allowing senders of telegraph messages to recover for damages to their feelings from delay in transmitting the dispatches leads to an enormous amount of litigation against the telegraph companies. In some of the digests almost the whole section referring to actions against telegraph companies consists of references to the decisions of the Texas courts. Many of the messages relate to the sickness or death of relatives. In one of the latest cases it was shown that the message could not have been delivered in time to enable the woman to whom it was addressed to be present at the funeral of her father, whose sickness was reported in the telegram. She endeavored, nevertheless, to obtain damages, on the ground that if she had received the message promptly she might have telegraphed asking that the funeral be postponed, and so might have been present at the services. The Supreme Court reversed the judgment for \$500, obtained against the company. A verdict of \$2,000, obtained by a father who had not received promptly a message concerning his sick son, one of \$500 for delay in delivering a telegram announcing the funeral of a brother, and one of \$1,000 for failure

to deliver promptly a message telling of the sickness of a half-sister were not set aside as excessive. In one case it was shown that there was no great affection between the person to whom the telegram was addressed and the sick relative, but the verdict was allowed to stand. In some cases the amount of mental anguish could not have been great, but the Texas juries, with great regularity and promptness, find verdicts against the telegraph companies when such cases are brought before them. — *Washington Law Journal*.

A case of considerable importance in connection with international copyright law was decided in the Court of Appeal on Thursday last week. Briefly, the case is this: The plaintiff, Herr Franz Hanfstaengl, is the well known art publisher in Munich, and some time ago he published photographic copies of a picture entitled "The Love Letter," of which he claimed the copyright. The defendants are the American Tobacco Company, trading in London, and they reproduced the work, and used it as an advertisement in connection with their tobaccos. The reproduction was admitted, and the contention was that the work was not copyright according to the International Copyright Act, which act gives the signatory countries under the Berne Convention the same rights in foreign countries as they enjoy in their own. The picture in question was painted in Florence, and sold, together with the copyright, to an Italian picture dealer, who subsequently sold the latter to the plaintiff, who afterward published the reproductions. The case, as tried by Mr. Baron Pollock some months ago, turned very much upon the terms "production" and "publication." The picture was publicly exhibited in Italy, but no copies of it were made there. According to Italian law, registration is necessary before publication; in Germany, where the copies were first issued, it is not. Mr. Baron Pollock ruled that the case was decided by Italian law, Italy being the country in which the picture was first produced within the meaning of the International Copyright Act, and gave a verdict for the defendant. Against this the plaintiff appealed, and the issue was tried before the master of the rolls, Lord Justice Lopes, and Lord Justice Rigby. In the end, the court held that, under the International Copyright Act, "first produced" means "first published," and that was done in Germany, and therefore the appeal was allowed. The three judges were in accord on the subject. The International Copyright Act is a great boon to artists and publishers, but in details it requires amendment. Of that we may have something to say anon, as there are other cases, pending under it which have soon to be decided. — *The British Journal of Photography*.

# The Albany Law Journal.

ALBANY, JANUARY 19, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE eighteenth annual meeting of the New York State Bar Association was held in the city of Albany on January 15 and 16, 1895. On Tuesday evening the association first met in the Assembly Chamber, in the Capitol, where the annual address of the president was delivered by Hon. Tracy C. Becker, of Buffalo, and the address of the meeting, on "Property, its Rights and Duties in Our Legal and Social System," was most ably read by Hon. John F. Dillon, of New York city. On Wednesday morning the association met at the City Hall, and after transacting routine business, listened to a paper on "The Law of Trade-Marks," by Rowland Cox, Esq., of New York; one by William B. Davenport, of Brooklyn, on "Some Curious Incidents in the Work of a Public Administrator," and a paper by Interstate Railroad Commissioner Martin A. Knapp, of Syracuse. After a delightful lunch at the Fort Orange Club, the following papers were read during the afternoon: "The Work of Bar Associations," by Ralph Stone, secretary of the Michigan Bar Association; "David Dudley Field and His Work," by J. Newton Fiero, of Albany; "Stenographers' Fees," by Emory P. Close, of Buffalo; "The Liability of Municipal Corporations for Damages Caused by the Contamination of their Water Supply," by Almet F. Jenks, of Brooklyn. The meeting of the association closed with the election of officers, which resulted in the election of Hon. William H. Robertson, of Katonah, N. Y., as president; L. B. Proctor, Esq., of Albany, as secretary; J. A. Lawson, Esq., of Albany, as corresponding secretary; Hon. Albert Hessberg, of Albany, as treasurer; Edward G. Whittaker, Esq., as chairman of the executive committee; Charles J. Buchanan, of Albany, as secretary of the executive committee; and J. Newton Fiero, Esq., of Albany, as chairman of the committee on law

reform. The reception to the judges of the Court of Appeals and to the justices of the Supreme Court at the Kenmore in the evening was a most charming event and fittingly ended one of the most successful and useful meetings of this association. There seems to be no doubt but that the active career and interest of the New York State Bar Association in legal matters has been of great benefit to the State, and the association can point with pride to the accomplishment of much that has been undertaken, as for instance, to the passage of the bill for the uniform examination of students for admission to the bar which was enacted by the Legislature and signed by the governor last year. The discussion in the morning of Wednesday was as to what legislation is necessary to carry out the provisions of the new judiciary article. Hon. Louis Marshall of New York, formerly of Syracuse, a member of the recent constitutional convention, presented a report showing what sections of the Code of Civil Procedure and the Code of Criminal Procedure should be changed in order to make the necessary changes required by the ratification of the new judiciary article by the people last November. One of the most important topics in this discussion was the relief of the Court of Appeals. It was thought at the time that the judiciary article was passed by the convention that sufficient relief had been granted to the court of last resort, but in a practical test of the subject it was found that over one hundred more cases are at present on the calendar of the court than were noticed for argument a year ago at this time. We have always maintained that however popular it may have been to remove the \$500 limitation for appeal to the court of last resort, yet it was a matter of absolute need to place a money limitation on appeals so that the Court of Appeals could properly cope with the work which came before that body. We also maintained at the time the matter was under discussion in the convention, that it was wrong to abolish the provisions for calling together the second division of the Appellate Court composed of judges of the Supreme Court, since it was apparent that such a measure would not be taken advantage of unless it was absolutely essential, and there was no reason why the need of such a body should not here-



after arise with the increase in this state of litigation which must be determined by the Court of Appeals. We have, however, arrived at the conclusion that the only remedy for the over-crowded calendars of the Court of Appeals is a thorough and practical change in the Code of Civil Procedure so that the practice in this State will be so simple and clear that many useless questions of procedure will not have to be determined by the court of last resort. Why should a client pay an attorney to litigate the way in which a right can be secured or maintained, and afterward continue the lawyer's fees in order to secure the right which he ought to have been granted in the first place without having first to have determined the method he should use to secure justice by litigation through many courts of the State. We presume that there are some members of the legal profession who prefer to throw around their cases the mysteries of the law but we do not believe in delving around in obscure nooks and corners in order to raise technicalities which may defeat the cause of justice. A party's right to the possession of property or of any of the other constitutional guarantees should be absolute and these he should obtain by due process of the law and not through obscure complicated and expensive means of procedure. The discussion of the question as to whether the Code of Civil Procedure should be revised, condensed and simplified, took place at the meeting of the bar association on Wednesday afternoon, and no voice was raised in opposition to the most complete simplification of our present Code which could be enacted by the Legislature. When a suit is commenced, the question should be, what is the object of the litigation, and not what is the manner in which we can secure the end which we wish to obtain. The remedy should be apparent and easy, not clothed with all the unnecessary legal phraseology and technicalities which at present absolutely condemn the present Code of Civil Procedure as a death-trap for unfortunate litigants. Simplicity of expression and phraseology and clearness of diction, with condensation of provisions, should not only be enacted, but methods should be so changed as to make the remedy absolutely simple and plain to the ordinary layman. This may appear *ultra*, but the wisdom of such

a change will eventually appear in the increased confidence of the public in the law and its advocates. In regard to making the Code of Civil Procedure conform to the requirements of the new judiciary article, a most excellent committee was appointed at the meeting of the bar association, among whose members are the following: Hon. Louis Marshall, of New York; Hon. Elihu Root, of New York; Hon. T. E. Hancock, attorney-general; Hon. Tracy C. Becker and other gentlemen, who are authorized to prepare a report of the sections of the Codes of Civil and Criminal Procedure which need revision, except those parts relating to the division of the State into departments and the place of holding the terms of the Appellate Division. This can be speedily submitted to the Legislature, with the recommendation of the bar association and passed at the earliest possible moment by the Senate and assembly. The committee on law reform, of which J. Newton Fiero, ex-president of the association, is chairman, were empowered to take such steps as they may deem fit to secure the simplification, condensation and revision of the Code of Civil Procedure in the lines which were suggested by the discussion of that subject. A bill to appoint two commissioners to perform that work will be soon introduced in the Legislature and we trust that the number not only will remain, but that two men who have had a large and active practice in the State and who recognize the defects in the present system will be appointed who will promptly accomplish a reform which will be felt in every branch of the law in this State and which will lead to a similar movement in other States and in the practice in the United States courts.

Judge Dillon's address before the State Bar Association of New York was delivered in the legislative Assembly Chamber on the evening of January 15, his subject being "Property, its Rights and Duties in Our Legal and Social Systems." The address set forth that from the first settlement of this country the right of private property, both in lands and chattels, had been recognized; that it was guaranteed in all the charters of the original States; that the Federal Constitution and all the existing State Constitutions contain provisions that

no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation, and that every State was forbidden to pass any law impairing the obligation of contracts. These constitutional guarantees were declared to constitute the basis of any consideration of the legal rights and duties of property; that it was on these foundations that our government was laid, in the belief that these principles are those best adapted to insure civil security and social and individual prosperity and happiness.

The existing social fabric or society as now organized is attacked by bodies of men who call themselves communists, socialists, anarchists, and by like designations. The speaker declared that these organizations could not be put down by denunciatory epithets, and were entitled to serious consideration as being, at all events, an organized protest of large numbers of men against the existing social order. One common principle was declared to underlie and pervade all these various movements, and that is that the institution of private property is wrong, and ought to be abolished or essentially curtailed. The various communistic and socialistic attacks on private property were reviewed, including the attacks upon the principle of inheritance, and their demands for a large percentum of taxes on all inheritances and transfers of estates, and for progressive income and progressive property taxes. The position was taken that all these movements, so far as they challenge the rightfulness of the fundamental basis of the existing social order and advocate a reconstruction of society on the basis of destruction or impairment of individual liberty and of private property and the substitution of State ownership of lands and of the means of economic production, were founded on illusory or pernicious principles. It was insisted by the speaker that the present social order, founded on the doctrine of individual liberty, on the right freely to engage in any lawful business for profit and on the institution of private property, was conducive to the highest individual and social welfare, that it is destined to stand, and that all useful reforms and improvements in our social and economic conditions can be better accomplished by amendment and reform, than

by the overthrow of existing principles and institutions.

The rightfulness and utility of private ownership of land and other property were justified historically, ethically and on the grounds of utility; the speaker said. He illustrated this by a sketch of the history of the settlement of this country and a statement of the public policy of the United States respecting the disposition of the public domain. Illustrations of the magic of private property in the growth and development of this country were given. Private property has been the source of all our wonderful prosperity; is the counterpoise of universal suffrage and the great bulwark against the subversive or revolutionary schemes of socialism.

The socialistic attacks on private property through the exercise of the power of taxation were sketched. It was declared that the most insidious, specious and therefore dangerous, of these attacks are those that are attempted or made in the professed exercise of the power of taxation. For as much as the power to tax is supposed to involve the power to destroy, it is boldly avowed by many socialistic reformers, and it is implied in the schemes of others, that the power of taxation is an available and rightful means to be used for the express purpose of correcting the unequal distribution of wealth, and it is insisted by these reformers that this may be done without a violation of the essential and constitutional rights of property. The speaker reviewed and combatted this position. He admitted that taxes in whatever form, direct or indirect, on property or income or inheritance, when reasonable and equal or proportionate in their character and imposed as a *bona fide* means of raising revenues to help defray the public charges, may be properly evied, and present merely questions of political expediency; but that when taxes so-called are imposed, not as mere revenue measures, but for the real purpose of reaching the accumulated fruits of industry and are not reasonable and equal but designed as forced contributions from the rich for the benefit of the poor, or as a means of distributing the rich man's property among the rest of the community, that this was class legislation of the most vicious type, was confiscation and not taxation. That such schemes of pillage are in-

defensible on any sound principle of political policy, violative of the constitutional rights of the property owner, subversive of the existing social polity, and essentially revolutionary.

The subject of illegal combinations, pools and trusts was discussed, and the power and duty of the State to suppress all combinations seen or found to be injurious to the public welfare, strongly enforced. The proposed socialistic remedy that the State shall intervene and assume the ownership of transportation systems and the leading productive industries, which is obviously the substitution of social industrialism and the surrender to the State of the individual's liberty of action, was declared to be a remedy immeasurably worse than the disease, and one not at all necessary to secure the public welfare, since the State's power to suppress any and every form of combination, whether corporate or individual, which is hurtful to the general good, is adequate to the end to be reached.

A large portion of the address was devoted to a consideration of the needed revision of our laws relating to inheritance and the power of testamentary disposition. This was the marked feature of the paper. The position of certain writers and courts that the right to take property by descent or will is neither a natural nor a constitutional right, was criticised and controverted. The position was taken that the parent is under a natural obligation to provide for his children, and the contrary position was declared to be in conflict with the universal sentiments and convictions of mankind. The existing laws of this country respecting the owner's power of disposition of his property during his life and by bequest, are essentially founded on the feudal and aristocratic notions on these subjects which we derived from England. They invest the owner with almost absolute power to dispose of his property as he sees fit. He may disinherit his children entirely, or give his property to them in unequal shares; he may tie it up by deed or will in private trusts, to be used and enjoyed as he may direct, for long periods of time after his death, and for charitable uses without limitation as to time. The practical operation of these laws tend to the concentration of wealth in single hands, and the speaker felt constrained to de-

clare that our laws on this subject as they now exist are open to grave objections, on the ground that they are in their practical operation frequently unjust to the heir and tend to produce those inequalities of fortune which, in a republican government, should never be encouraged or favored by legislation. While opposed to any confiscation or appropriation of his property on the owner's death for the use of the State, the speaker urged that the laws should be so changed that in their constant and unbroken operation they should secure the equal rights of the children against the ancestor's present absolute power; should tend more effectually than at present to keep property in free circulation and prevent its concentration in single hands.

The French law of forced heirships and prohibition of trust estates, its policy and practical operation, were considered at length and its principle commended. The fundamental policy of the French law is to maintain the simplicity of estates and different interests in land, to prevent its being kept out of commerce by means of trusts, and to prevent concentrations of property in the hands of single owners. That this policy had been in practical operation in France for a 100 years, with the result that there are to-day in that country 7,500,000 separate proprietors of land, of which 5,000,000 are estimated to average only six acres of land each. This is the direct, foreseen and necessary consequence of the principles of the French law on this subject, with the result that France is to-day one of the richest and most prosperous countries of the world. The result had been the same in Louisiana. The speaker was not prepared to say that we ought to adopt the French law bodily, but he did urge that we should introduce into our law such changes as will tend, by the constant, continuous and silent operation of the laws, and without interference with the just rights of property, to insure more effectually the free circulation of property, to prevent its being tied up with trusts and the concentration of vast estates in the hands of single owners. He regretted that this important subject had not received the attention of the recent Constitutional Convention in New York, and declared that true statesmanship looked at the future as well as the present, and makes its chief concern the shaping of peaceful

policies so that progress may be secured and revolution avoided.

His address closed with a consideration of the social as distinguished from the legal duties of property. He insisted with emphasis that we must increase our appreciation of the responsibility of society for the welfare of all of its members; that the possessor of a large fortune, no matter how honestly acquired, or however firm and exclusive in legal theory the right of ownership, and how fully he may discharge his legal duties, is yet a debtor to the community, and that his property has, in an important sense, a public as well as a private side, and that he owes to society manifold duties which are entirely beyond the range of legal cognizance. Our rich men, he said, have learned to gain wealth; they must now learn the more difficult lesson how to use it.

Sir John Thompson, the Canadian premier, who was on a visit to England, died on the 12th day of December, 1894, at Windsor Castle shortly after he had an interview with the Queen and had been sworn in as a member of the Privy Council. The *Law Times* gives a short sketch of his life which we believe will be interesting to our readers and which we give herewith. "Sir John Thompson was born in Halifax on the 10th of November, 1844. By birth, by early education, and by subsequent training he was a true Canadian, although the origin of his father's family was Irish. His period of public service in the Dominion Parliament has been relatively short. He was called to Ottawa and intrusted with his first portfolio as minister of justice by Sir John Macdonald in 1885. Beginning life, in common with many of the colleagues with whom he afterward had to work, in a lawyer's office, he made his first acquaintance with parliamentary procedure as an official reporter in the Provincial House of Assembly. At the age of twenty-four he had reached the position as reporter-in-chief and held it for four years, although he had in the meantime been called to the bar and entered early upon successful practice. In 1882 he withdrew altogether from politics and accepted the position of judge of the Supreme Court of Nova Scotia. He had shown himself under all circumstances upright, laborious, able, and energetic, rather than brilliant. As a jurist

he was highly respected, and the bench of the Supreme Court was held to have been much strengthened by his accession to it. By nature a student, the duty of weighing evidence was one for which he was peculiarly fitted. Unflagging industry and an accurate memory enabled him to amass a valuable body of legal facts, and it is related of him that during the three years while he continued to occupy his position upon the bench he never failed to devote five hours of study every day to the theory of his profession. In 1885 he was already regarded by competent persons who knew him well as one of the most accomplished lawyers of the dominion. The Judicature Act, which became law in 1884, is among the permanent works which he has left behind him. In 1885 Sir John MacDonald appointed him Minister of Justice in a cabinet of which the brilliant oratorical exercises might, it was felt, be always performed by others. No session was allowed to pass without some legislation of which he was the author. The active part which he has taken in urging the settlement of the copyright question is well known. His amendments to banking laws and his revision of criminal law have been of great value. In 1887 he accompanied Sir Charles Tupper to Washington, and during the negotiation of the Chamberlain-Bayard Fishery treaty he acted as legal adviser of the British plenipotentiaries. He has also given advice and prepared reports, always valuable for the array of facts which they contain, upon other international questions. In acknowledgment of his services at Washington he was made a K. C. M. G. He has since been called to the Privy Council, and it was for the purpose of taking the oath as Privy Councillor that he determined to take the journey which brought him on this last sad occasion to this country. He became premier on the resignation of Mr. Abbott in November, 1892. In the two years during which he has held office he has added to the high regard in which his reputation was already held, and the position of Canada under his guidance has been affirmed and strengthened in the eyes of the world. Sir John Thompson married, in 1871, Miss Annie Affleck, daughter of Captain Affleck. He leaves several children."

A writer in the *Halifax Herald*, in speaking

of the dead Premier, gives an interesting sketch, part of which is as follows: "As to his works—well is it for Canada that since 1885 a great series of international law questions have been taken up and disposed of, any one of which cost him more time and labor than half the law suits he ever tried in his life. I do not pretend to say that others, too, have not rendered great service in settling those matters, but upon the minister, for the time being holding the portfolio of justice, fell the chief responsibility. The fishery dispute, the copyright question and the Behring Sea case, have all been won for Canada, while his wonderful abilities were at the service of the State. Then the completion and passage of the Criminal Code marks a new era in criminal legislation and penal reform, not only for Canada, but for the world as well. It is as true as a proposition in Euclid, that the criminal law of Canada is above that of any nation or State on the face of the earth. It embodies most of the suggestion of Bentham, Becarri, Livingston, Mackintosh and Romily, and hundreds of others which never occurred to them, and is the first attempt on a national scale to make criminal law synonymous with justice, and substitutes for barbarism civilization and Christianity. But, perhaps, after all these are the least of his labors; to govern seven provinces and as many territories, extending from ocean to ocean, to maintain a high discipline in the public service, purify institutions, and penetrate the life of the people with his spirit and aim, to do for all and to provide for all and to trample under foot all the seducements of wealth and power are labors 'with which the perils of war are but the sports of children.' How this man worked for Canada need not be further referred to, for the seal of the nation's approval is set on most of his deeds. None of us knew him while he was here—we are all too much like the hired man who visited Olympus, but fell asleep after dinner and did not hear the conversation of the gods. We are all open to the charge of an immense frivolity, and our thoughts are tinged with our mental habits. There is something inexpressibly tragic in his death—that he, who was the most modest and humble of all her subjects, the man who of all others, shrank most from display, should have died in the culminating hour of his

career, in the palace of the Guelphs and at the foot of his sovereign. Had there been a choice to him, he would have preferred death in the hut of the humblest settler on the banks of the Saskatchewan. But to him there had come that day 'Get thee up into this mountain,' and it found him not chasing the bubbles of power and wealth, but doing his Master's business. No truer man ever died in Windsor Castle, and perhaps it is fitting that he who more than any other stood for the manhood of Canada, should have spent his last moments in the home of such a sovereign as Victoria."

The special counsel for the grand jury which is to investigate the police frauds in New York city have been appointed in the persons of ex-Surrogate Daniel G. Rollins and Austin G. Fox, Esq., who was recently appointed one of the members of the State board to examine applicants for admission to the bar. With the aid of Assistant District Attorney McIntyre, whose work was so admirable in the recent investigation, the inquisition of the grand jury will be conducted in a most honorable, thorough and competent manner. All of the persons who have been engaged in the unlawful and disgraceful pursuits should be indicted, without relation to race, color or previous condition of servitude. Let the drag-net execute its work thoroughly, and let all assist in whatever way they can, not as *dilletante* reformers, but as citizens of one country and State.

The Supreme Court of the United States, in an opinion delivered by Mr. Justice Brown, in deciding the case of Christopher C. Campbell v. City of Haverhill, has decided that the statute of limitations runs against claims growing out of alleged infringement of patents, as well as against claims arising from other transactions. The plaintiff sued the city of Haverhill for an infringement of the Phillips patent for the improvement of pumps. The trial judge held that the statute of limitations was a good defense to the claim. Justice Brown, in his opinion, holds that the question has been determined both ways by the Circuit Courts, and that in the absence of any Federal statute on the subject, the statute of limitations of the various States should apply.

## DAVID DUDLEY FIELD AND HIS WORK.

A paper read at the meeting of the New York State Bar Association by J. NEWTON FIERO

IN the rooms of this association, in the Capitol, hang two pictures, presented by David Dudley Field through the writer of this paper. One shows a man of stalwart frame, clear-cut features and apparently in the full maturity of high intellectual powers; the other the same commanding figure, addressing a most distinguished body of men, prominent in the literary, legal, scientific and social world. The first a speaking likeness of Mr. Field at the age of eighty-five; the other as he appeared when presenting his first project of an International Code before the British Social Science Association at Manchester in 1866.

These pictures present the man, the lawyer and the law reformer, the three-fold aspect in which I propose to recall his memory and work.

On his return from abroad in the early spring of 1894, after a prolonged absence, I had completed and ready for the mail a letter congratulating him on his safe return and requesting him to resume his duties as chairman of the committee on law reform, which I had temporarily filled at his request during his absence, when the telegraph announced his sudden death, at the age of eighty-nine. I was thereupon, as his successor, by the complimentary action of your committee, charged with the duty of paying this tribute to his life and work.

David Dudley Field long seemed to those associated with him "to have come down from a former generation," and this impression was not dispelled by the published interview on his return home after an extended absence, two days before his death, in which he spoke of the altered condition of affairs in Italy in 1898 as contrasted with 1837, when he first visited that country. When we recall that he began the agitation for law reform in 1839, and the fact mentioned in Pierce's life of Charles Sumner that in 1848 he was so actively engaged in political contests as to be a leader in the counsels of his party, we appreciate that he was a man of distinction before the birth of the majority of those now in active life, and this is still more noticeable when it is borne in mind that he was admitted to the bar in 1828 and his four score and ten covered over sixty-five years of service in his profession.

Mr. Field's appearance and manner is pictured by two of his friends, whom I take the liberty of quoting: "Tall, erect, stalwart, alert and decided in movement, courteous and graceful in bearing, he impressed the observer at once as a man of marked gifts and force. Those who knew him intimately saw an imperious nature, equipped with great intellectual power and restrained by an intuitive appreciation of the amenities of social life."

Again, "He was a man of strong feelings and passions. Every man of real force is so almost necessarily. He therefore fought for codification and he fought with dauntless courage."

Still another speaks of his "gracefulness, elasticity and magnetism," coupled with "perseverance, adroitness and readiness."

He occupied a foremost position as a lawyer for a very long period, and was connected with the most notable litigations in the city and State. His confidence in his views of the law, his insistence upon his rights as a lawyer and his disregard of personal considerations when in conflict with his idea of professional duty are aptly illustrated by his vigorous protests against what he regarded as the tyranny of public opinion, in the one instance, and of the bench in the other, in the notable litigations of the Erie Railroad and of the People against Tweed, in both of which he insisted upon the duty of a lawyer to defend to the utmost the rights and interests of his client regardless of consequences to himself.

Many of his arguments in the Supreme Court of the United States are preserved in an edition of his works, and may be referred to as models of exhaustive research and forceful argument.

Among them is the famous Mulligan case, involving the right to suspend the writ of *habeas corpus* during the war in States not in rebellion, in which he was associated with Judge Black and General Garfield and opposed by the attorney-general and Benjamin F. Butler.

Another is known as the case upon the "Constitutionality of Test Oaths," which arose under the Constitution of Missouri.

Still another involved the validity of the Reconstruction Acts, in which Charles O'Connor, Judge Black, Matt Carpenter, Lyman Trumbull and other distinguished counsel were engaged upon either side.

In the State of New York v. State of Louisiana, in which was considered the jurisdiction of the Supreme Court over controversies between the States, Mr. Field made an argument for New York.

All these cases involved grave questions of constitutional law, and were discussed with the vigor, learning and ability for which he was justly distinguished. As a lawyer, he was bold, aggressive, argumentative and convincing, learned in law, skilled in the practice, cool and sagacious, yielding or insistent, as the occasion demanded.

While Mr. Field was famous for many years in the strife of politics, and was a leader at the bar for a period commencing before the civil war and continuing almost up to the time of his death, it is as the champion of law reform that his greatest triumphs were achieved, and as a law-reformer he was best known, most admired and during his life most severely criticised.

His labors in the field of international law are little known to the bar of this State, but were by no means the least laborious of his efforts to bring about simplicity, uniformity and certainty in the law and its administration. In this direction he collated the rules accepted by modern authorities and acted upon by governments as the law of nations, in the form of an International Code, covering the principles enunciated by the ablest writers on the subject, and insisted upon arbitration as the method of procedure for their enforcement before resort should be had to the arbitrament of arms.

In this great work, he was not content with drafting of rules, and correspondence with the jurists of England and the continent, but delivered addresses on the subject at gatherings of which he was the leading spirit, and before bodies of which he was the honored head, including the International Code committee, the Association for the Reform and Codification of the Law of Nations and the Institute of International Law; in Ireland, Belgium, Switzerland, Holland, Italy, England, France and Germany, in successive years. Never hesitating to cross the Atlantic to further the work of cementing the brotherhood of nations, and devoting himself to bringing about the state of affairs he pictured in this eloquent sentence:

"In some happier age, under some more benignant star, there will yet, we would fain believe, be established among men a great Amphictyonic council of the nations, with a wider sway than the Council of Greece, to which nations will submit, as individuals now submit, with unflinching deference, to a court of honor."

His efforts for the codification of the substantive law are better known, but have given rise to the widest difference of opinion and the most bitter controversy. He was most decided and radical in his views on this topic, and but little disposed to reconcile lukewarm friends or brook opposition from the avowed enemies of his views. His agitation of this question took form in 1852, in a demand that the Legislature should provide for carrying on the work of codifying the laws, under the provision of the Constitution of 1846, authorizing a commission for that purpose. He said of the commission which had been appointed, it "failed entirely, and it failed because the men who were appointed to it had no faith in the codification of the common law. They thought only of a new revision of the statutes. We wanted no revision; we wanted codification."

In April, 1857, Mr. Field was appointed chairman of this commission, and thereafter, for thirty-seven long years, never faltered in his efforts to procure the passage of such acts as should codify the body

of the common law. In this he was only measurably successful, in that he lived to see the passage and successful operation of the Penal Code substantially as drafted by him, containing the law relative to crimes and their punishment, together with the Code of Criminal Procedure, regulating the enforcement of the criminal law.

He defined the proposed Civil Code as "the law which contains the rules of property and conduct." It embraced the laws of personal rights and relations, of property, and of obligations, in four general divisions, relating, respectively, to persons, to property, to obligations, and the fourth containing general provisions relating to these different subjects. The method adopted is again stated in his own language: "The commission has endeavored to bring together, and arrange in order, all the general rules known to our law, upon the subjects contained within the scope of such a Code, rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable." His views of the purpose to be subserved by such an enactment is best described in the first report of the commission, in 1858, to be: "The reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions and abolishing useless distinctions, with the introduction of such modifications as are plainly indicated by our own judgment or the experience of others."

This compilation of the Substantive Law, passed through many vicissitudes and has been the battle ground of many a hard-fought controversy, at times enacted by one branch of the Legislature and rejected by the other, and again passing both Houses and meeting defeat at the hands of the executive. It has been adopted in California and Dakota.

Meanwhile, time and circumstances are solving the problem, and vindicating at the same time, the wisdom of Mr. Field in pointing the way and leading in the work by framing a Code of Civil Law, and his enthusiasm and indomitable perseverance in urging its adoption, and the foresight and sagacity of those who insisted that we must in any event make haste slowly, and that it was unwise at the moment to attempt to embody the entire unwritten law in a single statute.

The result has been a middle course, adopted in England, in the enactment of statutes relative to special topics which embrace not only the substance of all previous statutes on the subject, but the well-settled common law rules applicable thereto, and in this State by statutory enactment covering substantially the entire topic, most frequently resulting from radical changes of the common law rules. But a single step remains in such case, by way of gathering together the scattered statutes and collating

them in a single act, with the more important of the well-settled legal principles on the subject legislated upon. Thus are accomplished the objects sought by the law reformer and thus are obviated the serious objections of the conservative lawyer. On the one hand, it is a practical concession that the whole body of the common law cannot be conveniently formulated in a single act, and on the other a practical demonstration that much of the common law which is either thoroughly settled or entirely obsolete, may and should be so declared by statutory enactment. Although not accomplished in the manner Mr. Field urged, this method very closely approximates the end he sought, which was "to collect all the existing laws on the different subjects, reconcile what is contradictory, strike out what is superfluous, obsolete, or mischievous, express it in as concise and exact language as possible and arrange the whole in scientific order."

The Political Code never met with sufficient favor to become a law in the form in which it was reported, but nevertheless the industry and skill of its author has been recognized by enacting its substance in various statutes drafted by the commission of statutory revision.

Not to be forgotten in the work of this great law reformer is the Code of Evidence, intended to state in concise form in its 221 sections, the principal rules of evidence scattered through the statutes and reports. In this compilation Mr. Field endeavored, by broad generalizations, to formulate rules which should embody the entire practice as settled upon this subject, whether at common law, in the equity courts or under statutory regulations. Here again arose a fierce controversy not yet allayed, and here again, in view of the subject and the occasion, I must refrain from the expression of any opinion upon the merits of the question involved, only insisting that the existing statutes on this subject might well be collated in a single statute without objection from any source, and still further, that certain well-settled and unquestioned common law rules might be enacted in the same connection without criticism from the most active opponent of the proposed Code, while it may be conceded that some portions of the Code of Evidence, as drafted and presented, appear somewhat artificial and arbitrary.

However, the crowning work of Mr. Field's life, that by which he was, and always will be, best known and remembered, and which has and will reflect most credit upon his ingenuity, ability, learning and inventive genius, is the Code of Procedure.

The matter of reform in civil procedure began to be agitated in the early part of the present century mainly through the efforts of Bentham and Livingston.

The work of Bentham was principally in the way of criticism upon the methods in vogue in the English courts, and, while he did not hesitate to suggest remedies, he was essentially a theorist and an iconoclast, and his views never took practical form in anything like a complete system of procedure.

Although Livingston, in his draft of the procedure in the courts of Louisiana, was far in advance of his time, he yet followed, to a very great extent, the arbitrary rules of the common-law practice, supplemented by the methods in use in the tribunals administering the civil law, so that doubtless the Code of Louisiana, being to some extent an adaption from both forms of procedure, was the earliest radical departure from and improvement upon purely common law methods. This, however, was very far from being so great an innovation upon established methods and customs as that suggested and carried through by Mr. Field, to whom must be given the credit for originating and putting in practice a method of procedure almost universally adopted by English speaking people to the exclusion of those forms which had been followed for centuries, and which were finally, even in the mother country, put aside for the reformed procedure.

In 1828 Lord Brougham moved in the House of Commons for a commission "to inquire into the defects occasioned by time, and otherwise in the laws of the realm, and into the means necessary for reducing the same," and in 1831, a report signed by leading judges and counsel, pronouncing against the abandonment of the existing forms of action, declared that the rules of pleading then in use made up "a system, the great advantages of which we have elsewhere endeavored to illustrate."

At about the same time, in Massachusetts, a most able commission, with Judge Story at its head, reported in favor of reducing procedure to a more simple form and relieving it of some of its cumbrous and inconvenient appendages, but added, "The commissioners are of opinion that it is not advisable at present to codify this branch of our jurisprudence."

Such was the condition of affairs when, in 1839, David Dudley Field began the agitation in favor of a radical reform in the administration of remedial justice.

It would be a task, beyond the time and patience of this body, to follow step by step, the almost Herculean labors in this direction, to which he devoted himself for many years. It is to be regretted that he did not live to complete the autobiographical sketch he had expected to prepare, and it is to be hoped that a thorough and exhaustive history of the reform of civil procedure in this State will be written by some competent hand and submitted to the profession at a very early day. Suffice it to



say, that by open letters, communications, essays, addresses, arguments addressed to lawyers and the Legislature, he continued the movement in favor of this reform, resulting in the adoption in the Constitution of 1846, of a provision for "the appointment of commissioners to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record."

This Constitution took effect on the 1st day of January, 1847, and in February of that year Mr. Field presented to the Legislature a memorial drawn by him and signed by fifty members of the New York bar, reciting "that a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people, that a uniform course of procedure in all cases, legal and equitable, is entirely practical and no less expedient, and that a radical reform should aim at such uniformity and at the abolition of all useless forms and proceedings," and praying the Legislature to take proper steps to bring about such result.

Very soon after, such a commission was appointed with Mr. Field at its head. It was obliged to devise a new system, to arrange its details and to encounter the opposition of almost the entire bar of the State. However, in February, 1848, it reported a Code, substantially the work of Mr. Field, in 391 sections, which was enacted and went into effect on the 1st day of July, 1848.

This is the author's statement of what it accomplished. "Its essential features were the abolition of the forms of action and of the distinction between actions at law and suits in equity and the substitution of one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, in which action should be determined all the rights of the parties, legal or equitable, in respect of the subjects in litigation."

Three separate reports were made by this commission, the first in 1848, another in January, 1849, and still another about January 1, 1850.

As a result of the second report, a revised code was passed in April, 1849, containing 473 sections, being substantially the code under which many of us began the practice of the law, and which continued in effect until superseded by the Throop Code in 1877. This Code contained certain provisions relative to the organization of the courts, but its distinctive feature was the regulation of procedure in an ordinary civil action treating of limitation, parties, pleadings, personal remedies, executions and appeals, most of which, although stripped of its clear and concise language and clothed in complex phraseology, has happily been retained in the present act regulating the practice.

It is a fact but little known, still most important in this connection, and to which I desire to call special attention, that the last report submitted by Messrs. Field, Graham and Loomis as commissioners is a complete Code of Procedure, consisting of 1,885 sections, containing not only a thorough revision of the 473 sections then in force, but treating fully what are now known as "Special Actions" and "Special Proceedings," and devoting over 200 sections to matters of "Evidence."

The existence of this work has almost entirely escaped attention, although in 1853 a Code of 1,740 sections, covering substantially the same ground, apparently again carefully revised and condensed by Mr. Field's hand, was presented for enactment in the Assembly. It was divided into four parts, treating of "Courts of Justice," embracing the powers and duties of judicial officers, the admission of attorneys and the jurisdiction and power of the courts, "Civil Actions" regulating the conduct of an action and containing the substance of the old Code, "Special Proceedings," comprising most of those provided for by statute and afterward embraced in the Throop Code, and "Evidence," being a compilation of the statutes on that subject, with some of the common-law rules, which afterward formed the basis of the proposed Code upon that subject. This draft was evidently before the commission which framed the Code of 1877 and of 1880, and to some slight extent was recognized in its work. It was, however, rearranged, rewritten and expanded from 1,740 sections to nearly double that number, although several of the subjects there treated—notably mechanics' liens, and most of the provisions relating to evidence—are omitted. This proposed Field Code might well be adopted to-day as a model of style and arrangement; true, the lapse of more than forty years has rendered many of its provisions obsolete, or even antiquated, since there has been a gradual but strong development of sentiment in favor of abolishing every rule which is merely formal and technical, and which does not tend to aid in arriving at the merits of a controversy, while the gathered experience of these years has shown where many additions and alterations, adapting the work to the demands of the times, could be made by a judicious hand. The part relating to evidence is open to just criticism, and would require careful consideration and the elimination of many of its features. With these limitations, it should be studied and utilized by the draftsman of any revision of the law of remedial justice.

By chapter 38 of the Laws of 1870 provision was made for a commission "to revise, simplify, arrange and consolidate all statutes of the State of New York, general and permanent in their nature,

which shall be in force at the time such commissioners shall make their final report." Under this authority the new commission proceeded with their labors upon the Code to the exclusion of the revision of the general statutes, which was thereby postponed till 1889, and still remains unfinished, and reported a new practice act in place of the one which had been in operation thirty years, to the entire satisfaction of the lawyers of the State, which, together with the additional parts reported in 1860, and revised in 1853, would have completed a reasonably perfect Code of Civil Procedure. It is useless to discuss the question as to whether this work was within the spirit and intent of legislative action; it is but fair to answer, however, that if it had been intended that the practice should be affected to any considerable extent Mr. Field, as the originator and inventor of the reformed procedure, would have had a place at the head of the commission, since he was unquestionably, in every respect, the most competent man living for the prosecution of such a work.

The Throop Code was adopted after a bitter controversy and upon the understanding that it should be improved by amendment, Mr. Field expressing his views with regard to its effect in this vigorous manner: "As the Code of Procedure stood from 1848 to 1877 it was a simple, well-known system which everybody understood and which nobody wished to change except a few persons who got up a commission to revise the statutes, and they set to work to change the Code against the remonstrance of its friends. I warned them of its consequences then and I tell them now that they will never have the civil procedure of the State of New York as it should be till they go back to the Code of 1867 and complete it according to the design of its authors."

The preparation or revision of a method of legal procedure requires the hand and brain of a lawyer, who either is or has at some recent date been in active practice and has thus become thoroughly familiar with its requirements, who is well acquainted with the principles of the common law practice and the provisions of the reformed procedure wherever they have been adopted in this country and abroad, so as to be able to appropriate all that is best in both systems, who has both special skill and wide experience in the drafting of statutes that he may use apt language to convey his ideas, and who is moreover a believer in and enthusiast about the work he undertakes, so that it shall be done as a labor of love and not performed as an onerous task. All these requisites Mr. Field possessed to a very high degree; how many of these qualities were developed in his successors is best told by the character and quality of their work. It is not amiss to say that their work is not characterized

by that close analysis, logical arrangement and clearness of statement which were notable in the act it superseded.

I have quoted freely from Mr. Field in this paper for two reasons; first, because he has expressed his views upon subjects which I have attempted to place before you much better than I can do; second, because I wish to call attention to the terse and vigorous English in which he clothed his ideas, as showing his pre-eminent ability as a statutory draftsman of the modern school, and the desirability of adopting his style as a model of clearness, brevity and simplicity.

The changes accomplished by and benefits derived from the reformed procedure cannot be measured alone by the fact that it abolished the distinction between law and equity, authorized all parties in interest to be brought in, and nearly all questions in controversy between them to be decided in a single action; that it abolished fictitious methods of pleading, and substituted therefor a plain and concise statement of the cause of action or defense, or that it enabled the common-law courts to require the examination of parties and production of papers, and compelled the oral examination of witnesses on the trial of equity causes; but beyond all this, it marked an era in the history of the administration of the law, in the simplification of legal proceedings by eliminating useless forms and unnecessary verbiage, discouraging technical, useless and troublesome methods, and, above all, by introducing into the practice a liberal and broad-minded spirit, in accordance with modern methods of thought and action.

The appreciation in which the Code Practice is held, is, best shown by its adoption in twenty-eight States and territories, by the passage of the English Judicature Act and the rules of the English courts based upon it, to the exclusion of common-law methods, followed by the enactment of its leading features in sixteen of the British colonies and dependencies, all within the life-time of its author. Surely no one man ever accomplished so great results by way of reform of either substantive or adjective law.

It is difficult to appreciate to the full extent the work of this indefatigable lawyer. Political addresses, papers for periodicals and reviews, discussions upon taxation, jurisprudence and the science of government were his diversions, arguments upon great constitutional questions, alternated with carefully prepared addresses upon arbitration between nations. In the intervals of an extensive practice, he prepared a complete Code of international law, involving the examination of treatises and treaties in many languages; a Civil Code, calling for a wide knowledge of both the written and the unwritten

law, and a thorough mastery of statutes and decisions of England and America; a Code of Criminal Procedure and a Penal Code, demanding a close acquaintance with the common law and statutory definitions of crimes and misdemeanors, and their appropriate punishments; a Political Code, requiring a close study of the details of town, county, city and State government, and a Code of Evidence, necessitating careful research to ascertain the rules adopted by the law courts and those enforced in equity jurisdictions.

In addition to all this he invented, perfected and put in operation a system of remedial justice which has superseded the method honored by centuries of user, and which, by its simplicity and adaptability to the needs of the bar, has won the admiration of lawyers, advocates and jurists throughout the civilized world.

The codification of the civil law in the reign of Justinian was the fruit of the united labor of a corps of the ablest lawyers of the Roman empire. The Codes of the first empire were the result of the combined efforts of a large number of the foremost advocates at the bar of France, presided over by the all embracing genius of Napoleon.

Save as to clerical assistance, the work upon the seven compilations mentioned was done by Mr. Field substantially alone and unaided. Of the quality of so much of this work of codification as has not been enacted, it is too early to speak without embarrassment. It is more than doubtful whether all that he hoped to accomplish is practicable or desirable, but so far as his avowed object "to reduce the bulk of the law, clear out the refuse, and condense and arrange the residuum so that the people and the lawyer and the judge may know what they have to practice and obey," is possible of attainment, it has the hearty sympathy and demands the unqualified admiration and support of every lawyer.

No higher compliment could be paid than that to Mr. Field, in London in 1867, when invited to meet the leading English law reformers and explain the features of the law reforms which he had inaugurated in America. There were present the most eminent legal authorities of the kingdom, including five men who had attained to the dignity of the lord chancellorship. The conference lasted till late into the night, and when they arose Lord Chancellor Hatherly took him by the hand and said, "Mr. Field, the State of New York ought to build you a monument of gold."

In the language of another, somewhat paraphrased, it was David Dudley Field who laid the foundation of peace, happiness and tranquility by formulating and establishing a system of remedial

procedure which makes law a blessing and not a scourge. He accomplished much in this direction, but much yet remains to be done, and if further needed reform in legal procedure is to come, it will be found along the lines laid down by this great master. "Law must grow with civilization or progress will cease."

It is proper that this association, of which he was for so many years a member, and in which for so long a period he presided over one of the most important committees, should recall the fact that for almost half a century Mr. Field stood among the leaders of the bar of the State and nation, and eminently fitting that the association should, in common with the members of the legal profession throughout this country, Great Britain and the continent, recognize that his place as a law reformer is foremost among those of any age or nation.

But there is a more effective and practical manner in which his memory may be honored, his influence perpetuated, and at the same time the client, the bench and the bar very materially benefited.

The Code of Civil Procedure was, all things considered, his best and most useful work. It is at once his most enduring title to fame and his richest legacy to his brethren of the law. Its revision and simplification, so far as to conform its general features to the form in which he drafted it and which the experience of more than a quarter of a century approved, is a necessity to the litigant and the lawyer. In this form it would be a monument to the acumen, learning, industry and genius of the original draftsman, a model of legal procedure to be closely followed by other States and countries, and most important of all, again become what it was designed to be by its author, "a convenient, simple and inexpensive method for the administration of civil justice."

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**RAILROAD IN RECEIVER'S HANDS—REDUCTION OF WAGES.**—Where the wages paid to faithful and competent employes of a railroad in the hands of a receiver are not shown to be excessive for the labor performed, and are not higher than the wages paid to like employes on other lines of similar character, operated under like conditions through the same country, the court will not, against the protest of its said employes, reduce their wages because of inability of the railroad to pay dividends or interest, even though present opportunity exists for securing other employes for less wages. (*United States Trust Co. of New York v. Omaha & St. L. Ry. Co.* [U. S. C. C., Iowa], 68 Fed. Rep. 737.)

## NOTABLE AND CURIOUS CASES IN THE COURT OF CLAIMS.

VOLUMES could be written about the claims against the government, which have been brought before the Court of Claims, the Court of Private Land Claims, or before Congress itself. Some of the petitions are evidently the work of cranks, others of ingenious rascals, while yet others are legitimate. It sometimes seems as if the last class were the least likely to gain satisfaction.

Some of the just claims, I am pleased to say, belong to estates where heirs have not spent all their strength and substance in the prosecution, but who have been able to earn a competence for themselves. An instance of this is the somewhat peculiar claim of the Childs family in Philadelphia.

It was in 1777 that the Continental Congress sent two spies to Montreal to report upon the preparations then being made by the British government to subjugate her rebellious colonies. The men were appointed by General Washington, and a Mr. George W. Childs was one of them. The men did their work to the satisfaction of the general, who gave them certificates to the effect that their wages were well earned. Whether his comrade fared better I do not know, but the compensation promised Mr. Childs was not paid by the Continental Congress, and his heirs petitioned the Fifty-second Congress for two million dollars, which they affirm to be the principal and interest due them.

Another interesting claim is that of Richard W. Meade, father of the hero of Gettysburg. It seems that at the time when the United States purchased Florida, she agreed to assume all the claims which American citizens had against Spain. Among these claims was one for \$373,879 which had been allowed by Spain to Mr. Meade, and which under the terms of the treaty should have been promptly settled. Mr. Meade, it seems, was unable to obtain from the Spanish government the proofs upon which his accounts had been settled with Spain, and without these the United States courts refused to act. The case had been before Congress nearly a score of times, and has been reported favorably nearly every time, but it was never acted upon by both Houses of the same Congress. The original claimant died years ago, and if ever the heirs are able to get their claim through, they will be the richer by several millions of dollars.

One of the most curious claims ever put into a congressional bill was originally presented by Mr. Weaver, who is now better known as a recent presidential candidate on the People's party ticket. It was afterward reintroduced by Mr. Smith of Illinois. The bill proposed to pay to Federal soldiers the difference in value between the gold dollar and the

depreciated currency in which they were paid during the war. This depreciation ranged from twenty-five to two and a half cents on a dollar, and it was estimated that it would take about \$500,000,000 to satisfy the terms of the bill.

At present there is no limit to the number of times a claim may be presented to Congress. Every political change of administration is sure to bring back thousands of applicants whose petitions have been rejected by the outgoing power.

I have said that some of these claimants are cranks. A citizen of the middle West has spent at least three times as much money in postage as he claims the government owes him, in writing letters to the treasury, to United States officials, and even to the Chinese and Korean legations. Nearly two million claims have been filed in the treasury department alone, and the way in which many of them are addressed is odd enough. It must have taken the "blind reader" of the post office department to make "second auditor" out of "second oratorio," or out of "sekun oder of the Tresur."

Saddest of all are the just claims which will probably never be satisfied, and whose inheritors have died in poverty.

Major Joseph Wheaton is recorded as a gallant soldier in the Revolution who served throughout the war. During 1780-1783 Congress passed an act guaranteeing half pay for life to every officer who stayed in the service to the end of the fight for liberty. Major Wheaton never received a dollar of the money promised. Moreover, during the war of 1812, this gallant officer used thirty thousand dollars of his own money with which to purchase army supplies, at a time when the army must have perished without this aid. He was then acting as assistant quartermaster-general. This money, likewise, was never refunded to him, although Congress doubtless intended that it should be. Some time after the major's death a bill for the relief of his daughter finally succeeded in passing both Houses during the same session, but by a fatal error reference was made, not to the treasury, but to the interior department, for payment, and I believe the daughter died in poverty, although the undoubted heir to plenty.

There are said to be more than fifteen thousand claims, acknowledged to be perfectly just, dating from revolutionary times to the last war, which cannot get a satisfactory settlement from Congress.

One of the oldest is that of James Bell, a Canadian, who spent a fortune in building and fitting out three vessels for the Yankees during the Revolution. He was afterward arrested for treason, his unspent property confiscated, and his life spared only through the clemency of the English king, who, it is said, was the man's cousin. Bell was released on parole, and at the close of the war re-

turned to this country. Pointing to Washington's proclamation, that whoever assisted us in our struggle for freedom should be rewarded if we were successful, he asked for aid. He died without it and very poor. A very small portion of the claim has been paid to some of his descendants, but the bulk of it is still an acknowledged debt.

Over in Georgetown there lives, or did a year or two ago, an old lady whose husband was a soldier in the Northern army. During the war the Federal troops used her farm as a camping-ground, and her live stock and other movable property as their own. The damage is put at \$20,000, and the justness of her claim is undisputed, but she will probably never get her money.

Now and again there comes a claim which the government has tried to satisfy, but which the claimant persists in prosecuting to the last cent. One of these, apparently, is the famous Reid claim, which is said to have furnished the plot for Mr. Crane's play, "The Senator."

In September, 1814, British buccaneers destroyed the brig *General Armstrong* in the neutral port of Fayal. The owners tried to recover damages, but their efforts had been fruitless up to 1885, when they all engaged Samuel C. Reid of New York to prosecute their claims. The agreement, signed by the fifteen owners, consigned to Reid their rights in the claim, with the agreement that he was to bear all the expenses of the prosecution and retain half the money he might recover. It was not until 1857 that England and the United States submitted the loss of this vessel to the arbitration of Louis Napoleon, and it was not until 1882 that Congress directed the secretary of state to adjust the claims of the captain, owners, officers, and crew of the brig. Long before this, Mr. Reid had assigned his claim to his son, Samuel C. Reid, Jr. The Court of Claims fixed the value of the vessel at \$70,739, and put the owner's share at \$43,000. For want of evidence to adjudicate the relative interests of the heirs of the fifteen owners, Secretary Frelinghuysen decided that their estates should share alike. Mr. Reid got his half of the whole at once,—\$21,500. He also got something for his services from the share of the officers and crew, so that one would think he might have been satisfied. The owners' shares were not all paid out, however, as some of them had died without heirs. This part of the award, of course, reverted to the United States; and it is for all, or at least the major part, of this that Mr. Reid continues his suit.

The McGarrahan claim is another interesting case, but one which is so perennially before the public that it seems useless to give more than a brief outline of what the claimant really wants. His claim is for title to land for which nobody disputes, I be-

lieve, that he has paid good money. At the time of the purchase, however, the title was not good. Since then it has become vested in the United States, and the present question is, shall the man who actually bought and paid for the property in good faith receive the final title, or shall it go to a mining company who are simply squatters?

To show how investigators may be taken in, I will give a brief *résumé* of the Weil and La Abra bills, as they are called. The history of these cases runs back to 1868, when by a treaty with Mexico the United States secured something like four million dollars' worth of awards. The La Abra Silver-Mining Company was awarded \$683,041 for alleged damages arising from the closing of a silver mine. In the Weil case the award amounted to \$487,819, and was for cotton and mules said to have been seized by Mexican troops. When the United States had paid to each claimant about one-third of his award, suspicions of fraud were aroused, and further payment was suspended. This was in 1877. After a long fight in Congress, early in 1892, the matter was finally referred to the Court of Claims. If the court finds that the awards were procured by fraud and perjury, the unpaid balance will be returned to Mexico; otherwise, payment on the claims will be resumed. The suspicions are founded in the mine case on what seems to be conclusive evidence, that it had never been seized at all, but had been voluntarily abandoned as valueless, and that the claim had been a fabrication of the former superintendent of the mine, inspired by the appointment of the commission to consider claims arising out of the Mexican war. The ex-superintendent, I believe, died before any payment had been made on the award.

In the La Abra case, then, there had once been a mine, though a valueless one. The Weil claim, however, had even less foundation in fact, if the latest evidence proves to be correct. The claim was based on the allegation that Weil lived in New Orleans, was engaged in running cotton through Mexico during the war, and had lost a heavy mule train and seven hundred bales of cotton through seizure by the Mexicans. Cotton was then worth fifty cents a pound. The proofs at the time seemed so complete that the award was promptly made, and question would probably never have been raised, had it not been for the mixed conditions of Weil's business affairs, which caused a quarrel over the disposition of the proceeds. It now looks as if Weil had never owned a mule or a pound of cotton in his life.

The Court of Private Land Claims was organized, I believe, in 1891, for the purpose of adjudicating claims to private ownership in land before it was ceded to the United States. There have been filed

in this court upward of forty cases, over thirty of which are located in New Mexico, the total area claimed amounting to nearly two and a half million acres. These, of course, are grants alleged to have been made to private parties before New Mexico became the property of the United States, and the only way of proving the truth or falsity of the claims is to patiently and carefully overhaul old Spanish records and archives, much worn and very badly arranged. In this way not only the fact of the grants but also their proper boundaries and areas have to be established.—*Kate Field's Washington.*

#### PRESENCE BY TELEPHONE.

**I**N the administration of the business of corporations and their boards the question has arisen, when a meeting is attempted and a quorum is not present, can it be "counted" by calling up the necessary absentee by telephone? Practical acquiescence will often silence any question as to the effect of so doing. But the legal question remains, and will doubtless be the subject of frequent professional advice, and perhaps of some litigation. The reason of the rule requiring an actual meeting is that the legal object of constituting a board is to secure an opportunity of free expression of views, and to give each a knowledge of the arguments presented by each of the others. The most important class of cases will probably be that of board and committee meetings. Where discretionary powers are committed by law to a board or body of persons in their collective capacity, they can only be properly exercised at a meeting. Usage is very loose in this respect, but where the assumption of such persons to act as a board or committee by circulating a paper for signatures without a meeting has been challenged, the courts have condemned it as illegal and ineffectual. (*McCortle v. Bates*, 29 Ohio, 419; *D'Arcy v. Tamar, etc.*, R. Co., L. R., 2 Exch. 158, and cases in *Cook on Stockholders*, § 592, note 1.) In many cases the transaction is such that the body can by a subsequent meeting ratify the act and thus cure the mischief; but, strictly speaking, this is not a ratification which validates the form of assent secured without meeting, but a fresh act which may take effect, although the previous attempts proved abortive. Wherever liberty of action is essential the failure to meet will be fatal as against third persons. The statute of wills requires that the testator's signature, if not expressly acknowledged, be made in the presence of witnesses, and that the witnesses sign in presence of testator, and of one another. This provision has often been the subject of discussion. A recently highly-esteemed authority thus describes the incertitude of opinion on the point: "From the first enactment of

the statute of frauds down to the present day, the witnesses to a will have been commonly required by legislation to sign or subscribe their names 'in the presence of' the testator. English and American codes well harmonize in this respect, though they seldom require explicitly that the witnesses shall sign in the presence of one another. The object of such a requirement seems to have been that the testator should have clear assurance that the instrument subscribed was his own identical will, and nothing else. But while that idea was kept steadily in view, the courts soon found themselves confronted by controversies which involved the 'presence of' a testator in the single sense of his visible presence, apart from all other attendant circumstances of cognizance on his part of his witnesses' subscription. Hence, in the laudable desire to uphold the policy of the Legislature on the one hand, and, on the other, to permit wills which had been honestly executed to stand, the English judiciary presently led off in a series of precedents whose practical effect has been to establish in probate law a curious theory of constructive presence. Traced down from Charles II to Victoria, the restrictions of this doctrine run very closely; so that seeing on the testator's part comes to mean, at length, scarcely more than the opportunity to see the witnesses as they sign. Thus it has been held a good subscription, under the statute, where the maker of the will sat outside the house in his carriage, or remained in one room while his witnesses subscribed in some remote apartment, with a lobby and a broken-glass window intervening; for in such instances the witnesses were within the testator's range of vision, and if he did not really see them, he might at least have done so. But, on the other hand, the will has been treated as insufficiently subscribed where the witnesses, although in an adjoining hall, were hidden from the testator's possible view by a flight of stairs. One will has been refused probate because the testator lay helplessly in bed with the curtains down, while another has been admitted because the testator was strong enough to have pushed the curtains aside and seen subscription had he chosen to do so, though in neither case did he probably see the will signed by the witnesses." (*James Schouler*, 26 Am. L. Rev.) We apprehend that as to the telephone, distinction between presence and assent will be generally accepted as sound. If presence is required, the telephone cannot give it. Where only assent is required, the telephone can give it, if oral assent is enough. If written assent is to be given, the telephone cannot give that (though forms of electric communication not yet in commercial use may), but the telephone may give authority to an agent to sign written consent in those cases where oral authority is enough. Where assent must be under

seal, oral authority is not generally enough. The principle that the intending signer of an instrument may authorize another person to hold the pen and make the signature, plainly requires presence; and upon the above view could not be relied on to authorize one by telephone to sign the name of an absent speaker to a deed.—*University Law Review*.

### Abstracts of Recent Decisions.

**ADVERSE POSSESSION—COLOR OF TITLE.**—Color of title is that which in appearance is title, but which in reality is no title. While the phrase "color of title," in the Limitation Act of 1874, means a paper title, it does not mean a perfect paper title. The statute, when its conditions are complied with, is intended as a protection to a person holding in good faith under a mere colorable title. (*De Foresta v. Gast* [Colo.], 38 Pac. Rep. 244.)

**ATTORNEY AND CLIENT—EMPLOYMENT—TERMINATION OF CONTRACT.**—Where defendant employed a law firm to conduct a certain case to a final determination, when the fee was to be paid, the death of one member of such firm during the pendency of such case, dissolved the partnership, and terminated such employment, but did not mature the firm's claim for compensation for services rendered before said death occurred. (*Landa v. Shook* [Tex.], 28 S. W. Rep. 185.)

**CANCELLATION OF DEED.**—A father promised his son that if the latter would live and work for him during the latter's life-time, he would devise to him certain lands, and about eighteen months before he died made his will accordingly. Afterward, and nine days before he died, being very feeble in mind and body, and laboring under a delusion as to his son's conduct, he made a voluntary conveyance of a part of the lands to two of his grandchildren, who were in personal attendance upon him. The son fully performed the conditions of his father's promise. *Held*, the conveyance must be set aside as against the son. (*Kastell v. Hillman* [N. J.], 30 Atl. Rep. 535.)

**CARRIERS OF PASSENGERS — ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.**—Whether a passenger who knowingly and intentionally alights from a slowly-moving train is guilty of contributory negligence is a question of fact, depending upon the attending circumstances. (*Chicago & A. R. Co. v. Byrum* [Ill.], 38 N. E. Rep. 578.)

**CONTRACT—ILLEGAL—RECOVERY OF MONEY PAID.**—When a plaintiff is in *pari delicto* with the defendant, money paid by the former to the latter cannot be recovered back. This rule applies where the act done is in itself immoral, or a violation of the general laws of public policy, but it does not bar a

recovery where law violated is intended for the protection of the citizen against oppression, extortion or deceit. Money paid on a usurious contract in excess of the principal and legal interest may be recovered back. (*Taylor v. Hintze* [N. J.], 30 Atl. Rep. 551.)

**CORPORATIONS — SUBSCRIPTION FOR RAILWAY STOCK.**—One who subscribes to the capital stock of a railway company chartered under the general law for incorporating such companies must take notice, notwithstanding any representations made to the contrary, that the railroad company has no power to issue or deliver to its stockholders any stock in an existing or future construction company. It follows that oral representations made touching the construction company, its resources, or the value of its stock are not pertinent as a defense to an action by the railroad company against a subscriber to enforce payment of his subscription. (*Russell v. Alabama Midland Ry. Co.* [Ga.], 20 S. E. Rep. 350.)

**HUSBAND AND WIFE—USE OF WIFE'S SEPARATE ESTATE.**—Where a husband applies the principal of his wife's separate property in the support of their family, she may, in the absence of an agreement to repay the same, recover it back. (*Hammond v. Bledsoe* [Ind.], 38 N. E. Rep. 530.)

**INJUNCTION — SALE UNDER MORTGAGE.**—Where one of several co-devisees of land buys a mortgage which is a lien on the land, he will be enjoined from selling the land thereunder until it is determined what amount of the mortgage the respective interests of himself and his co-devisees are subject to, so that the latter may satisfy the mortgage by paying their proportion of the mortgage debt. (*Fisher v. Hartman* [Penn.], 30 Atl. Rep. 513.)

**LIFE INSURANCE—NON-PAYMENT OF PREMIUM.**—The giving of a note for a premium to an agent, who had no power to postpone payment of the premium or to substitute anything for it, which was never accepted by the company or brought to its knowledge, will not keep alive a policy which provides that the company assumes no risk whatever for that portion of the year for which the premium shall have been actually paid in cash in advance. (*Smith v. New England Mut. Life Ins. Co.* [U. S. Ct. of App.], 63 Fed. Rep. 769.)

**WILL—DEVISE TO TRUSTEE—LEGAL TITLE.**—A devise to the testator's children for life, with contingent remainder to their children, a trustee being appointed "to hold the legal title during the estate for life, and for the preservation of the remainder," does not clothe the trustee with legal title to the remainder, but only with such title to the particular estate. The remainder created is a legal, not an equitable, estate. (*Baxter v. Wolff* [Ga.], 20 S. E. Rep. 326.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

JUDGE HERRICK, on Wednesday, January 23, 1895, decided that notaries public, as public officers, could not have free transportation over railroads under section 5 of article 13 of the Constitution. It is a matter of great interest to carefully examine the well-written opinion in this case, and to realize that the spirit of the Constitution is to be upheld by such a judicial interpretation. The history of this amendment is rather brief, but most interesting. During the last part of the session of the convention an amendment had been proposed which on its face prohibited certain public officers from accepting passes from the railroads of this State, when Hon. De Lancey Nicoll, of New York, formerly district attorney of that county, called the attention of the members of the convention to the fact that the proposed amendment which was then before them could easily be nullified, as it was improperly drawn, and was not sweeping enough in its terms to cover all officers in the employ of the State. Mr. Nicoll presented the existing provision, and said that he believed that it was one which could not be easily made a subterfuge, but that he was willing to accept any amendment which might strengthen the language used in framing the section. This amendment was passed by the convention, and subsequently ratified by the people. From the circumstances of its passage and from the sweeping language contained in its provisions, we cannot see how it is possible for any public officer to accept free transportation over the road of any company in this State, or to take any of the passes, which were formerly considered as emoluments due to an office-holder. The principle of the amendment is good, its language is strong, and the decision of Mr. Justice Herrick in interpretation of its provisions is one which, we trust, will be followed by the opinions of any judge who may

hereafter be called upon to construe the section. In the decision of Judge Parker in regard to the railroad commissioners we think that the different reasoning was proper, as the expense of the commission, under the provisions of the law creating it, was to be borne by the railroads of the State, and the statute existing at the time of the passage of the amendment to the Constitution in regard to passes was one which the members of the convention were deemed to be cognizable of, and which did not, in effect, make exception to the anti-pass provisions of the Constitution. Judge Herrick's opinion in regard to notaries public using passes is as follows:

"This is an action commenced by the attorney-general of the State, to forfeit the office of the defendant as notary public. The plaintiff alleges that in January, 1894, the defendant was appointed a notary public in and for the county of Albany, by the governor of the State, and was confirmed by the Senate. That thereafter he took his oath of office as notary public and filed the same in the office of the county clerk of Albany county, and since then has been acting as notary public in and for the county of Albany. That at the time of his appointment as notary public he was possessed of a free pass, which entitled him to free transportation over the lines of the D. & H. C. R. Co., and that on the 2nd day of January, 1895, the defendant, while traveling over the tracks of the D. & H. C. R. Co., a railway corporation organized under the laws of the State of New York, from the city of Albany to the city of Troy, in this State, made use of such free pass and received free transportation from such railroad company, which the complaint asserts to have been in violation of section 5 of article 13 of the Constitution of the State of New York, and asks the judgment of the court that it adjudge and decree that the defendant has forfeited his office of notary public, and that he be evicted therefrom. The defendant demurred to the plaintiff's complaint upon the ground that it 'does not state facts sufficient to constitute a cause of action.' The section of the Constitution which it is alleged has been violated reads as follows: 'No public officer, or person elected or appointed to a public office under the laws of this State, shall directly ask, demand, accept, receive or consent to receive for his own use and benefit, or for the use and



benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any corporation, or to make use of the same for himself or in conjunction with another. A person who violates any provision of this section shall be guilty of a misdemeanor, and shall forfeit his office at the suit of the attorney-general.' Art. 13, § 5, of the Constitution. The first question that arises is, whether a notary public is a public officer. 'Every man is a public officer who hath any duty concerning the public.' 7 Bacon Abr., Offices and Officers; Tomlyn Law Dict.; Hall v. Wisconsin, 103 U. S. 5. 'An office is simply an appointment or authority on behalf of the government to perform certain duties at and for a certain compensation.' Smith v. Mayor, 37 N. Y. 518; People v. Nostrand, 46 N. Y. 375-81. And the person who holds such office, appointment or authority may properly be said to be a public officer. It seems to me that a notary public comes within these definitions of what constitutes a public office and a public officer. He is appointed by the executive authority of the State and confirmed by the Senate; he is appointed to perform certain public duties; some arising under the laws of the State; some under the laws of nations; some under commercial usage, and some are to be performed in pursuance of the laws of other governments and States. See chap. 683, Laws of 1892, §§ 81 and 85. Some of his duties may be performed in any part of the State; others are limited to the county for which he shall have been appointed; he may protest commercial paper, take affidavits and acknowledgments, and, in some instances, take testimony in actions pending in other States. These are essentially public duties, and the argument that was made before me that the duties performed by him are at the instance and for the benefit of private persons, does not conflict with the idea that a person who is appointed for the purpose of performing such offices for the benefit of private citizens is a public officer. Most of the duties imposed upon public officers, most of the acts that they do, are at the instance and for the benefit of private persons. The duties and powers conferred upon notaries public are of a character that it would not be safe to permit every citizen to discharge for their mutual benefit without any sense of official

responsibility. To expedite both public and private business, and for the purpose of authenticating business transactions for the public benefit, as well as for the benefit of individual citizens, this particular office has been created, and the powers of the persons holding it defined. It seems to me, therefore, that a notary public is a public officer. It is contended on behalf of the defendant that he is not a public officer within the meaning of the Constitution, and it is argued that in order to discover the true intent and meaning of the section we must examine into the reason for its adoption and the evils it was intended to cure; and it is asserted that the mischief intended to be guarded against was the possibility of persons discharging public duties being affected in such discharge by consideration for railroad companies or other companies of that class, giving them free passage or privileges. To constitute such mischief it is absolutely necessary that the one prohibited from receiving such privileges should be an officer discharging a duty to the public, and it would seem to be equally necessary that it should appear that the duty was of such a character that there would be reason to apprehend that the acceptance and use of it would tend to such a discharge of the duty as would be against the interests of the people and favorable to the company.' And it is contended that the duties of a notary public can in no way be influenced by the granting or withholding of a pass, and, therefore, that the holder of such office does not come within the intent of the constitutional provision. If there was any ambiguity in the language used in the Constitution; if the phraseology was indefinite or uncertain, there might be some reason for our attempting to inquire into the reasons for adopting this provision, and the abuses it was intended to correct; but there is no such uncertainty; the language used is, 'no public officer or person elected or appointed to a public office under the laws of this State;' that is equivalent to any and all public officers; it makes no distinction, but includes every and all officers within the boundaries of the State. When we are asked to look beyond or behind the language used, for the purpose of ascertaining the mischief against which the prohibition was directed, and thus restrict its operation, we are asked to go into

an exceedingly dangerous field of inquiry. The danger of seeking a meaning and interpretation by such means is very forcibly presented by Chief Justice Bronson in *People v. Purdy*, 2 Hill, 31. Each class or kind of public officers in the State could be taken in turn, and as to each it might be held that it did not refer to them, because the mischief intended to be prevented could not be worked by them in their particular official positions; and as to others, the court might well say that it would not presume that such officials could be guilty of the mischief aimed to be prevented, and, therefore, that such officials did not come within the meaning of the Constitution. One class after another might be thus eliminated until the clause in question would be a dead letter. The language used is apt, broad and comprehensive, and 'we are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language.' *People v. Purdy*, 2 Hill, 31. The language is so clear and precise here that there is no need of interpretation. 'It is not allowed to interpret what has no need of interpretation. When an instrument is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusions—there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it.' *Vattel*, bk. 2, chap. 17, § 263; *Newell v. People*, 7 N. Y. 9. Courts will not seek to elude or evade the Constitution, but rather to enforce and uphold its true intent and meaning, and where the language is clear and unambiguous, that intent and meaning is to be gathered from the language used; and where plain, ordinary words are used, they will give them the meaning that is ordinarily attached to them at the time they were used, and not attempt to inject into them a new force and meaning, or by judicial construction deprive them of their full power and significance. In this case plain, ordinary, comprehensive words have been used, words with a well-understood meaning, and the only function for the court, therefore, is to declare the law as it is written; as the Constitution has recognized no difference between public officers, the court can recognize none."

It is a fact which must be admitted that Bryce's *American Commonwealth* gave to many Americans the first inkling of an idea how the affairs of state are administered. There seems to be a confidence of the people that the government is conducted in a manner which does little harm and perhaps but little more good. Reformers spring up like the noxious weed only to fade away in egotistical self-satisfaction and with an indistinct mysterious idea that some unforeseen, unknown disaster has been averted by their action, and either pass into obscurity without having finished the work which they started to accomplish, or become anxiously patriotic to serve their country in consideration of a return, great or small, of the filthy lucre. Every country needs a body of citizens conversant with the affairs of state and intelligent in perfecting the laws. Senator John L. Mitchell, of Wisconsin, wrote an article in the *North American Review* on the passage of a bill through Congress, which is not only interesting but most instructive, and which we have the pleasure of printing. "The course of a bill through Congress is most interesting. Take, for instance, a private bill that has had its origin in the Senate (and for the purpose of illustration the Senate will do as well as the House, for in both of these bodies the system is practically the same.) A private bill is, as the term indicates, for the relief of some individual, while a general or public measure is far-reaching in its effect. In nine cases out of ten the senator who introduces a private bill is solicited to do so by one of his constituents who wants a pension, or who desires the charge of desertion removed from his military record, or who has a claim against the government of some kind or another. The bill may or may not be properly drafted, but whether it is or not, it is usually introduced by the senator without careful consideration. Any error in language or intention is left to the committee to correct by amendment. There is a legend printed on the bill that the senator first asked and obtained consent to introduce the bill; but, in fact, the senator does nothing of the kind. He rises in his place during the morning hour, when the introduction of bills is in order, and simply reads the title of the bill and asks that it be referred to the proper committee. It is true that an objection might be raised to

the first reading of the bill, but that has not been done for years, if, in fact, it was ever done. However, this is a safeguard against objectionable legislation. The reason, perhaps, why the rule has never been enforced is that no bill is ever considered in the Senate that has not first received consideration by one of the committees of that body. It is not difficult to get a bill introduced in the Senate. If the senator does not care to be responsible for it, he states that he introduces the bill by request, and it is so printed. There are many people, ignorant of the course of legislation, who believe that the mere introduction of the bill insures its passage, and it is a lamentable fact that there are senators who give false hope to their constituents by simply introducing the measure, sending a copy of it to the claimant, and then dismissing the whole matter from their minds. The life of a bill terminates with the Congress in which it was introduced, and it is customary with some senators to reintroduce in the new Congress all the old bills which were not favorably acted upon. In the Fifty-second Congress one senator from a middle State, probably through the zeal of his private secretary, introduced an old bill four times. In each case the bill was referred to the same committee and was for exactly the same relief. When the bill is referred by the President of the Senate to the committee, it is usual for the chairman of that committee to send it to the proper executive department for the purpose of obtaining information that will justify either a favorable or an unfavorable report. This is the course when the bill is new; but if it should be a measure that has been before Congress at some previous time, the archives of the Senate are searched for the purpose of ascertaining what prior action has been taken upon it. When adverse action has been taken on a bill, two or three Congresses are sometimes permitted to intervene before it is reintroduced. In the meantime new evidence may have been secured, or the old facts may be susceptible of a stronger presentation and in a more favorable light. The old bill is usually accompanied by a mass of papers that have upon them the earmarks of preceding Congresses. These papers cannot be withdrawn from the files of the Senate if at any previous time the measure has been reported upon adversely. They are retained in evidence of that adverse action, but if a

measure has been reported favorably the papers may be withdrawn upon a motion of a senator. Old claims may or may not be meritorious, but they are invariably regarded with suspicion as well as dislike. The multitudinous duties of a senator leave him but little time to delve into musty papers and to prepare written reports which will stand the test of the committee, let alone the Senate. But there was once a senator who did take the time to thoroughly investigate a number of these stale claims. He found what none of his predecessors on the committee had found, that there was undoubted merit in them. It is true that he sat up for many nights to make these investigations, and that it took him a long time to write his reports. But each report contained such a lucid and concise presentation of the facts, and was so logical and convincing in its reasoning, that the bills were passed by the Senate, and became laws. This senator made so lofty a reputation among his colleagues in dealing with these old claims that when a vacancy occurred in the Federal judiciary they united in urging the President to nominate the industrious senator to that high position, and to-day he is a member of the Supreme Court of the United States. It is a hard matter to get a bill out of committee, for several reasons. Most of the committees of the Senate are composed of nine members. These members are in turn appointed sub-committees, to which are assigned the various bills which have been referred to the whole committee. In the course of a congress these references to the working committees of the Senate consist of from three to nine hundred measures. All of this means a good deal of exacting work. Perhaps in the mass of bills referred to an individual senator, as a sub-committee, there is a large percentage which is not deserving of favorable recommendation. These bills are usually held back out of consideration to the senators who have introduced them. If a report is urged upon any of them it means unfavorable action, and that is never desired, as an unfavorable report practically kills the bill. But outside of these bills there are many meritorious measures which lie dormant until the sub-committee in charge is stirred up to make up a report upon them. Sometimes a senator who has become interested in a private bill will appear before the committee, make a statement of the case,

and personally appeal to have the case acted upon at once. He may go so far as to write the report on the bill, and if a majority of the committee favor its passage, the report may be adopted. When a bill has passed the committee, the senator who prepared the report submits the bill to the Senate, amended or not, as the case may be. The bill is reprinted with its amendments, and is given a calendar number. The report is also printed and given the same calendar number, the calendar being a record of each of the bills in the order in which it is reported back to the Senate, with the favorable or unfavorable recommendation of the committee. At this period in the course of the passage of the bill the claimant feels hopeful. He believes his measure is nearly a law, for if it is passed by the Senate he will then only have to get it through the House. Perhaps he has anticipated the action of the Senate, and has had a similar bill already introduced in the House. His efforts may have been successful in that body, and the bill may be on the House calendar also. If such is the case, he believes that he stands near success. But the work of getting the bill on both the Senate and House calendars has been the work of months. The committees usually meet but once a week, and then remain in session not over an hour and a half. For weeks at a time no legislative business may be considered by the committee in charge of the bill, on account of nominations made by the President. In the present Fifty-third Congress the judiciary committee of the Senate, on March 1, 1894, had not given up one session to the consideration of legislative business; but this action is not usual. However, the private claimant finds that weeks have passed into months, the long session ended and the short one begun before he gets his bill on the calendar of each house. There is not much time for legislation of a private character in the short session, except at the beginning. The appropriation bills for carrying on the government for the ensuing fiscal year must be prepared, and as they have the right of way over all other legislation, a private bill must take its chances. But being on both the Senate and the House calendars, it has a favorable prospect. The claimant then urges the senator who has had charge of the bill to call it up at some odd moment for consideration and passage. This is not difficult in

the Senate, but in the House only the greatest popularity with the speaker and the representatives can secure such a favor. Sometimes in the Senate, under one of its rules, that body will proceed to the call of the calendar, as it is termed, and if there be no objection to the bill, it is only a question of how rapidly it can be read to secure its passage. This reading of the bill at full length is called the second reading of the bill. It is then open to amendment, and if none be made, the title is read (which is called the third reading) and the bill is passed. When the bill has passed either the House or the Senate it becomes an act, and is signed by the clerk of the House if it be a House bill, and by the secretary of the Senate if it be a Senate bill. The Senate bill has now become an act, and is again reprinted, but still retains its identity as a Senate measure. The only changes are in the heading, which reads 'in the House of Representatives,' and affixing the date of passage and the name of the secretary of the Senate. While the reprinted bill is correct in every particular, it is not recognized as the original, which eventually finds its way into the bound files of the Senate. From the time of the organization of the Senate up to the beginning of this Congress the original act was engrossed on blue sheets of paper, each line being numbered for convenience in quickly determining where amendments were to be inserted. It was only by the hardest work on the part of the engrossing clerks that, under this old custom, the work of the Senate could be kept up. Now the original act is printed. When the act is ready to be transmitted to the House, the secretary or one of his clerks takes it and appears before the speaker, who suspends business until the message from the Senate is received. If the claimant has been active he will have interested some member of the House in the passage of the bill by the Senate, and will have requested him to call up the House bill on the calendar, and ask the unanimous consent of the House to have the Senate bill substituted. Sometimes this consent is given, but more frequently it is not. The member may ask that the Senate bill lie on the speaker's table and wait for a more favorable opportunity to call up the bill. If he again calls up the bill and fails to get consideration, the bill is referred to its committee, and is generally considered promptly. It may be

that the language is not expressive of the ideas and policy of the House committee, and it is amended. The bill is then reported back, with a recommendation that it pass. It is still a Senate bill, and goes on the calendar of the House under that heading. Should there be an amendment, the bill is reprinted, the omitted part having a line run through the word. Type specially cast for this purpose is used. If there be any thing added the words are printed in italics. During the course of a Congress many bills are reported. The House calendar in the last days of a Congress is usually a thick voluminous document, and it would be a matter of impossibility to dispose of all the bills which still remain on the calendar. It is customary, therefore, for the House to assign to the several important committees one or two days each for the consideration of the business which the committees deem most pressing. Only a few of the many bills can be selected to be pushed to a final passage. The claimant must still be on the alert to secure for his bill a place among those which shall be given this great favor. If his bill passes, it goes back to the Senate, with the amendments made by the House. A new complication arises if the Senate does not at once accede to these amendments, and a conference is then asked between the two Houses. The short session is near its close. Night sessions may be necessary—and they usually are—for the purpose of getting the big appropriation bills through. But, nevertheless, desperation spurs the claimant on. He urges the conferees to get together and settle their differences. Sometimes this is done quickly, and, even though a conference report is privileged and may be called up at any time for consideration, other conference reports are pressing, and above all loom the appropriation bills and their innumerable conference reports. The private bill must wait its chance. The representative in charge of the bill in the House solicits the speaker for recognition, and the name goes on the list at the foot of fifteen or twenty others, who in turn give way whenever the Sundry Civil, the Indian, or the Legislative and Executive appropriation conference reports come in. All these reports provoke discussion. Congress is drawing near its close, and yet the conference report on the private bill has not

been called up. At last an opening is secured. The report is called up, adopted, and the member in charge rushes to the clerk's office to secure its speedy transmittal to the Senate. Perhaps the President and his Cabinet have already arrived at the Capitol, and are in the Red Room on the Senate side when the conference report comes to the Senate. It is there adopted, but the claimant must not relax his exertions. The act must then be enrolled, and the president of the Senate and the speaker of the House must affix their signatures to the parchment. This means that the secretary of the Senate must 'message' the bill to the House. It is hurriedly signed and 'messed' back to the Senate. Already the clock that is supposed to mark the hour of twelve, mid-day, when the session of Congress ceases, has been turned back two or three times, in order to get the bill before the President. The senator who has had charge of the bill goes with the chairman of the committee on enrolled bills, who carries all the bills passed by the Senate to the President. No time has been given to compare the bill as enrolled with the copy of the bill as it came out of the conference committee. It may be full of errors, for, in the rush of copying, grave mistakes are often made which vitiate the full force and effect of the bill; but that is a chance which the private claimant must take. When the act is laid before the President, a few hurried words, needed to explain the purport of the bill, are spoken. If they are not satisfactory, a 'pocket veto' follows, which means that the President has declined to approve the law, and it therefore dies with the Congress. This frequently happens. But if the President is satisfied, he affixes his signature, his executive private secretary records the number of the bill in his book, and then rushes out of the doorway to appear calmly in front of the president of the Senate and announce that the President has approved Senate bill No. 4,896. The private bill has become a law, and the claimant is at rest.

In *Krecker v. Shirey*, decided in the Supreme Court of Pennsylvania, it was held that the laws of an ecclesiastical body will be recognized and enforced by the civil courts if not in conflict with the Constitution or the laws of the State.

## PROPERTY—ITS RIGHTS AND DUTIES IN OUR LEGAL AND SOCIAL SYSTEMS.

Address delivered before the New York State Bar Association, at Albany, January 15, 1895, by Hon. JOHN F. DILLON.

### CONSTITUTIONAL GUARANTIES.

FROM the first settlement of this country the right of private property, in both lands and chattels, has been recognized. It was expressly recognized in the charters of the colonies. The charters and Constitutions of the original States contained in general or specific terms provisions for the security of property, as well as of life and liberty. As new States were formed and admitted into the Union, the Constitution of each contained similar guaranties. Contracts between individuals are property, and their inviolability has been also secured by the organic law.

Accordingly, the Constitution of each State of the American Union contains in terms or substance these provisions: "No person shall be deprived of life, liberty or *property* without due process of law." "Private property shall not be taken for public use without just compensation;" which means, as we all know, that private property shall not be compulsorily taken at all for private purposes, and that when taken for public use the compensation must be actual or in money. In the organic law of almost every State is the provision, borrowed from the Federal Constitution, that the Legislature shall not impair the obligation of contracts. These are limitations upon the States.

In the Federal Constitution similar limitations exist upon the powers of the general government. For, by the Fifth Amendment, it is ordained that "No person shall be deprived of life, liberty or *property* without due process of law; nor shall private property be taken for public use without just compensation." And in the original Constitution it was ordained "That no State shall pass any law impairing the obligation of contracts."

As a result of the experience of eighty years of national life came the great provision, born of the travail of our civil conflict, known as the Fourteenth Amendment. This placed the fundamental rights of life, liberty and property in the several States of the Union under the ultimate protection of the national government, for it ordained: "Section 1. Nor shall any State deprive any person of life, liberty or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Even in this assemblage of learned and distinguished lawyers, judges and legislators, this reference to the more important constitutional guaranties of private property and private contracts, will stand excused, for they constitute the basis of any consideration of the legal rights and legal duties of the owners of property, and they have also an important bearing upon the other aspect of the subject to which I shall refer, namely, the place of property in our social, as well as our legal system.

## THE ESSENTIAL FOUNDATIONS OF OUR SOCIAL FABRIC.

It was on these foundations that our government was laid. It was believed that these principles were those best adapted to insure civil security and social and individual welfare. These foundation-principles assert and imply the right of every man to enjoy personal liberty, to work out in his own way, without State domination, his individual destiny, and to enjoy, without molestation or impairment, the fruits of his own labor. Until lately the conviction among all our people has been general and unquestioned, that these great primordial rights, including the right of private property, whether gained by one's own toil or acquired by inheritance or will, were protected and made firm and secure by our republican system of government. Such is the established social order. But in our own day, the utility as well as the rightfulness of these fundamental principles are drawn in question by combined attacks upon them and upon the social fabric that has been builded upon them. This assault upon society as now organized is made by bodies of men who call themselves, and are variously called, communists, socialists, anarchists, or by like designations.

Presumably movements of the magnitude which these organizations have attained, have some reason for their existence. They cannot be put down by denunciatory epithets, and are entitled to serious consideration as being at all events an organized protest of large numbers of men against the existing social order. This is a wide subject. I shall make no attempt to discuss it in all its breadth. My studies have not been such that I would feel competent to do so. One common principle, however, underlies and pervades all of these various movements, and that is that the institution of private property is wrong and ought to be abolished or essentially curtailed. I confine myself to this aspect of the subject.

While I do not deny that there is much in our social, industrial, and economic conditions that ought, if possible, to be improved, yet I maintain that the existing social order is sound at the core, and that the remedies proposed which involve, among other consequences, denial of the right of private property, or of its full enjoyment are radically pernicious, or Utopian. While I shall insist that private property is rightful, beneficial and necessary to the general welfare, and that all attempts to pillage or destroy it under whatever guise or pretext are as baneful as they are illegal, I shall insist with equal earnestness upon the proposition that such property is under many and important duties toward the State and society, which the owners too generally fail fully to appreciate.

### SOCIALISTIC ATTACKS ON PRIVATE PROPERTY.

At the outset let us see whether the statement that these associations question the right of private property and seek its abolition or essential impairment is justified, and at the same time let us also observe what they propose to do with it or substitute

for it. "Communism," says the author of the article on that subject in the last edition of the Encyclopedia Britannica, "is the name that has been given to the schemes of social innovation which have for their starting point the attempted overthrow of the institution of private property."

"Socialism" is of various types, but in its original and pure form as it exists on the continent of Europe and generally elsewhere, the abolition of private property in lands and of the means of production is one of the declared ends in view, and the substitution of an economic system in which production is to be carried on in common under State control or supervision, for the common benefit, on some supposed equitable principle of distribution. This was the scheme of St. Simon, the earliest advocate of pure socialism.

Louis Blanc thus expounds his social theory: "The want and misery of man," he says, "must be corrected by a new organization of labor, which, abandoning individualism, *private property*, and private competition, the fundamentals of existing society, shall adopt fraternity as its controlling principle."<sup>1</sup>

Proudhon, the great anarch of French socialism, declared in 1840 his hostility to property and property owners in language whose intense ferocity has made it world-famous. "What is property?" he asked; and he answered, "Property is theft" (*La propriété, c'est vol*), and "property owners are thieves."

The moderate branch of Belgian socialists advocate the national ownership of land, and as a means of effecting the change favor four measures, which are so suggestive and bear so strongly upon some views which I shall presently present that I quote them in this connection:

- "1. Abolition of collateral inheritances.
- "2. Proclamation of the liberty of bequest.
- "3. A tax of twenty-five per centum upon all inheritances.
- "4. Enlightenment of the masses so that they shall soon demand the collectivity of the soil, or, as the English say, the nationalization of land."<sup>2</sup>

Such also are the demands of the "Belgian Labor Party" formed in 1885. That party "looks to the triumph of the political and social system known as Collectivistic Socialism. The fundamental principle of this system is common or collective ownership of all of the means of production, especially of capital and land. These to be attained through a series of partial and preparatory reforms: such as compulsory primary instruction; the attribution of corporate rights to workmen's unions; accident, sickness and old age insurance; State ownership of the coal mines; the labor contract; limitation of the hours of labor; *suppression of collateral inheritance, and a heavier tax upon direct inheritance.*"<sup>3</sup>

Karl Mark, the founder of German social democracy and a man of great intellectual ability, declared that "the foundation of the capitalistic method of production is to be found in that theft which deprived the masses of their rights in the soil, in the earth, the common heritage of all."<sup>4</sup> And so holds Lassalle. The more moderate Rodbertus limits the rightfulness of private property "to income alone."<sup>5</sup>

The "socialistic working-man's party," representing 25,000 members, declared themselves in 1875 in the Gotha Congress, among other things, in favor of "the transformation of the instruments of labor into the common property of society," and "demanded the establishment of socialistic productive associations with State help under democratic control of the laboring people." Encyclopedia Britannica, article "Socialism."

Mr. Kirkup, the intelligent author of the article on socialism in the Encyclopedia Britannica and of a work entitled, "An Inquiry into Socialism," 1887, and who represents what may be called the moderate type of English socialism, while insisting that there is nothing in the fundamental principles of socialism in conflict with what is good in existing social institutions, yet admits that socialism contemplates "a new form of social organization based on a fundamental change in the economic order of society." In his view, socialism is "in economics the principle of co-operation or association," and looks to replacing the present economic order "by an economic system in which industry will be conducted with a collective capital and by associated labor and with a view to an equitable system of distribution."<sup>6</sup>

Even in this modified and moderate form, socialism involves a substantial overthrow of the existing social system and, it would seem, the abolition of private property in land and in the means of production.

So far as these various forms of social organizations represent dissatisfaction with the existing economic conditions and seek by peaceful means to improve those conditions, they are open to no criticism. They have been the means of effecting much good in securing the recognition of the unrestricted right of labor combination; shortening the hours of labor; the prohibition of Sunday labor, and of the employment of young children; securing the sanitary inspection of factories and workshops, and in many other ways promoting the welfare and interests of laborers and employees. But so far as these movements challenge the rightfulness of the fundamental basis of the existing political and social system, and advocate the reconstruction of society on the basis of the destruction or impairment of individual liberty and of private property and the substitution of State ownership of land and of the means of economic production, they are founded on illusory or false and pernicious principles, and merit general condemnation. Much, doubtless, there is

<sup>1</sup> Ely, French and German Socialism, p. 117.

<sup>2</sup> Ely, French and German Socialism, p. 151.

<sup>3</sup> Prof. M. Vauthier, of the University of Brussels, in an article on the new Belgian Constitution, in Pol. Science Quar., Vol. IX, p. 718, December, 1894.

<sup>4</sup> Ely, French and German Socialism, pp. 181, 202.

<sup>5</sup> Ely, p. 168.

<sup>6</sup> Pol. Science Quar., Vol. 3, p. 363.

in existing social, economic and industrial conditions which demands the most thoughtful consideration with a view to improve the condition of the poor or laboring class. But history and experience confirm the conclusions of reason, that the present social order, founded upon the doctrine of individual liberty, on the right freely to engage in any lawful business for profit, and on the institution of private property, is destined to stand, and that all useful reforms and improvements in our social and economic conditions can be better accomplished by grafting them "on the old plant of private property, than by rooting it up altogether and planting the seedling of communism or socialism in its stead."

#### RIGHTFULNESS AND UTILITY OF PRIVATE OWNERSHIP OF LAND AND OTHER PROPERTY.

It is thus seen that the main point of socialistic attack is upon the rightfulness of private ownership of land. The main ground of attack is the specious proposition that land is in its nature common wealth, and ought to remain common to all the people, and that private ownership of property of any kind, if admissible at all, should be limited to property which is the direct and exclusive product of the individual labor that creates or produces it, and such ownership cannot rightfully extend to any value which it derives from the general growth of the community. This precise form of attack in terms limited to land, but in principle not capable of limitation to this species of property, takes for its euphemistic motto a demand for the nationalization of land, and for its ground and reason the assumption that land has been converted into private ownership by force or fraud or other indefensible means. This assumption, especially in our own country, is without the slightest foundation in fact. Our whole history, colonial, State, and national, is convincing proof of the rightfulness as well as of utility of private ownership of land.

After the discovery of America this vast continent was in a state of nature, sparsely occupied by barbarous tribes. Colonies were founded with the greatest difficulty, and involved a warfare with nature and savages. Land and its ownership was the great and only efficient inducement to colonization and settlement. At that time nobody dreamed that the ownership of land thus acquired was open to the slightest impeachment on ethical, political, or any other grounds. The hardships and difficulties of the New England, and, indeed, all of the Atlantic colonists and settlers need not be recounted. They are matters of familiar history.

In considering this subject, let it be remembered that land in a state of nature is of little value. It must be reclaimed. Forests must be felled, wild beasts extirpated, savage tribes kept at bay, mines opened, fields plowed, fenced and cultivated, habitations erected; and to bring wild land into a productive state, and to make it of value, involved years of self-denial, privation and toil by the proprietor and his family. The establishment of our

independence gave us vast tracts of unoccupied territory beyond the Alleghanies. The history of the conquest and settlement of this remote and almost unexplored wilderness, involving wars with Indians and struggles with nature, need not be here related. If one wishes to refresh his memory on this subject, let him read the graphic story of the settlement of Kentucky, Ohio and the country beyond, in Mr. Theodore Roosevelt's late work, "The Winning of the West." The pioneer went out with his rifle on his shoulder, and "before the land could be settled it had to be won." So in the region beyond the Mississippi, the Missouri and the Rocky Mountains, acquired from France. For forty years of my life I lived on the Mississippi, in a country just acquired from savages, where I have seen the process of settlement constantly going on. A wagon covered with white canvas, containing the pioneer's family and nearly all his earthly possessions, penetrated into a new and, in the main, timberless region. A cabin of logs, a sod house, or a "dug-out" on the side of a hill forms the first habitation, and years of labor were necessary to transform it into a comfortable home and make the land productive and valuable. Witnessing the hardships and toils of these pioneers and early settlers, I have been constrained a hundred times to say, although land was given by the government or sold for the small sum of \$1.25 per acre, that in creating and establishing homes thereon under such circumstances, they earned it many fold.

#### PUBLIC POLICY OF THE UNITED STATES RESPECTING THE DISPOSITION OF THE PUBLIC DOMAIN—"THE MAGIC OF PROPERTY."

Let it also be remembered that such ownership of the land has been acquired under an uniform, settled and unchallenged policy of the government originated and approved by the people themselves. The wise policy was early adopted by the general government of selling the public lands at almost nominal prices, and afterward the still wiser policy of giving them away under the Homestead Act, in order that they might be occupied and cultivated in limited parcels by a large body of *owners*, and not by tenants. I deny that this was either an unjust or a mistaken policy. I maintain, on the contrary, that it was a policy founded on the profoundest wisdom—the wisdom of having the landed domain broken up into small holdings, and finding its way into the hands of owners, who have thus the highest motive to develop and improve it, and a conscious and permanent interest in the government from which it was acquired, and by which it is protected. It is the real counterpoise of universal suffrage. It is to-day our great bulwark against the revolutionary schemes of socialism. This policy of late years has been questioned by socialistic doctrinaires, and not long since I observed in one of their publications a lament that the United States had not retained the ownership of all the vast regions which now constitute forty prosperous States of the Union, occupied by multiplied thousands of individual owners, and leased the land instead of

<sup>1</sup> Encycl. Brit. (9th ed.), art. "Communism."



selling it. But I deny that it is better to have a land of tenants, though the landlord be the government, than a land of owners.

Let me illustrate the wisdom of our policy of facilitating and encouraging the private ownership of land by two or three extracts from the celebrated travels of Arthur Young in France just before the French Revolution, which bring out very strikingly what he so aptly describes as "the magic of property." Under date of July 29, 1787, he writes:

"Leaving the rocky country of Sauve, these active husbandmen who turn their rocks into scenes of fertility because, I suppose, their own, would do the same by the wastes if animated by the same omnipotent principle" of ownership.

July 30. "The very rocks of this region are clothed with verdure. It would be a disgrace to common sense to ask the cause: the enjoyment of property *must* have done it. Give a man the secure possession of a bleak rock, and he will turn it into a garden; give him a nine years' lease of a garden, and he will convert it into a desert."

Again, November 7, 1787. "Walk to Rosendale [in Flanders]. Between the town and that place are a great number of neat little houses on the Dunes, built each with its garden, and one or two fields inclosed of most wretched *dune* sand, naturally as white as snow, but improved by industry. The magic of property turns sand to gold."

And why, let me ask, did the American colonist, pioneer and settler undergo these hardships and make these sacrifices? What was the mainspring of his action? What his controlling motive and real purpose? The answer is obvious. It was to gratify a want that is instinctive in the nature of man and which is rightful in all its depth and scope, as well as beneficent in its operation and results. That want is a spot of earth that a man can call his own—and which by the magic of his affections he can transform into a place dearer to him than all others—a home—a home for himself and his family, where he and they may live in security, and which dying he may transmit to those who are bound to him by the sacred ties of blood and affection. He has thus a title to the land, whether in town or country, which rests upon an indisputable foundation of justice, as well as of sound public policy. The opportunity thus to acquire it was equally open to all; it was acquired by the consent of all; its acquisition wronged no one and was beneficial to all, and I insist that such an owner has the highest of all titles, namely, that its real and substantial value came from the sweat of his own brow, and is the product of his own labor.

And now we are met by the teachers and advocates of socialistic theories who say that all this is wrong, that such ownership is theft; that land belongs of inalienable right to all the people and that it or its full enjoyment ought to be shared by all; and so, on the same principle, as to all other property of whatsoever nature, at least all property which has a productive value—that is, property which yields a return without manual labor bestowed upon it.

Such theories are in conflict with the existing scheme of organized society, and if carried into execution destructive of it. It is not my purpose, nor have I the time, to enter into any extended argument to justify the principle or the institution of private property. Briefly it may be said that it is supported on three grounds—historically, as belonging to every civilization that has advanced beyond the early period of common ownership; ethically, as being mediately or immediately the acquiescence of labor; and, thirdly, on the ground of utility or the common good. Private property, rightfully acquired, accompanied and limited with just conceptions of its duties, has its justification and support in the nature of man, and the good of society. Man longs for individual ownership. Property therefore connects itself inseparably with the personality of its owner. His dominion over it arises from his personal rights in and concerning it. Properly and legally regarded, the rights of the owner are personal rights, and not that incomprehensible abstraction called the right of things. Ihering puts this in a striking way: "In making the object my own, I stamped it with the mark of my own person; whoever attacks it attacks me; the blow which strikes it strikes me, for I am present in it. *Property is but the periphery of my person extended to things.*"<sup>8</sup>

Labor is the main element of the right. Occupation is necessary in order to bestow labor upon it, and the right of ownership and dominion springs from it, and is justified by labor, and possession is the essential prerequisite and condition of labor. "Only through a lasting connection with labor," says Ihering, "can property maintain itself fresh and healthy. Only at this source is it seen clearly and transparently to the very bottom to be what it is to man." "Communism thrives only in those quagmires in which the true idea of property is lost. At the source of the stream it is not found."<sup>9</sup>

The institution of private property, moreover, is justified by its utility. It arouses man from his natural inertia and love of ease; it induces self-denial, and is the only motive that is certain to enlist his ambition and activity, and to call forth the highest exercise of his powers. Viewed from a mere social or economic standpoint, the man who subdues the wilderness, and by his labor converts a waste into a productive land, makes the field bloom and blossom into the harvest, does not injure, but benefits, his fellow-men. The benefits to the individual from the ownership thus acquired, and the labor thus bestowed, overflow the boundaries of private proprietorship and inure to the advantage of the whole community. Such a proprietor is a benefactor, and not a robber. The community owes him as much as he owes the community.

<sup>8</sup> The Struggle for Law (Am. ed.), 55; Pol. Sci. Quar., vol. 1, p. 604.

<sup>9</sup> Ihering Struggle for Law (Am. ed.), pp. 49, 50; Pol. Sci. Quar., vol. 1, p. 605.

#### ATTACKS UPON PRIVATE PROPERTY THROUGH THE EXERCISE OF THE POWER OF TAXATION.

Socialistic organizations in all their forms, being hostile to private property or its full enjoyment, their attacks upon it assume various shapes. I have no time to notice these at length. The most insidious, specious and, therefore, dangerous, are those that are threatened, attempted or made in the professed exercise of the State's power of taxation. Forasmuch as the power to tax is supposed to involve the power to destroy, it is boldly avowed by many socialistic reformers, and it is implied in the schemes of others, that the power of taxation is an available and rightful means to be used for the expressed purpose of correcting the unequal distribution of wealth, and that this may be done without a violation of the essential or constitutional rights of property. Such taxes, may be, amongst others, in the shape of a progressive income or progressive property tax, or both; or a tax on the transfer or devolution of property, limited in amount only by the legislative will, that is to say, not limited at all, so that if the heir or successor gets any thing, it is by legislative grace, and not of right.

Taxation in any of these forms, reasonable and proportional in its character, imposed as a *bona fide* means of raising revenues to help defray the public charges, may doubtless be levied, and under these limitations, presents merely questions of political expediency. But when taxes, so-called, are imposed, not as mere revenue measures, but for the real purpose of reaching the accumulated fruits of industry, and are not equal and reasonable, but designed as a forced contribution from the rich for the benefit of the poor, and as a means of distributing the rich man's property among the rest of the community—this is class legislation of the most pronounced and vicious type; is, in a word, confiscation and not taxation. Such schemes of pillage are indefensible on any sound principle of political policy, violative of the constitutional rights of the property owner, subversive of the existing social polity, and essentially revolutionary. Let us consider this for a moment.

The State is a commonweal. It exists for the general good, for rich and poor alike. It knows or ought to know no classes. Universal suffrage is grounded upon this idea. All vote because all have an interest in the State, and especially because the personal rights of individuals as distinguished from their property rights, are matters of universal concern. The blessings and benefits of the State are intended to diffuse themselves over all. Political duties should ever go hand in hand with political rights, and it is a serious and even dangerous mistake to permit them to become separated. The duty to support the State rests upon all; and, therefore, the exemption of any class from this duty while he enjoys the privileges of citizenship, and especially the elective franchise, may produce, at all events tends to produce, grave consequences. The one thing to be feared in our democratic republic, and therefore to be guarded against with sleepless vigi-

lance, is class power and class legislation. Discriminating legislation for the benefit of the rich against the poor, or in favor of the poor against the rich, is equally wrong and dangerous. Class legislation of all and every kind is anti-republican and must be repressed. If universal suffrage shall be guilty of such short-sighted folly as to seek in the guise of tax laws to deprive the owner of his property with a view to distribute it among the community, or shall frame our tax laws, whether imposing direct or indirect taxation, in such manner as to exempt any class from bearing a proportional and just share of the public burdens, and distribute and impose those burdens, either wholly or disproportionately, upon the rich, the results of such injustice will react upon the whole community. Such a course would excite class antagonism, and would also tend to arrest the accumulation of property or cause its flight to other States and countries; it would in these and other ways injuriously affect the general welfare, and the real interests of the laboring and non-taxpaying class of the community.

#### THE STATE'S TRUE FUNCTION — PATERNALISM — ILLEGAL COMBINATIONS, POOLS AND TRUSTS.

The essential end of government is the common good of all the people who compose it. The State exists, not for the special benefit of any one or more classes less than the whole, but for the commonweal of all. Its benefits must not be denied to any class or to any person of any class; all who compose the State, the rich and the poor, the plutocrat and the proletariat, all who share in the associated life, are each and equally entitled to the protection, support and care of the State, whose blessings, like the air, the dew, the rain and the sunlight, should fall upon all without discrimination or preference. The State is founded primarily upon the necessity of the individual that his just rights shall be protected from invasion by others, but the complex organization of social or associated life which we call the State, exists for the higher end of the common benefit by enabling each member to enjoy, not only life and liberty, but to pursue happiness, that is, by aid of the State, whatever its form, to develop and perfect his individual and social life and well being. The scope or limit of the legitimate function of the State in the attainment of the ends or aims of its existence, cannot be conclusively defined or unalterably marked out in advance. All of the many attempts of this character have failed, and from the nature of the case will ever fail. One class of thinkers, extreme individualists, hold that nothing is more pernicious than over activity on the part of the State, which is paternalism, or tending toward it; and hence they maintain that the State's function should be narrowly confined, being principally limited to protection and security of the acknowledged legal rights of individuals; any extension beyond this being regarded as an unwarranted encroachment upon individual liberty. Others, such as extreme nationalists, favor the largest extension of the State's functions, holding that the State should assume the ownership and control of trans-

portation, of capital, and all of the means of productive industry, becoming the general or universal father or guardian of the people in their social or economic relations. Between these extremes are many shades or degrees of opinion as to the true limits of the State's function. I cannot but regard all such *a priori* speculations as of doubtful utility. If the true end, purpose and justification of the existence of the State is the highest development and happiness of the individual and the common good of all, it must be left to experience to determine, from time to time, on the special exigencies and circumstances of the situation, the character and extent of the State's regulation or positive intervention to promote the common and permanent good of society.

#### REMEDY FOR HARMFUL TRUSTS AND COMBINATIONS.

These principles are applicable and should be applied in dealing with the modern form of combinations known by the name of "trusts."

Industrial problems are constantly assuming new shapes. Transportation and production are largely carried on by corporate aggregations of capital. This cheapens cost and prices and to this extent enures to the public advantage. Competition, sometimes destructive (being often the death as well as the life of trade), is met by combinations which assume the forms of pools or trusts so-called. These combinations are professedly intended to maintain and steady reasonable prices and to prevent the evils of ruinous competition. When limited to this end, such combinations are not necessarily injurious, and may be beneficial. But they are capable of being used to destroy, not merely to regulate, competition, and to increase, for a time at least, prices beyond those necessary to yield a fair return. In these and other ways the injuries to the public may far outweigh the advantages, in which case the question is, What is the remedy? The socialistic theorist says, let the State intervene and assume the ownership of our transportation systems and of the leading productive industries. This is obviously the substitution of social industrialism for the existing order, and implies the surrender to the State of individual's liberty of action.

But no such drastic or heroic remedy—a remedy immeasurably worse than the disease—is at all needful to secure the public welfare. The dominion of the State over the actions of its corporations is supreme within the limits of their constitutional rights, which are mainly rights of property. The State may, with strong hand, suppress every form of combination, whether corporate or individual, which proves to be hurtful to the general good. The State can bridle its corporate agencies, and keep them at all times under effective and salutary control; it can forbid all persons, whether corporate or natural, from courses of action harmful to the public welfare; and thus it is seen that the visionary scheme of social industrialism looking to the State's assumption of private property and of the means of production, and the consequent creation

of a socialistic Grand Mogul and the resulting encroachment on the rights and liberties of the citizen, lacks the support of any legal or actual necessity. The State's plain duty is to see that the just interests of the public are protected and secured so far as the law can do this consistently with the rights of others. The real test of the usefulness or hurtfulness of combinations like pools and trusts is experience. It may be the best policy to regulate them, or it may be the best policy to destroy them. The principle on which the State may intervene is plain. If, and in so far as, such combinations shall be found tending to create monopolies, to destroy legitimate and useful competition, thus interfering with the free industry of the people; to yield undue profits at the expense of the consumer, thereby facilitating the creation of enormous private fortunes and the production of inequality of wealth—if such shall be seen or found to be their effect, the State has the power to correct the evil, and it would be its duty to call that power into vigorous activity.

#### NEEDED REVISION OF OUR LAWS RELATING TO INHERITANCE AND POWER OF TESTAMENTARY DISPOSITION—AMERICAN AND FRENCH SYSTEMS COMPARED.

I come now to consider a phase of the subject of property in its relations to the State and to our social system, which I regard as of the first importance. It is one which has heretofore received among us, I am persuaded, far less attention than it deserves. I regret that the time at my disposal will not enable me to present it with the requisite fullness. I refer to the laws of this country relating to the descent and distribution of property on the death of the owner, and to those relating to the owner's power of disposition during his life and by last will and testament. They are essentially founded, with some modifications, on the feudal and aristocratic notions on these subjects which we derived from England. I regret that the subject which I proceed to consider failed to receive attention in the recent Constitutional Convention in this State.

From the standpoint of political economy and of provident political polity, the existence of enormous private fortunes is of evil tendency, in that it is injurious in its effect upon the owners, inducing idleness and luxury in them and their children, and injurious in its consequences to the community in accumulating in a few hands so large a portion of the property and wealth, which ought to be more generally distributed—thus tending to divide society into classes and to separate by an impassable chasm the rich and the poor. Moreover, the power of the owner of a colossal fortune is so great as to be capable, in bad hands, of much abuse. A wise and provident policy, therefore, dictates that the statesmen and legislators of the present should, by constitutional and legislative provisions, so far as may be consistent with individual liberty and the best rights of property, so shape our policy as to secure, by its continuous and silent operation, as wide a distribution of property as is practicable, thereby

preventing the concentration of vast fortunes in a few hands, especially the division and crystallization of society into classes of which property or wealth is the dividing line, and above all into caste-classes, in which the condition of the poor is permanent, and without prospect of improvement. Such a condition is, of all others, the most efficient cause of socialistic movements. Heretofore in this country land has been so abundant and population so sparse as to obscure the importance of this subject. But our available public land is now almost exhausted, population is already pressing upon the means of subsistence, suffrage is universal, the non-property-owner is becoming relatively a much larger part of the community. These are considerations which make the subject of our laws relating to property, and especially real property, as respects its descent, and the power of the owner to fetter it by trusts or dispose of it by deed or will, as he sees fit, one of practical moment. It is very clear that existing laws do not prevent the concentration of wealth. Mainly upon the data supplied by the last census, Mr. George K. Holmes concludes that 4,047 millionaires in the United States own "about one-fifth of the nation's wealth," and "possess about seven-tenths as much as do 11,593,887 families." After giving the details he thus sums up the result: "Twenty per cent of the wealth of the United States is owned by three-hundredths of one per cent of the families; fifty-one per cent by nine per cent of the families (not including millionaires); seventy-one per cent by nine per cent of the families (including millionaires), and twenty-nine per cent by ninety-one per cent of the families."<sup>10</sup>

The right of the owner of property to transmit the same on his death by descent or will, as well as the corresponding right of the heir or devisee to take the same, pursuant to the provisions of the statute regulating the subject of inheritance and of testamentary disposition, has been universally recognized in our laws. By these laws, if the owner dies intestate, his property goes, subject, in general, to dower, curtesy, the homestead right and a few similar provisions, in equal proportions, to his nearest relatives. But by these laws also the owner is given the absolute power to dispose of his property by will as he pleases. The scope of the power is such that the parent may, at his pleasure, with or without cause, disinherit his children entirely, or give his property to them in unequal shares. He may tie it up by deed or will in private trusts to be used and enjoyed as he may direct, for long periods of time after his death, the only restriction being that he shall not infringe the law of perpetuities: and for charitable uses without limitation as to time. This almost unlimited power of the owner of property to control its disposition as his whim or pride or passion may dictate, to the extent of disinheriting his children without cause, and this right of the nearest relative however remote to take the whole estate however great, to the exclu-

sion of the State, are very marked characteristics in our laws concerning the descent and devolution of property; and they have not escaped searching criticism as being unjust to the children of the owner and contrary to public policy, since they tend to the concentration of wealth in the heir, and particularly in the favored devisee or legatee.

And it is precisely at this point that property, or the right to transmit or receive it on the owner's death, is made the subject of socialistic attack. It is argued that there is no such thing as a natural right of inheritance, or natural right to dispose of property by will, since each of these rights rests, it is said, alone upon statute or positive law. It must be admitted that many writers and some courts have so declared. For example, in sustaining the constitutional validity of a Collateral Inheritance Tax Act, the judge who delivered the opinion of the Court of Appeals of Virginia broadly declared: "The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The Legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may, to-morrow, if it please, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses. Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it, can be successfully questioned."<sup>11</sup>

So, in a case in Massachusetts, Chief Justice Gray, said: "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly on statute, and may be conferred, taken away, or limited and regulated in whole or in part by the Legislature," and the court held that it was competent for a homestead statute making provision for the widow to limit to that extent the owner's power of testamentary disposition.<sup>12</sup>

It is obvious, if the language of the writers and judges referred to be taken without restriction, that as against the legislative power of the State the right of the owner of property, though held in fee or absolute ownership, would be little if any thing more than an estate or right for life, since the State by denying the right of the owner to transmit, could appropriate the property to its own use, thereby constituting itself the universal successor, and could make this policy effectual by prohibiting gifts, deeds or donations which contravened it. I may be permitted to doubt, however, if the question shall ever arise for solemn judgment under our

<sup>10</sup> Pol. Sci. Quar., vol. 8, p. 593, Dec. 1893.

<sup>11</sup> Eyre v. Jacob, 14 Grat. (Va.) Rep. 1858.

<sup>12</sup> Brettum v. Fox, 100 Mass. 234.

American Constitutions, whether the Legislature, while doubtless having full power to regulate the right of succession, can deny it by enactments which are not intended as regulations of the right, or measures of reasonable and equal taxation to raise revenue for public uses, but which are confiscatory in their nature, and intended to appropriate the property to the public use. The doubt is much strengthened by the observation of the present chief justice of Massachusetts in the very recent case of *Minot v. Winthrop* (38 N. E. Rep. 513), sustaining the validity of the Collateral Inheritance Tax Act of that State. And yet I feel constrained to declare that our laws respecting the subject of the owner's power over his property extending to the dis-inheriting of his children without cause, and apportioning his property unequally among them, as well as his power to tie it up in private trusts and keep it out of commerce and circulation to the extent now allowed, are open to grave objections on the ground that they are, in their practical operation, frequently unjust to the heir, and tend to produce those inequalities of fortune which in a republican government should at all events never be encouraged or favored by legislation.

The tenor of this address makes it scarcely necessary to say that I am opposed to any confiscation or appropriation of property on the owner's death for the use of the State, but what I mean is that the laws should be so changed that in their constant and unbroken operation they should secure the equal rights of the children against the ancestor's present absolute power, should tend more effectually to keep the property in free circulation, and to prevent as far as practicable its concentration in single hands. We ought to distinguish between the parent's dominion over his property as respects his children and as respects strangers to his blood. Strangers have no natural claim to a provision out of the donor's or testator's property, and they take through the power of disposition which the law recognizes as an attribute of ownership. The child has all of the rights which spring from this source, and, in addition, those which spring from the parental relation.

The parent is under a natural obligation to provide for his children. He is responsible for their being. In my view, his moral obligation does not cease with their attaining their majority. On the contrary, it is an obligation of perpetual duration. No parent is ever able fully to discharge it. Those writers who maintain that there is no such thing as a natural right in the child to inherit the parent's property, and no such thing as a natural duty on the part of the parent to provide for the child out of his property, take a position in conflict with the universal sentiments and convictions of mankind.

#### THE FRENCH LAW OF FORCED HEIRSHIPS AND PROHIBITION OF TRUST ESTATES—ITS POLICY AND PRACTICAL OPERATION.

For a government founded upon republican institutions and which aims at their perpetuation, the

French law is in its fundamental provisions, policy and practical operation, superior to ours. The estates are simpler, more effectual provisions are made to prevent property being kept out of commerce, and also to prevent its accumulation in the hands of single owners. This policy dates from and was the direct fruit of the Revolution of 1789, and assumed its complete shape by the law of November 14, 1793, which prohibited the disposition of property by deed or will whereby one person is to hold it for the benefit of some other person; in short, speaking generally, it prohibits all of the trust estates of the English chancery system. The policy of preventing the suspension of the power of alienation—that is, of securing the right freely to dispose of property and of preventing the concentration of property in single ownership—is effectuated by provisions in the Code Napoleon which restrict the disposition of property by the owner by donation, or transfers either *inter vivos* or *mortis causa*. The principal of these restrictions are:

(a) The institution of forced heirship.

(b) The prohibition of substitutions, *fidei commissi*, or what we denominate trust estates.

Both of these provisions are important and work to the same end. The doctrine of forced heirship, in the French law, proceeds upon the principle that the relation between ascendants and descendants, and between a child without children and its parents, originates duties so sacred that the law steps in and compels their performance. This it does by making all descendants the forced heirs of a specified portion of the ancestor's property, and which right the ancestor cannot defeat by deed or will, or in any other manner. As to this reserved or legitimate portion, the *legitime*, as it is called, the descendants have the substantial rights of creditors, and can set aside all dispositions in fraud of their rights. Donations *inter vivos* and *mortis causa* may not exceed one-half of the testator's property, where he has but one child, a third where he has two children, and a fourth where he has three or more; and not exceeding a certain portion where the disposer having no children, leaves a father or mother. Under the name of children are included descendants of whatever degree *per stirpes* and not *per capita*. As to the disposable portion, the testator may, for any lawful purpose, do therewith as he pleases, provided the donees are capable of taking it. The principle, you will observe, effectually compels the equal division of the *legitime* or non-disposable estate on the death of the owner, an effect which it is not within his power to thwart.

The prohibition of substitutions, or trust estates, by the famous law of November 14, 1793, was founded in part upon the policy of preserving the simplicity of titles, and to keep the property in commerce, but largely upon the policy that such trusts were aristocratical in their nature and repugnant to the principles established by the revolution, in that they tended to maintain large holdings of land in great families, and to perpetuate in the eldest son or head of the family the *édats* of a great

name, and were prejudicial in these and many other ways to the public and general good.

All the great commentators on the French Code recognize that the law of November 14, 1792, which abolished substitutions and trust estates in France, was based on political reasons as well as on motives of sound political economy. Thus, Laurent says:<sup>12</sup> "Substitutions were the most solid foundation of the aristocracy, and the nobility was inseparable from the throne. \* \* \* Being closely allied to the aristocratic Constitution of the old regime, they had necessarily to fall with the old monarchy. The law of November 14, 1792, prohibited all substitutions; they were incompatible with the democratic regime established in 1789; the nobility being abolished, it was necessary to destroy the power which it drew from its immense possessions; and for this reason the law of 1792 was given a retroactive effect. When Napoleon, unfaithful to the spirit of 1789, re-established the monarchy, he desired, also, in imitation of the old regime, to re-establish substitutions. Hence the *majorats* (landed estates descending with a title) created by the Senate decree of August 14, 1800. The new edition of the Civil Code, published under the empire, sanctioned this return to the past. Vain effort! The tide of events cannot be turned backward. In Belgium the *majorats* fell with the empire. In France the restoration also tried to bring back the old regime, with its nobility and its substitutions. The law of May 17, 1826, was as powerless for this purpose as the Imperial Act of 1806. The future belongs to the democracy. Whether one rejoices or deplors this fact, it is a providential fact, against which all the efforts of the men of the past have been broken in shipwreck. All these reactionary laws have been repealed, and the democratic wave rolls on increasing. Room must be made for it in society or it will overflow and destroy every thing."

Marcade says:<sup>14</sup> "There is not much legislation which has undergone so many changes as that relative to *fidei commissa* substitutions, and the cause of it is that there is no other subject than this more closely allied to governmental forms, and holding a more intrinsic relation to political systems."

Demolombe says:<sup>15</sup> "Among all the subjects of private law, substitutions are most closely attached to public law, and therefore they must inevitably receive the shock of the revolutions which take place in the form of the government and the political system of the country. Hence the history of substitutions in the last half century is nothing more than the history itself of our changes of Constitutions."

These laws having been in operation in France for 100 years, their effect is a matter not of speculation but of demonstration. It is thus stated by Brédrick: "Of some 7,500,000 proprietors, about 5,000,000 are estimated to average six acres each, while only 50,000 average 600 acres. This *morcelle-*

*ment* is the direct and foreseen consequence of the partible succession enforced by the Code Napoleon. With some rare exceptions all of the great properties have been gradually broken up. \* \* \* It is a significant fact that neither under the first empire, nor under the restored dynasty of the Bourbons, nor under the Orléanist monarchy, nor under the new Republic has any serious attempt been made to repeat this law bequeathed to France by the authors of the Revolution. It is a guaranty for the respect of property: it conduces to industry and thrift."<sup>16</sup>

The world knows that the wealth and prosperity of France to-day are simply amazing.

Aware that the French law on the subject of property had been adopted in Louisiana and had been in effect there for nearly a century, I inquired of a distinguished lawyer of New Orleans, Mr. Charles Howard Farrar, concerning its practical operation in that State. He commends the law in unqualified terms. He says: "Under this system no great estates have grown up in Louisiana."

He adds these forcible observations: "Apply these rules to the great estates in New York and elsewhere, where the common law prevails—estates whose portentous dimensions increase with each generation and hang like a shadow over the welfare and prosperity of the republic—and see what would become of them in two or three generations. They would be dissipated so as to be unnoticeable. This then appears to me to be the remedy for the much complained of accumulation of wealth in a few hands. No people on earth suffered in this regard more than the French people. They found the remedy through a baptism of blood and a carnival of horrors. Will the American people be wise enough to profit by their experience, and wipe out by peaceful legislation the pernicious doctrines of omnipotent power in the testator and of uses and trusts, which persist, like some voracious saurian, from a feudal and aristocratic into a democratic era, devouring the many to exalt the one; or must the red flag of anarchy storm their strongholds before they learn the wisdom of history."

I now leave this important subject. I commend it to your study, examination and reflection. A lawyer who consents to address the bar of the great State of New York, which has left such a deep impress upon the laws and jurisprudence of this country, ought to feel that he has something to say. If this address has any value, it is to be found in the lessons which it is possible to draw from the considerations which I have so imperfectly presented. I do not say that we can or ought to adopt the French law *en bloc*. I only mean to say that, in my judgment, it is possible to introduce into our laws such amendments and changes as will tend, without interference with the just rights of property, to make those laws more simple, to insure more effectually the free circulation of property, to prevent the concentration of vast estates in the hands of single owners. Stupidity and selfishness may shut their eyes and fold their arms until red-handed

<sup>12</sup> Vol. 14, § 389.

<sup>14</sup> Vol. 8, § 456.

<sup>15</sup> Vol. 18, § 62.

<sup>16</sup> English Land and Landlords, chap. iii.

revolution rouses them like a fire alarm in the night from their indifference. True statesmanship looks at the future as well as the present, and makes its chief concern the shaping of peaceful policies so that progress may be assured and revolution may be avoided.

#### THE SOCIAL AS DISTINGUISHED FROM THE LEGAL DUTIES OF PROPERTY.

I have thus far spoken only of the legal rights and the corresponding legal duties of property, namely, duties in the lawyer's sense that their performance is or may be enforced by the power of the State. But an important aspect of my subject remains to be noticed. I refer to what, in lawyers' phrase, are termed the imperfect duties of property owners, meaning hereby that they are imperfect only in the sense that, lying beyond the boundaries of civil law, their performance is not enforced or enforceable by the tribunals of the State. These may, for convenience, be called the social as distinguished from the legal obligations of property owners.

In this domain the example and doctrines of the Heavenly Dreamer of the Gallilean Hills, the Divine Teacher, the Blessed Saviour, have unrestricted scope and are destined, as the world grows up to their fuller conception, to a wider and more beneficent sway. The good of His children, who comprise the whole family of man, was the sum total, the beginning and the end of the divine philosophy which was exemplified in His life and teachings. He went about doing good. The fine expression of Kant, that "Humanity is the true end of all our efforts," is essentially borrowed from Him of whom his great apostle said, "He was touched with the feelings of our infirmities." "We, then, that are strong ought to bear the infirmities of the weak." "Come unto me all ye that labor and are heavy laden and I will give you rest." The first beatitude, the opening words of the Sermon on the Mount, was the saying, at once bold and compassionate, "Blessed are the poor." And afterward came the promises of infinite preciousness: "Whoever shall give to drink unto one of these little ones a cup of cold water only in the name of a disciple, verily I say unto you, he shall in no wise lose his reward." "Inasmuch as ye have done this unto one of these, even the least, ye have done it unto me."

If I were required to sum up in one sentence the lesson which existing conditions ought to teach us, it would be the Christian lesson that we must increase and deepen and quicken the sense of the responsibility of society for the welfare of all its members.

The possessor of a large fortune, no matter how honestly acquired, and however firm and exclusive in legal theory is the right of ownership, and how ever fully he may discharge his legal duties, is yet a debtor to the community. His right and title to his property are of positive institution. The power of the State has protected and preserved it, and the existence of organized society has conferred upon it its chief value. In short, property has in an important sense a public as well as a private side.

The owner of a great fortune owes to society manifold obligations which are entirely beyond the range of legal cognizance. Such a fortune gives power, and power always involves correlative duties. Over some of these let me cast a rapid glance. I do not stop to mention that a rich man ought to avoid the vulgarity of an ostentatious display and parade of

wealth. Riches suddenly acquired are especially obnoxious, and every body tries to avoid the splatter and splash of "newly mounted pride." Bearing himself ever with modesty, it is pre-eminently a rich man's duty to identify himself with the communal life in the midst of which he lives and bring to bear for its good the power and influence which wealth always gives. If he is wise he will even cultivate popularity, not by cheap arts, but by considerate, active and daily beneficence. The pulsations of his life will be felt for good throughout the community. It is a duty of perpetual obligation on the part of the strong to take care of the weak, of the rich to take care of the poor; and the rich man who fails to interest himself actively in education, in public improvements, and public and private charities, falls not only below the ideal of good citizenship, but he fails to discharge toward society the obligations which spring from the mere possession of large wealth. In no other way can the envy, and even hostility, of the poor toward the rich be so successfully repressed; and therefore the recognition of these social duties not only satisfies a moral obligation, but it is a course founded on a policy of the profoundest wisdom. A public sentiment is rapidly forming which views as a reproach a very rich man who lives or living dies without connecting himself and his name and memory, by substantial benefactions, with works educational, philanthropic or charitable, for the benefit and welfare of his fellow-men. I say it with emphasis, that wealth has some important lessons yet to learn and put into practice. Our very rich men have learned how to gain wealth. They must now learn the more difficult lesson how to use it. Man lives not by bread alone.

If our statesmen and legislators shall adopt the line of policy which I have endeavored to set forth, and if the possessors of large properties shall co-operate with them in the mode I have indicated, we may turn our gaze toward the future of our beloved country, not with gloomy forebodings, but with serene cheerfulness and with the highest hopes. The institution of private property will remain, and there will be no revolutionary overthrow of the existing state or social fabric by any mode of socialistic or communistic attack. But if we are blind to history and to duty, if we idly drift and do nothing, then, with an overcrowded population pressing with augmenting force upon the means of subsistence, with the hopeless separation of the rich and the poor into distinct, hostile and incommunicable classes without common interests and common sympathies, and with the growth of a *proletariat* armed with the ballot in one hand and a gun in the other, the prediction of Lassalle, the great orator of German iconoclastic socialism, may come to pass — may within the next century come to pass, even in this goodly heritage of ours: "The goddess of revolution, after the lapse of a certain time, will force an entrance into our social structure, amid the convulsions of violence, with wild streaming locks and brazen sandals on her feet."

INSURANCE—PROOFS OF LOSS WAIVED.—Acceptance of a premium by an insurance company after knowledge of a loss occurring while the premium was in default waives the forfeiture, and does not merely revive the policy as to the future. (*Continental Ins. Co. of New York v. Chew* [Ind.], 88 N. E. Rep. 417.)



# The Albany Law Journal.

ALBANY, FEBRUARY 2, 1896.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

MUCH has been written by the most prominent lawyers of the country on the unconstitutionality of the income tax, and there have been few, indeed—in fact, none that we know of, who have openly defended the most vicious statute that ever was enacted, at a time when war or some other calamity did not demand such extreme legislation. One or more pseudo-suits have been brought in such a way as to convince the most impartial on-looker that it was not an honest desire to test the constitutionality of the law which prompted parties to begin them. Some have been commenced in direct violation of United States statutes prohibiting such an action in such a manner, and they will undoubtedly do much to injure the proper determination of this matter. Of such pseudo-suits and of their instigators it can only be said that it is not very difficult to follow the peculiar sinuousities and obvious machinations of some, who, either in sheep's hides or wolves' skins, show their shallowness and hypocrisy in the deserved failure of their piratical enterprises. And those who truly seek that justice should be done must not be discouraged, and, as in the past, we shall always be glad to devote the columns of this journal to articles which will directly or indirectly influence a just and equitable settlement of this matter, which would be a declaration by the Supreme Court of the United States that the income tax of 1894 is unconstitutional. We have had written for the JOURNAL an article by Carman F. Randolph, author of the work on Eminent Domain, on the unconstitutionality of the income tax of 1894, which we will publish within a few weeks, and which, we trust, will prove of great benefit to the opponents of the existing law. We also give an opinion by William C. Hannis, of Philadelphia, on this subject, which is as follows:

"In reply to your inquiry, I have considered

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carefully the question whether the tax upon incomes levied by the revenue act of Aug. 28, 1894, is constitutionally enacted, and my opinion is that it is not, for the following reasons: This tax is either a direct tax or a tax in the nature of a duty, impost or excise. If it be a direct tax, the Constitution requires that it shall be apportioned among the States according to their respective populations. If it be a duty, impost or excise, the Constitution requires that it shall be 'uniform throughout the United States.' The question whether or not an income tax is a direct tax was raised under the income tax law of June 30, 1864, and the Supreme Court in several decisions held that it was not a direct tax, and therefore not subject to the constitutional rule requiring apportionment among the States according to population. These decisions, however, leave us in no doubt as to the category in which the Supreme Court placed an income tax, as in at least two of the cases it expressly says that an income tax is not a direct tax, but an excise or duty. This brings me to the important question in the case. If it be an excise or duty, is it so enacted as to be uniform throughout the United States? This question of uniformity was not raised in the decision before adverted to because, under the income tax law of 1864, there was no reasonable ground to complain of any discrimination or want of uniformity. I am not of opinion that there are such discriminations in the income tax law of August 28, 1894, in favor of certain classes of persons as destroy the uniformity required by the Constitution. The subject-matter of the act is a tax on incomes. The uniformity required by the Constitution is uniformity of the tax on all incomes. It was intended that all taxpayers should be measured by the same rule. Undoubtedly, a tax levied on all incomes, with a reasonable exemption applicable to all incomes, could be constitutionally enacted. Has the act of 1894 been thus enacted? Under a constitutional income tax law there can be but two classes of persons—first, persons without incomes; second, persons with incomes. The persons with incomes, whether natural or artificial, must all be treated alike. This is the mandate of the Constitution. Is the tax on incomes, under the act of August 28, 1894, uniform on all incomes throughout the United



States? A cursory reading of the act will show it is not, because: 1. The act professes to exempt all incomes of \$4,000 and under, yet, if a citizen has an income of \$4,000 or less, and it is all invested in corporate shares, there is no exemption at all, for the corporations in which the shares are held are required by the act to deplete the net earnings to which the shareholder is entitled by the amount of the income tax. Thus, a person so situated is deprived of the exemption accorded to others. (2.) If several persons, each having a taxable income, happen to live together as one family they are jointly entitled to but one exemption of \$4,000, instead of \$4,000 on each income. Here again is want of uniformity. (3.) The salaries due to State, county or municipal officers are exempt from the payment of the income tax. (4.) All corporations or associations for charitable, religious, educational, or beneficial purposes; all building and loan associations which loan to their shareholders only, and a large class of insurance companies and savings institutions are exempted from the payment of the income tax. (5.) The income on certain United States bonds is exempted from the tax. If it be urged that the United States could not repudiate its contract with bondholders that their bonds should be free of tax, it is a sufficient answer to say that the Constitution requires a uniform tax on incomes, and if it exonerates one person from the payment of the tax it thereby releases all. Of course, an act may be unconstitutional in part and valid as to the remainder, if the remainder is so distinct from and independent of the unconstitutional part that it can be enforced without reference to it. For instance, the income-tax law is comprised in but a few sections of a voluminous revenue act, and the blotting out of the entire income sections would not interfere with the enforcement of the other independent revenue sections. But the want of uniformity lies at the root of every provision of the income-tax sections, and they cannot be enforced without recognizing the discriminations in the act. Those deprived of their exemption cannot have it restored to them. Those exempted cannot be taxed. For the foregoing reasons I am of opinion that so much of the revenue act as provides for an income tax has not been constitutionally enacted, and is therefore null and void.

At the same time, as the act provides that upon failure to make a return the tax official may arbitrarily make a return for you, and impose a penalty of 50 per cent in addition, I would advise that a return be made under protest, and then contest the attempt to collect the tax. Thus, if the court should reach a different conclusion from mine, you will have only incurred the costs of the suit, and will not be subjected to the payment of a perhaps excessive tax with a 50 per cent penalty added. There are other features of the act, such as the taxing of incomes earned prior to the passage of the act, its inquisitorial character, the arbitrary and unusual powers conferred on tax officials, the impairment of contracts involved in it, all of which go to make it very obnoxious, but in my judgment, however unwise, are within the power of Congress."

It is growing to be more and more apparent that either some legislation should be enacted or some agreement reached between capital and labor by which strikes can be avoided and a peaceful settlement made of questions which arise between the two great industrial forces which contribute so greatly to the material wealth and prosperity of the country. Aside from the loss of life and property, the continuance of even a show of force tends to weaken the respect for labor and capital, and the utility of the government under which they act. The intervention of the courts in this matter has been in few cases beneficial, and has rather tended to increase dissatisfaction between master and servant, whose relations cannot cease, and could be more beneficial to each other and to the increasing wealth of the country, if the relation was such as would tend to promote the interest of each other rather than to cause each other all possible injury and harm. It is apparent that no legislation can be enacted which will prevent the association of workmen, and it is doubtful whether such an expediency would be beneficial, while it is impossible, as has been shown, to prevent the moneyed interest of the country from caring for each other's benefit and advantage. Like many of the evils which confront the welfare of the country, the cause is apparent but the remedy is difficult to apply, because it deals with the nature and constitution of men. On the one

side, it is apparent that the laborer desires the greatest possible return for his services and the shortest possible working hours, while the capitalist most anxiously seeks to obtain exactly the opposite results. The report of the commissioners on the recent Chicago strike, and the failure of the State Board of Mediation and Arbitration in the Brooklyn troubles, make it apparent that such a body so constituted is of little practical benefit in bringing the parties to an amicable settlement of any difficulty. The Hon. Lyman Trumbull, formerly justice of the Supreme Court of Illinois, and later Senator of the United States, delivered, some time ago, an address before a meeting of the members of the Populist party in Chicago. He said in speaking of the wage-earners: "They see around them in the possession of favored corporations and the pampered few all the magnificence and luxury which accumulated wealth can bestow, while they toil and even suffer for the means, the God-given right, to live. Is it any wonder that discontent prevails among the masses and that they act in concert in the effort to improve their condition when such a state of things exists? The happiness of the people is the happiness of the individuals which compose the mass. Laws which open the door to large fortunes by devise, by inheritance or speculation have no tendency to promote the happiness of the people at large and often not even the happiness of those for whose benefit they are made." He then, in speaking of the remedy for these evils, said: "Neither strikes of the laboring classes which array against them the money power and the governmental power which controls, nor the governmental control of the great railroad and other corporations will remove the existing conflict between capital and labor which has its foundation in unjust laws enabling the few to accumulate vast estates and live in luxurious ease while the great masses are condemned to excessive toil, penury and want. What is needed is the removal of the cause which permits the accumulation of the wealth of the country in a few hands, and this can only possibly be brought about by a change of the laws of property. The remedy for this growing state of affairs would be to restrict the formation of corporations to such as are formed for public purposes or such as the public have an interest in. Seventy-eight per

cent of the great fortunes of the United States are said to be derived from permanent monopoly privileges which ought never to have been granted. I do not mean to say that all great fortunes exceeding a million have been acquired by immoral means, but such as have not are the exception, and to limit the privilege of disposing of more than a million by devise or descent would not affect one in 10,000 of the people. In short, such limitations would tend to discourage any honest enterprise or industry but stock-jobbing, trickery and questionable methods of acquiring vast fortunes." Even the United States courts did not escape his attention for he refuses to recognize any justice in their attempts to uphold the law, and in this respect says:

"Of late years, United States judges have assumed jurisdiction they would not have dared to exercise in the earlier days of the republic. They now claim the right to determine the extent of their jurisdiction and enforce such orders as they think proper to make. These Federal judges, like sappers and miners, have for years silently and steadily enlarged their jurisdiction, and unless checked by legislation they will soon undermine the very pillars of the constitution and bury the liberties of the people beneath their ruin. To vest any man or set of men with authority to determine the extent of their powers and to enforce their decrees, is of the essence of despotism. Federal judges now claim the right to take possession of and run the railroads of the country, to issue injunctions without notice, and to punish for contempt by fine and imprisonment any one who disputes their authority. Congress some years ago passed an act limiting the powers of Federal judges to punish for contempts, except such as are committed in their presence, or by officers of their courts, or in disobedience of some lawful order. But what protection does this afford the citizen, when the very Federal judge who issues the order passes upon its legality?"

It cannot be asserted that this remedy for one of the causes of labor troubles would be fair and just, and it cannot be considered that all restrictions should be placed upon capital, while labor should receive nothing but favors and have no limitations placed on their action or privileges. It would not be well

to go to such an extreme as is hinted at in the report of the strike commission and to say that there was not any fault on the part of the wage-earners, and it is only fair and proper to restrict each factor in the present question in a proportionate and proper manner. We think that a little advance is made in the proposed law which was introduced on the 17th of January, 1895, by Mr. McGann in the House of Representatives. The title is, "A bill concerning carriers engaged in interstate commerce and their employes," and the first section provides that the provisions of the act shall apply to any common carrier, their agents, officers and employes engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for the continuous carriage or shipment from one State or territory of the United States or the District of Columbia, to any other State or territory. The act also includes all bridges and ferries, and the term "transportation" includes all instrumentalities of shipment or carriage. The second section provides that whenever a controversy concerning wages, hours of labor or conditions of employment shall arise between a carrier subject to this act and the employes of such carrier, seriously interrupting or threatening to interrupt the business of such carrier, the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, with all practical expedition, put themselves in communication with the parties to such controversy, and shall use their best efforts by mediation and conciliation to amicably settle the same, and if such efforts shall be successful, shall then endeavor to bring about an arbitration of such controversy in accordance with the provisions of this act. The board of arbitration is to consist of the chairman of the Interstate Commerce Commission and one named by the carrier or employer and the other named by the labor organization to which the employes directly interested belong. The submission of the controversy shall be in writing, and shall be signed by the employer and by the labor organization representing the employes, and shall state, first, that, pending the arbitration, the existing status shall not be changed; second, that the award shall be final on both parties, unless set aside

for error of law apparent on the record; third, that the respective parties to the award will faithfully execute the same; fourth, that the employes dissatisfied with the award shall not, by reason of such dissatisfaction, quit the service of the employer before the expiration of three months thereafter the making of such award, nor without giving three months' notice, in writing, of their intention to quit; fifth, that such award shall continue in force as between the parties for the period of two years after the same shall go into practical operation. Section 4 provides that the award, after it is filed in the clerk's office of the Circuit Court of the United States, shall go into practical operation, and judgment shall be entered thereon accordingly, unless within thirty days either party shall file exceptions thereto for a matter of law apparent upon the record. Other provisions in regard to appeals are contained in this section, and the appeal is finally to be decided by the Circuit Court of Appeals. It is provided that during the pendency of arbitration, the employer shall not discharge the employes except for inefficiency, and that a violation of this shall be punishable by a fine not exceeding \$1,000, or by imprisonment not exceeding one year. The same punishment is provided for any employe who aids or abets strikes or boycotts against the employer during the arbitration, or during the thirty days after the filing of the award. The eighth section provides that the employes of railroads in the hands of receivers shall have the right to be heard in the federal courts, and section nine provides that an employer shall not require any employe or person seeking employment, to enter into an agreement not to become a member of any labor organization or shall conspire to prevent an employe from obtaining other employment. Section ten provides that whenever a controversy arises which threatens to obstruct the operation of a railroad, the attorney-general of the United States may file a bill in equity to prevent the commission or continuance of the public mischiefs caused or threatened as aforesaid, in any circuit court or courts of the United States and that said bill shall pray for the appointment of a receiver pending the continuance of such controversy and that the defendants of such bill shall be the carrier and

employees directly engaged in the controversy. Many of the provisions of this act are worthy of consideration and the public must sooner or later recognize that some arbitrary measure must be taken to prevent a continuance or recurrence of the difficulties experienced during the past year, if any discontinuance of the unfortunate scenes of the past is to be expected. Many have maintained that the decree of any court of arbitration could not be enforced except by public opinion, but we believe that the final decree of a properly constructed commission must be rigidly carried out and that such a measure would be less injurious than the results of the unpleasant scenes which have recently been witnessed.

The anti-pass provision of the revised Constitution seems to have offered an opportunity for the railroad officials to promulgate and enforce stricter rules as to the issuance of passes. Many of the clergy have often received free transportation or have been allowed to purchase tickets from the companies at half rates. Unfortunate as it may seem, it transpires that some of these ministers have increased their alleged families, who have ridden at half-fare, to even greater numbers than the prolific rabbit, and this indiscreet addition to the domestic household has reacted on the unfortunate heads of the family, since the railroads cannot now, indeed are not anxious to make, any discrimination on behalf of the ministers and are less prone than formerly to send them free passes. Already wails of anguish have been heard. One divine on Sunday last even chose for his text "Why should I awake?" "I will seek it yet again." Would that with true biblical courtesy we could say, "Seek and ye shall find; ask and it shall be given."

In *Alabama & V. Ry. Co. v. Sparks*, decided in the Supreme Court of Mississippi, it was held that where a common carrier unloads a shipment of horses at an intermediate point in the morning, and then reloads them late in the afternoon, but twelve hours before the departure of the train by which they are to be shipped, and against the owner's protest, and the horses are injured while thus waiting, the carrier is liable, though, by its contract, not responsible for unusual or unreasonable delay.

### THE PRESIDENT'S ADDRESS.

Address of Tracy C. Becker, President New York State Bar Association, at the annual meeting of the Association at the Assembly Chamber, Albany, N. Y., Tuesday evening, January 15, 1895.

IN the act of incorporation of the New York State Bar Association, and again in its constitution, it is stated that the association is formed "to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, and to cherish a spirit of brotherhood among the members thereof." It now becomes the duty of the president of that association, at the close of his term of office, to report in what respects, and to what extent, the objects stated have been attained during his administration, and to recommend such measures as, in his judgment, may lead to the attainment of those objects hereafter. It will be conceded that nothing could be more conducive to the attainment of each and all of these objects than measures tending to raise the qualifications for admission to practice at the bar. For many years it has been apparent that while in other professions the standards for admission to membership therein were constantly being raised, but little advance had been made in the extent and character of the educational qualifications required by law of those who sought admission to practice law. Moreover, however high and extensive the requirements of the preliminary education and study fixed by the rules of the Court of Appeals may have been, and anxious as the members of that court undoubtedly were to formulate additional requirements whenever possible, it was painfully manifest that the methods and means of examination, which had long obtained, for practically testing the character and capacity of applicants were not the best methods and means attainable. Under the system of examination which prevailed, by a separate board of examiners in each of the five judicial departments, each of which boards of examiners conducted its examinations according to its discretion, there was no uniformity in the character and extent of the examinations in the different departments, while in some departments, as the examiners changed from year to year, the nature and scope of the examinations changed also. Thus was possible the rank injustice of young men who had devoted years of time and study, under rules of the court similar throughout the State, to preparing themselves for admission to the bar, finding a difficult and elaborate system of examinations in one department, a less difficult system in another, and, possibly, an easy one in another; an examination largely written and only partly oral here; an examination largely oral and only partly

written there; a strict adherence to the rules concerning certificates of proficiency in educational branches and scholastic attainments here, an evasion of those requirements there; a strict standard of marks enforced here, no standard of marking at all there; a board of able and experienced lawyers, all of whom devoted great care and attention to their work, in some of the General Term departments, while in others the lack of time or fidelity to their trust on the part of some of the examiners caused the whole work of the board to fall upon one of their number, who struggled along with it as best he could, and whose conclusions were acquiesced in without much scrutiny by his associates!

The growth of a higher regard for legal education, fostered and evidenced by the rapidly increasing number of students who took the benefit of at least a two years' course of study in the law schools, afforded a sure warrant that no obstacle would be interposed by the faculty or students of those schools to reform in the existing methods of examination for admission to the bar. Mindful of the objects of its incorporation, and cognizant of the necessity for such a reform, this association in 1892 and 1893, prepared and presented to the Legislature a bill providing for a single board of law examiners, who should act under rules of the Court of Appeals prescribing a uniform system of examination throughout the State. This bill encountered more or less opposition from various sources, and on one pretext or another was twice defeated in the Legislature. At the last annual meeting of this association, held in January, 1894, the matter was brought up for discussion, and the ablest educators in our profession in the State were invited to and did discuss it in all its bearing. Messrs. William A. Keener, Dean of the Columbia Law School, George Chase, Dean of the New York Law School, Austin Abbott, Dean of the Law School of the University of New York, Abner C. Thomas, Dean of the Metropolitan Law School, Le Roy Parker, Vice-Dean of the Buffalo Law School, H. B. Hutchins, Associate Dean of Cornell University School of Law, and the Rt. Rev. Wm. Crosswell Doane, Vice-Chancellor of the University of the State of New York, participated with many of the members of this association in that discussion. So strong were the arguments adduced by these gentlemen in favor of the bill, and so zealously did the committee of this association having it in charge perform their labors, that at the last session of the Legislature the bill proposed by this Association, but slightly modified, became a part of the statute law of this State, taking effect on the first of January, 1895. Under this act of the Legislature the Court of Appeals has appointed the Hons. Austen G. Fox, of New York city, Frank B. Danaher, of Albany, N. Y., and Wm. P. Goodelle, of Syracuse,

as the three examiners provided for in the bill, and has prescribed admirable rules for their guidance in the performance of their duties. The high professional character and standing of the gentlemen appointed, are a justification of the wisdom of the association in vesting by the bill the power of appointing the examiners in the Court of Appeals, and a satisfactory guaranty that they will perform their duties with due regard for the advancement of the standards for admission to the bar, requiring legal education, good character and ability in all applicants therefor. The passage of this bill would have been impossible but for the organized and continuous efforts of this association, through its proper officers and committees, and if the association had during the time of its existence accomplished nothing else, the procurement of this very great and far-reaching reform should commend it to the respect and confidence of the bench and bar throughout this State, and of the citizen suitors whose interests are closely affected by the fitness and capacity of those who are certified to them as possessing the necessary legal and moral qualifications for practicing law.

So prevalent has been the practice in the Legislature of enacting amendments to the Code of Civil Procedure, and to other general statutes, to fit the exigencies of particular cases, and to suit the purposes of individuals who had political influence, that this association attempted to keep on file in the office of one of its members in each of the judicial districts of the State, a copy of all bills introduced in either house of the Legislature, amending the Code of Procedure or the general laws, so that such legislation could be carefully watched by our committee on legislation, and so that any member of the association could have reference to such proposed acts without sending to Albany.

As stated in the report of the committee on law reform, this attempt has not proved an unqualified success, because the number of bills has been so large and the matters to which they relate so numerous, that it is almost impossible to devote the time and attention to determining the merits of each bill, which would be required in order to guard against imperfect or unnecessary legislation. Still, the attempt has been made in good faith, and the slight expense which it has cost the association has not been wasted, for it has demonstrated more forcibly than ever the supreme necessity of the adoption of a law providing for a board or council of revision, to which all statutes should be referred before their adoption and final transmission to the governor for his approval. Such a board or council could also assist the members in drafting bills properly, to begin with, and in many ways aid in statutory revision and in the proper performance of their legis-

lative duties by the senators and members of Assembly. As will appear more fully in the report of the committee on law reform, inquiries directed to the Secretary of State of each of the States of the Union elicited replies showing that the only States which have provisions for such a board, or council, or something of the kind, are Maine, South Carolina and Connecticut. In England the counsel to the Speaker of the House of Commons, who receives \$9,000 per annum for his services, performs some of the duties which would be devolved upon such a board or council. In the Dominion of Canada the Senate has a law clerk salaried at \$2,500 per annum and the Commons one at \$3,200 per annum. The Ontario legislative assembly also has a law clerk, and in England and Canada the duties of parliamentary draftsmen are exercised, as to private bills, by officers employed by the committees. In the Northwest Territory, three legal experts sit in the legislative assembly by virtue of a statute, who may take part in debate, but have no vote. The provisions of chapter 24 of the Laws of 1893, devolving upon the commissioners of statutory revision the duty, "on request of either house of the Legislature, or of any committee, member or officer thereof, to draft or revise bills and to render opinions as to the constitutionality or consistency, or other legal effect of proposed legislation, and to report by bill such measures as they deem expedient," is a long step in the right direction, but on account of the laborious character and extent of the actual work of revision which the commissioners must perform, it has been evident that their attention cannot be constantly distracted from their regular work to perform the duties specified in the Act of 1893 without greatly detracting from the value and character of their regular business. It is submitted, also, that the very kind and class of bills, namely, special legislation, which ought to be most closely scrutinized and unhesitatingly repressed by any board or council of revision, is the kind of legislation which the members or officers of the Legislature who introduce the same, would endeavor to slip through to a final passage, without the examination and criticism of an independent board or council acting solely in the interest of the whole people of the State. For these reasons the directory and permissive provisions of the statute of 1893 should be amended so as to peremptorily require that every bill, at some time after its introduction and before its final passage, should be submitted to the commissioners of statutory revision, whose number and pay should be increased sufficiently to insure a strong and efficient board, or that a separate board or council of revision should be created and placed upon a practical, permanent and substantial basis, so that any of our best lawyers could afford

to accept a position as member of such board and perform his duties to the exclusion of all other private business during the session of the Legislature, and for such time thereafter as might be necessary.

During the last two sessions of the Legislature, this association, greatly aided by the zeal and ability of Prof. Charles A. Collin, one of its members, has urged that all bills should be printed in the final form in which they are adopted, instead of being engrossed after final passage. At the last session of the Legislature, the committee on rules of the Senate and Assembly adopted new rules tending to bring about this result, and the adoption of the constitutional amendment proposed by the last Constitutional Convention, requiring that all bills should lie upon the desks of members for at least three days before final passage, has placed this matter in such a position that the reform long sought by this association of abolishing as far as possible engrossed bills, and thus avoiding the corrupt and careless practices well known to at times prevail in the engrossing room, is sure to be fully accomplished.

Some of the other reforms beneficial to the profession which this association, through its committees on law reform and on legislation, has helped to bring about are: Increase in the number of peremptory challenges in jurors in civil actions from four to six, and the adoption by the Court of Appeals of an amendment to its rules requiring copies of the points of counsel to be filed with the clerk and exchanged between counsel, before the argument of the case. The merits of these measures are too obvious to need particular mention here.

During the last year, from May 8 to September 29, a Constitutional Convention, more than four-fifths of whose membership was composed of lawyers, sat in this Capitol, at Albany, and labored to perfect amendments to the organic law of this State which should be satisfactory to our people. More than 500 proposed amendments were submitted to that convention for consideration. Of these, but thirty-three amendments were finally submitted for popular approval. The work of that convention has been approved at the ballot-box. Some of it is now in practical operation, while other portions (notably the judiciary article, in which the members of this association are particularly interested) do not take effect until 1896. Having been a member of that convention, it does not become me to praise its work, but I cannot refrain from congratulating my brother lawyers that the old-time assertions that "lawyers make poor legislators," and that "there are too many lawyers in Congress and in the State Legislature," have been practically disproved by the self-sacrificing, intelligent, conservative, yet broad-minded and reformatory work accomplished by that body. Besides this, the spectacle is presented to

the people of this State of a body of men serving the State for the modest compensation of ten dollars per diem, whose right to compensation ceased on the 15th day of September, voluntarily sitting for fourteen days thereafter to fully complete and carefully revise and prepare their enactments for submission to the people. I deeply regret that some persons have introduced and are pressing a bill in the Legislature, for pay for the members for these extra fourteen days. The example to the people of this State afforded by voluntary and self-sacrificing labor for that short period ought not to be lost or detracted from by any application for back pay. I sincerely hope that, at the meeting of this association to-morrow, strong resolutions will be adopted protesting against the passage by the Legislature of any act or appropriation for compensation of any kind to the members of the convention after the 1st of September, 1894. All of them took office with full knowledge that their pay would cease on September 15, and if they sat longer than that they would do so in the interests of the State. They should therefore be willing that their services for the additional period after September 15th should stand in the annals of history as voluntarily and gratuitously contributed. The adoption of the amendment striking out of the Constitution the word "coroners," makes it possible that legislation similar to the Massachusetts act of 1878, providing for a board of trained medical examiners, may now be adopted. No doubt the association will carefully consider this very important matter at its meeting to-morrow.

Your committee on law reform, following to a great extent the lines of recommendation laid down by the association itself, at the time of the constitutional commission in 1890, adopted certain recommendations and suggestions relative to the Judiciary Article, and submitted the same to the Constitutional Convention as the sense of that committee concerning the matters under consideration. These recommendations and suggestions are enumerated in the report of the committee of law reform and need not be fully referred to now. It should be recorded here, however, that with but a single exception—the number of judges of the Court of Appeals—the views of the committee on law reform of this association were substantially adopted by the convention. The discussion which has taken place at the annual meetings of this association, since the commission of 1890 proved abortive, has done much to create a well-directed sentiment and understanding amongst lawyers throughout the State, of the conditions, requirements and difficulties connected with a revision of the Judiciary Article of the Constitution. It is a very remarkable circumstance that the final report of the judiciary

committee of the convention was but slightly modified in the convention itself, and, as a whole, was adopted with but few dissenting votes, and received almost unanimous commendation from the press and the bar throughout the State. This of itself must have contributed greatly toward the adoption of the other valuable reform amendments which were proposed by the convention and submitted to be voted upon by the people with the Judiciary Article amendment. While it is often invidious and improper to single out any individuals for express praise and commendation in an address of this character, I must accord in this public manner the sincere and cordial thanks of the association to the Hon. Louis Marshall, a member of its committee on law reform, and to the Hon. Elihu Root, of New York, also a member of this association, for the intelligent skill, sound judgment and untiring industry which they devoted to the preparation of the Judiciary Article of the Constitution. To these two men more than to any two others in the whole State will be due the great reforms in the judiciary which are comprised in that article. The amendment providing for future constitutional conventions is almost wholly the work of Mr. Marshall, and its necessity was demonstrated by the experience which the convention had in effecting its own organization, and the serious questions that were raised; first, as to its right to be the judge of the election and qualification of its own members; and, secondly, as to whether it was obliged to submit any of its amendments to a vote of the people at all, to mention nothing of the disputes and difficulties that arose before the convention between the Governor and the Legislature; and between political partisans in the Legislature concerning the membership of the convention, and the time and method of holding its deliberations.

During the business meetings of this association to-morrow, a discussion will be held as to what legislation is necessary to carry out the provisions of the new judiciary article. Invitations to participate in this discussion have been extended to all the members of the judiciary committee of the Constitutional Convention, as well as to the members of this association, and I now tender a like invitation to all lawyers, whether or not they are members of the association, who are present here.

During the past year the committee on law reform has considered the question whether the Code of Civil Procedure should be revised, condensed and simplified. It certainly seems an extraordinary anomaly that the practice and procedure in this State should be so cumbersome and complicated as to require for a statement of the bare legal rules regulating them, 3,500 sections, containing upwards of 275,000 words! It is quite as great an

anomaly that, in what purports to be a guide of practice and procedure, should so constantly be found so much substantive or active law having little or no relation to methods of practice and procedure. Yet this code has been amended, altered, modified and construed so much since it was first presented to the Legislature that it has come to be fairly well understood by the members of our profession. That it should be revised and simplified may, perhaps, be conceded, but in attempting to revise and simplify it, are we not in danger of entailing upon our profession another series of years of appeals from court to court for the purpose of procuring a construction of the new language implied in the amendment and revision?

Personally I have always been in favor of broadly extending the provisions of the statute regulating the adoption of rules of practice by our courts, so as to require that at least triennially there should be a convention of the judges of our courts of record, upon which should be imposed the duty of adopting the new revisions or amendments of the Code which their experience had demonstrated to be possible and necessary. I should also go a step further, and have it enacted that the Legislature should have no power to pass any amendments to the Code of Civil Procedure until they had been first considered by this convention of judges. These are my personal views, as above stated, and should not be construed as any expression of the views of this association. At the meeting to-morrow the question will be fully, carefully and intelligently discussed, and I have no doubt some conclusion will be reached which may work for the good of our profession and of the public.

It is evident from the foregoing statement that for several years past the State Bar Association has been rapidly growing in usefulness and importance. Its list of membership now includes about one-tenth of the bar of the State. This may seem a small proportion, and no doubt it should be increased, but the influence which one-tenth of any learned profession may exercise is not limited by its numerical proportion. Each member necessarily comes in contact from day to day with other members of his profession; some are serving in the Legislature, some are on the bench, some are occupying high official station, and where all take an interest in the broad and beneficent objects specified as the objects and purposes of such an association, and labor earnestly to attain those objects, much good must necessarily result to the legal profession and to the whole people of the State.

The recent growth and uprising of public sentiment for municipal reform, for civil service reform, for legislative reform, enhances and emphasizes the opportunities and duty of the members of the legal profession to take part in the conduct of civic af-

fairs. To this profession, from its earliest rise in the mother country to the present time, the people have looked — and have never looked in vain — for the defense on the hustings, at the forum and on the bench, of their dearest liberties. To it the people now look to aid and assist them in emancipating themselves from corrupt and tyrannical bossism in our municipalities and in the State government. Every lawyer who has become a member of this association has public spirit enough to belong to a good government club, or similar organization in his own locality, and he ought to do so. The recent example of what a constitutional convention, composed almost wholly of lawyers, had the courage to do in the way of proposing reform measures, has strongly tended to break down the somewhat prevalent feeling amongst the people of the State that lawyers are too conservative, too doubting and hesitating, too timorous, too technical, too much affected by class distinctions and corporate influences, to be reliable guides and mentors in governmental affairs. Now is the opportunity for the brethren of the law to make themselves more felt than ever in the adoption and conduct of public measures. One of the ways in which this can be done is also by taking a deep interest in the meetings of this association, serving on its committees faithfully and well, and in responding whenever called upon, to press upon the attention of our courts or our Legislature proper measures of reform which this association proposes.

Tendering my heartfelt thanks to the officers of the association, who during the year of my administration as president have labored so faithfully to insure its success, and congratulating all of its members upon its prosperity and usefulness, I close this brief statement of what has been done and what may be accomplished, with the expression of the hope and expectation that this present prosperity and usefulness may be but a slight presage of the extent to which its beneficent objects may hereafter be accomplished.

FEDERAL COURTS — UNITED STATES CIRCUIT COURT—JURISDICTION.—A trust company to which bonds are delivered, merely to be held by it until the performance of a condition by the payee entitling it to possession, is a necessary, and not merely a formal, party to an action by such payee against it and the maker of the bonds to obtain their possession; and the United States Circuit Court of the State of which such maker is a resident has no jurisdiction of such action where plaintiff and such trust company are both non residents of such State, but residents of the same State. (*Massachusetts & S. Const. Co. v. Township of Cane Creek* [U. S. S. C.], 15 S. C. Rep. 91.)



## BRITISH SUITORS IN FRENCH COURTS.

THE current impression in England, with reference to the refusal of the French courts to adjudicate between foreigners, is that the exceptions eat up the rule; that, in fact, the rule is merely one of those fictions in which the judicial mind sometimes delights to indulge. The impression, however, is not altogether correct. As a matter of fact, the French courts hold that, outside treaty stipulation, there is no obligation binding on a State under international law to render justice in the suits of foreigners between themselves. The exceptions to this rule, they hold, are merely matters of French municipal law, which might be abrogated at any moment without breach of international duty.

A striking instance of the existence of the general rule was furnished recently in the case of *Le Scheick Abdul-Rassoul v. Le Maharajah Dhuleep Singh* (Tribunal Civil de la Seine [1er Ch.] 21 Juillet, 1892.) The suit was promoted by one Abdul Rassoul, alleged to have been sent to India by Dhuleep Singh to stir up rebellion in the provinces formerly under the government of the family of Runjeet Singh. The Maharajah Dhuleep Singh, successor of the last-named, and a pensioner of the British government, conceived, some few years ago, a design of obtaining possession of the provinces in question. He endeavored to proceed to India, but was arrested at Aden. Being subsequently released, he, it was alleged, deputed Abdul Rassoul to go to India. The latter succeeded in reaching Indian territory, but was thrown into prison. On being set at liberty, he presented a claim against his alleged principal for a sum of 400,000fr. by way of indemnity, and, as Dhuleep Singh then resided in Paris, the suit was prosecuted in the French courts.

The grounds put forward by the Tribunal of the Seine for its decision are remarkable. They are, that the defendant has no permanent residence in France, and therefore no domicile; whereas, in England, he had a residence called Elveden Hall. The defendant not being domiciled in France, and the action not having reference to property situated in France, or to obligations contracted in France, the tribunal falls back on the general theory of the incompetence of French courts to decide suits between foreigners.

English lawyers will, of course, note that, in such a case as that described, English courts also would decide against the plaintiff. But they would base their action on very different considerations. They would refuse to acknowledge as enforceable agreements having as their object the stirring up of revolt in the territory of a friendly power.

There are grounds for believing, however, that even if a Franco-British Treaty had given rights of unrestricted access to French courts to British sub-

jects, the Tribunal of the Seine would still have decided against the plaintiff on grounds of international law. Although not basing its judgment on that feature of the case, the court shows that it is sensible of its existence.

“Le Tribunal—sur l’exception d’incompétence—Attendu \* \* \* que sans apprecier le caractère civil et obligatoire des faits et des actes dont Abdul Rassoul entend se prevaloir \* \* \* ; que le défendeur est fondé à décliner la compétence du tribunal. Par ces motifs: Dit nulle et de nul effet l’assignation du 3 Octobre 1891 introductoire d’instance; se declare en tant que besoin, incompetent pour statuer dans la cause; et condamne le demandeur aux dépens.”

The French renunciation of jurisdiction affects, singularly enough, British subjects particularly. If Dhuleep Singh had been a Portuguese subject, resident in Goa—Portuguese territory in India—the French tribunal could not have renounced jurisdiction on the grounds they alleged—that is, merely because the defendant was not domiciled in France, and that neither property existing nor obligations contracted in France were in question. Treaties with various European powers, including Portugal, Spain, Switzerland, Italy, and Russia, give mutual rights of resort to courts. With regard to British subjects, however, a decision of the Court of Cassation of the 27th of January, 1857 (Sir. I. 161) decides that the Treaty of Utrecht of 1713 confers no such rights of access to courts of law.

The rule of renunciation of jurisdiction between foreigners is a judge-made rule. This fact contradicts another current impression in England—that French judges do not legislate. Neither in the codes nor in the preliminary discussions (which, in France, may be quoted as elucidating the intention of the legislator) is there any such declaration of judicial “incompétence” in regard to foreigners. The rule really shows in a way the continuity of judicial tradition. Before the First Republic, the general rule was “*Actor sequitur forum rei*,” interpreted in such a manner that a domiciled foreigner could be sued by any one; a non-domiciled foreigner only if immovables existing, commercial obligations, contracted, or punishable acts committed in France, were in question; or there was a submission to the jurisdiction.

The exceptions to the present general rule may be divided into two classes—those falling under the obligatory jurisdiction, which the courts hold they have no power to decline, “*Compétence obligatoire*,” and those under the voluntary jurisdiction, “*Compétence facultative*.”

There is one class of cases, however, in which the general rule is absolute. French courts will not, directly at least, adjudicate in suits involving matters of State policy.

Under the obligatory jurisdiction, the French courts will adjudicate between foreigners when a treaty gives either plaintiff or defendant access to tribunals.

When the foreigner, whatever his nationality, has received governmental permission to fix his domicile in France (Cod. Civ. A. 13). The recent law making such permission terminable in five years, unless naturalization follows, should be noted. When a foreigner, without permission, fixes his residence in France, many courts hold that he acquires a "domicile de fait," and cannot decline the jurisdiction if the courts wish to assert it.

When the public order of the State is concerned, that is, in actions arising out of a "délit" or "quasi-délit:" (Cod. Civ. A. 3.)

When the suit is in a commercial matter: (Cod. Proc. Civ. A. 420.)

When the action has reference to a remedy which the courts regard as "provisoire et conservatoire." Under this head are included administration of the property of a lunatic or of a prodigal; education of children, alimony, and a comprehensive exception, "la saisie-arrêt"—the Scotch "arrestment"—the seizure of property in the hands of a third party.

When one defendant is French, another may be foreign, if the claims against both are connected. If the plaintiff is French and the defendant foreign, another foreigner may intervene in like case. If the defendant has been at one time French, some courts hold they have jurisdiction if his acquisition of foreign nationality was with intent to escape from their authority.

When an exequatur is demanded for a foreign judgment—another comprehensive exception.

Under the voluntary jurisdiction, "compétence facultative," the courts may adjudicate by consent of parties. But either the court or one or other of the parties may refuse the jurisdiction. A suitor's objection, to be valid, must be made *in limine litis*, except in "questions d'état," when it may be made at any state.

Passing now from consideration of the actual law of France, and considering the subject from the point of view of international law, there can be no doubt that the French judicial renunciation of jurisdiction is as invalid internationally as is the French legislative assumption of jurisdiction over foreigners under Art. 14 of the Civil Code. (See as to latter, *Schibaby v. Westenholz* [1870], 24 L. T. Rep. 93, *per curiam*.)

As Weiss (iv. 938) and Laurent (i. 549) have shown, there is a "deni de justice," cognizable under international law, and giving ground for restitution by foreign States. The foreigner's right to protection by the State which tacitly accepts the duty of protecting him (by permitting him to reside) cannot cease from the fact that the person who is

guilty of a breach of legal obligation is also a foreigner.

The judicial arguments adduced in favor of the present rule are obviously drawn from that state of opinion and sentiment which arose in France during the Napoleonic reaction against foreigners, following on the non-reciprocation by other States of the Republican proclamation of fraternity. This order of ideas is not so greatly in harmony with modern French opinion; and no doubt the many exceptions to the rule, introduced in practice, have alone prevented its formal abolition. To say, as French judges have said, that the State is not bound to render justice to foreigners, is to deny international law. To say that French judges should not be expected to know foreign law applicable to classes of foreigners' rights, is to ignore current French practice in regard, for instance, to a foreigner domiciled by permission. To say that French suitors might be inconvenienced by a block of business is simply absurd; the excluded cases would form only a small part of those in which foreigners are already concerned. If true, the remedy, as Weiss points out, is to increase the number of the courts.

Looking, however, for a practical solution of the question, the course which is readiest and open to least objection is to negotiate with France, on behalf of the British government, a treaty similar to those already in force between France and Italy, Spain, Russia, and other European powers, expressly acknowledging the international law right of British and French suitors to resort to the tribunals of either State. No such treaty, be it remembered, is required to give French suitors access to British courts. Our tribunals, following the strict rule of international law, administer justice to all suitors, without inquiry as to their nationality.—*Law Times*.

Baltimore is now in a state of excitement so great that it leaves its terrapin untasted and forgets to boast of its base ball team. There is a great question at issue, one that comes home to every household in the city of hills. A Baltimore man stole a cat from a neighbor. A fine Maltese tabby it was, and the neighbor had him arrested for theft. Then the man's lawyer stood boldly up in the court room and said that it was impossible for any one to steal a cat, as that animal is not property, and to take forcible possession of a feline, even though it be a pet one and wear a ribbon and answer to its name, is not a legal offense. What is more, the bold lawyer won, and the attorney-general agrees with him, and a blow is struck at all the cats of Maryland. The attorney-general, in his formal opinion, declares that a cat really is nothing but a wild animal, that it is of no use to man, and that the taking of a cat without the consent of its owner is not an indictable offense.—*New York Press*.

## PUNCTUATION IN THE EYE OF THE LAW.

THERE is a tradition to the effect that it was once forbidden to introduce punctuation marks into the statutes, the theory being that the law should be so plainly worded that its meaning would not depend upon the easily transposed "points," and that this must be tested (as it is wise to do in writing a telegram, even yet!) by omitting the marks altogether. The spread of general knowledge, and possibly a lessening of the distrust which the ancient burghers entertained as to the honesty of men who were more trained in the use of the pen than of the sword, have led to a disregard of this precaution, and statutes are now punctuated according to the judgment of the engrossing clerk. When this functionary errs in judgment (is it not even hinted that Jupiter nodded on occasion?) there is tribulation in the land. We quote the following article apropos of this subject, from the *American Book-maker*:

From time to time it is announced in correspondence from Washington, D. C., that the punctuation of acts passed by Congress is defective, and the legal advisers of the government are called upon to settle the knotty questions arising from these errors. Several instances of defective punctuation have been noted in the new tariff act, and similar errors occurred in the wording of the tariff act of 1890. None of the errors can be corrected without a joint resolution of the two houses, for the "law print" of the bill must be an exact copy, wording, spelling, punctuation, and everything else contained in the enrolled bill, which is the copy that becomes a part of the archives of the government. It is unfortunately too true that now, as in the time of Chaucer,

A reader that pointeth ill  
A good sentence may oft spill.

Those who have tried, by means of the law courts, to take advantage of erroneous punctuation, have had their trouble and bills of cost for their pains, and it may be said that a similar fate awaits the person who may endeavor to defeat, by legal means, the manifest intent of the law. One of the oldest legal maxims—as old as the law itself—is to the effect that bad grammar does not vitiate a deed ("*mala grammatica non vitiant chartam*"); and, in the eye of the law, the same principle applies in the case of bad or wrong punctuation. As the late George Perkins Marsh, LL. D., long representative of the United States at the court of Italy, says in one of his lectures on the English language, delivered at Columbia college, and afterwards published in book form: "Mistakes in the use of points, as in all the elements of language, written and spoken, are frequent; so much so, in fact, that in the construction of private contracts, and even statutes,

judicial tribunals do not much regard punctuation; and some eminent jurists have thought that legislative enactments and public documents should be without it." Bishop, in his "Commentaries on Written Laws and their Interpretation," says: "The statutes in England are not punctuated in the original rolls; but more or less marks of punctuation appear in them as printed by authority. With us the punctuation is the work of the draughtsman, the engrosser, or the printer. In the legislative body the bill is read so that the ear, not the eye, takes cognizance of it. Therefore the punctuation is not, in either country, of controlling effect in the interpretation." Punctuation, in fact, forms no part of the law, as pointed out in the foregoing extract—a fact well recognized in Great Britain, as may be observed in legal advertisements for next of kin, and often reprinted in the leading daily papers here, which are noticeable for their want of punctuation. Some of the cases in the United States in which the above cited principle has been laid down are *Doe v. Martin*, 4 Term R. 65; *Barrow v. Wadkin*, 24 Beav. 326; *Cushing v. Worrick*, 9 Gray (Mass.) 385; and *Gyger's Estate*, 65 Pa. St. 311. Those interested may also consult Sedgwick on Statute Law for further information on this subject. Punctuation cannot have a controlling effect, but may be disregarded altogether when plainly contrary to the legislative intent, in which case the courts will repunctuate to give effect to such intent, as decided in *United States v. Isham*, 17 Wall. (U. S.) 502; *Albright v. Payne*, 43 Ohio St. 15, 1 N. E. Rep. 16, and in *Pancoast v. Ruffin*, 1 Ohio, 385.

The following extracts are from some of the decisions of the courts on this interesting question:

"Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail." *Ewing v. Burnet*, 11 Pet. (U. S.) 54.

"Punctuation is no part of the statute," *Hammock v. Farmer's Trust & Loan Co.*, 105 U. S. 77.

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required." *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. Rep. 625 (opinion given by Chief Justice Mellville Fuller).

"Punctuation in written contracts may sometimes shed light upon the meaning of parties, but it must never be allowed to overturn what seems the plain meaning of the whole contract." *Osborn v. Farwell*, 87 Ill. 89.

"Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists, except what the punctuation itself creates." *Weatherly v. Mister*, 39 Md. 620.

"The want of proper punctuation is, if objection-

able at all, no more allowable in vitiating the contract or destroying its effect than bad grammar, the rule against which is a maxim of the law." *White v. Smith*, 83 Pa. St. 186.

From the writings of the authorities cited, and from the foregoing extracts from decisions, it will be gathered that there is no hope for any litigants who may base their cases solely upon the erroneous punctuation of the acts passed by congress.—*Law Book News*.

#### INTERNATIONAL LAW AND INTERSEA COMMERCE.

THE completion of the Baltic Ship Canal—which is constructed through territory now exclusively German, a result of the Schleswig-Holstein annexation—recalls the protracted negotiations on the subject of the passage through the natural waterway of the Sound. The Sound dues controversy was chiefly remarkable for the assertion of the right of free passage between the North Sea and the Baltic, successfully put forward by the great powers as against Denmark. It was also noticeable on account of its furnishing an instance of United States interference in strictly European concerns—a refutation of the position taken up by so many writers that the recent projected American participation in the Armenian inquiry constituted an unprecedented move on the part of the United States. As a matter of fact, it was the United States interference that brought to a climax the long-standing controversy with Denmark on the subject of the Sound dues on shipping. As a consequence, the Danish claim to exact from all ships passing through the narrow waters from the Baltic to the North Sea was abandoned on payment of a fixed sum by way of compensation. Here, however, as a result of increased engineering enterprise, we find a waterway between the two seas exclusively under the control of Germany. No one, so far, proposes to assert a right of passage over that waterway, such as the right of navigation through the artificial channel of the Suez Canal. To what is this absence of claim attributable? Is it to the fact that the Baltic Canal is in Europe, and that there is a greater sanctity in European territorial sovereignty? Or is it merely to the fact that Germany is a great power, whereas Turkey and Egypt belong to the decaying rule of the Ottoman? If Schleswig-Holstein had remained under Danish rule, would the new canal have become like Suez, an international possession? A similar series of questions might be propounded in respect to the projected Canal des Deux Mers, between the Bay of Biscay and the Gulf of the Lion, the subject of inquiry by a public commission in France. Like the Baltic Canal, the new intersea passage is advocated on undisguisedly military

grounds—not merely as a means of facilitating commerce. Gibraltar, it is said, will be greatly diminished in importance, so far as French interests are concerned, by the construction of the Canal des Deux Mers. International law as to ship canals is apparently going to have yet another chapter added. Latest reports from Washington state that in the United States Senate it has been publicly announced that negotiations are in progress between the British and United States governments on the subject of the construction of a canal between the Pacific and the Atlantic at Nicaragua. A senator states that the British government have no objection to the work being carried out by the United States government, but the British assent is qualified by a stipulation that the new canal must be subject to the same regulations as to freedom and neutrality as now apply to the Suez Canal. If the British government have really assented to this project, it seems probable that interocean communication will be more likely to be attained than seemed probable a short while ago on the collapse of the Panama undertaking. But it is important to remember that there are British treaty rights involved. The Clayton-Bulwer treaty has never been admitted by the British government to be at an end, notwithstanding the contention to that effect of some American diplomatists. That treaty expressly provides for the British right of using, under conditions guaranteeing order and neutrality, not merely all interocean canals, but interocean railways constructed across the isthmus.—*Law Journal*.

#### "A REASONABLE DOUBT" AND "INTENT TO DEFRAUD."

FROM the charge to the jury by Judge Swan in the Marvin embezzlement case: "The evidence must satisfy the judgment and conscience of the jury of the guilt of the defendant, and that there is no other reasonable explanation. It is not meant that speculative notions, not arising from the proof, due to the ingenuity of counsel, should permit the defendant to escape. What is meant is honest misgiving, generated by the insufficiency of proof. It is not necessary that the evidence should establish the absolute certainty of guilt. It is sufficient if the evidence would lead you to act in the more important affairs of your own lives. If it is such, you cannot be said to have any reasonable doubt. In other words, a reasonable doubt means a doubt for which you can give a reasonable explanation from the proofs in the case. There must be a substantial misgiving from something you can lay your finger on in the evidence—not a mere speculative doubt. The statute makes it an essential ingredient of this offense that it must be done with the intent to injure or defraud the bank. It

is not necessary to show that the defendant had malice or ill-will toward the institution. All that is necessary to establish the intent is to show that the defendant did something which was illegal, and which in the natural course of events would result in loss and injury to the bank. The law presumes that a man intends the natural consequences of his own acts. The law presumes the intent when an act deliberately entered into produces its natural result of injuring and defrauding. If you are satisfied from the evidence beyond a reasonable doubt that the defendant abstracted, embezzled or wrongfully converted the funds of the bank, the intent to defraud is to be presumed."

### Abstracts of Recent Decisions.

**ACCIDENT INSURANCE—ACTION ON POLICY.**—In an action on a policy insuring against death from "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein, the burden of proof is on the defendant to show that death was from one of the excepted causes. (*Anthony v. Mercantile Mut. Acc. Ass'n. [Mass.]*, 38 N. E. Rep. 973.)

**ADVERSE POSSESSION—NOTICE TO CO-TENANT.**—The possession of one tenant, asserting an exclusive right to the land under a deed conveying the land to him by specific description, is adverse to his co-tenants having notice of the deed. (*Puckett v. McDaniel [Tex.]*, 28 S. W. Rep. 360.)

**ANIMALS—VICIOUS DOGS.**—The owner of premises who, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits the agent to retain him, and allow him to run at large on the premises, is liable for any damage he does to a passer-by. (*Harris v. Fisher [N. Car.]*, 20 S. E. Rep. 461.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.**—Where, by the withdrawal of one partner, a new firm is created, which agrees to pay such member for his interest, and assumes the old debts, the new firm may, by a subsequent deed of trust for the benefit of creditors, give preference to the claim of such member and to the creditors of the old firm. (*P. J. Willis & Bro. v. Murphy [Tex.]*, 28 S. W. Rep. 362.)

**ASSIGNMENT OF PATENT—CONSTRUCTION.**—An assignment of a patent "and improvements on the same which may hereafter be made" does not include a patent subsequently granted the assignor for a machine to manufacture by a different process the same goods as were produced by the machine covered by the patent assigned, but which can be

used without any of the machinery included in the earlier patent, and without infringing thereon. (*Allison Bros. Co. v. Allison [N. Y.]*, 38 N. E. Rep. 956.)

**BANKS—CHECKS—REASONABLE TIME FOR PRESENTATION.**—Checks drawn on a Milwaukee bank were indorsed over to plaintiff and delivered to his father, who at once mailed them to plaintiff, at New Richmond, several hundred miles north-east of Milwaukee. Plaintiff delivered them to his bank, who mailed them to its Chicago correspondent—having no Milwaukee correspondent, and they were then sent to Milwaukee. *Held*, that plaintiff did not use due diligence in presenting said checks for payment. (*Gifford v. Hardell [Wis.]*, 68 Fed. Rep. 1064.)

**BANK CHECKS—ESTOPPEL TO DENY.**—In an action by a bank which has paid to another bank a check drawn on the former bank and transferred to the latter by a forged indorsement, it is immaterial whether the signature of the drawer of the check is genuine, since both parties are estopped to deny its genuineness. (*First Nat. Bank v. Northwestern Nat. Bank [Ill.]*, 38 N. E. Rep. 739.)

**CARRIER—INJURY TO LIVE STOCK.**—Where a common carrier unloads a shipment of horses at an intermediate point in the morning, and then reloads them late in the afternoon, but twelve hours before the departure of the train by which they are to be shipped, and against the owner's protest, and the horses are injured while thus waiting, the carrier is liable, though, by its contract, not responsible for unusual or unreasonable delay. (*Alabama & V. Ry. Co. v. Sparks [Miss.]*, 16 South. Rep. 263.)

**CONTRACT—ILLEGALITY—CANCELLATION.**—Where the parties are in *pari delicto*, an executed contract will not, as a general rule, be set aside because of want of authority to make it.—(*Cincinnati H. & D. R. Co. v. McKeen [U. S. C. C. of App.]*, 64 Fed. Rep. 36.)

**CORPORATIONS—ELECTION.**—A director of a corporation cannot sue in equity to hinder or control the election of other agents of the company in the manner prescribed by its charter and by-laws, on any showing as to what such agents may or may not do or intend to do; especially until he has tried the usual methods of relief, and invoked the action of the full board of directors. (*Greenough v. Alabama G. S. R. Co., U. S. C. C. [Ala.]*, 64 Fed. Rep. 22.)

**COURT OF CLAIMS—JURISDICTION—TORTS.**—The Court of Claims has no jurisdiction of claims against the government for mere torts. (*Schillinger v. United States [U. S. C.]*, 15 S. C. Rep. 85.)

**CRIMINAL LAW—HOMICIDE.**—An instruction that former threats against defendant not only cannot excuse defendant, if there was nothing indicating a deadly design against defendant at the time of the killing, but are evidence of special spite and special ill-will on the part of the defendant, is erroneous. (*Thompson v. United States* [U. S. S. C.], 15 S. C. Rep. 78.)

**DECEIT—SALE OF LANDS.**—Neither an agreement to sell land and cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants, which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vendor for false and fraudulent representation as to his title, where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although, in fact, they are both invalid. (*Union Pac Ry. Co. v. Barnes* [U. S. C. C. of App.], 64 Fed. Rep. 80.)

**EVIDENCE—PUBLIC DOCUMENT—CERTIFIED COPY.**—A paper certified by the secretary of state, under his seal, to be a true copy of a description of routes of a trolley line, filed in his office, is not evidence. (*State v. Board of Public Works of City of Camden* [N. J.], 30 Atl. Rep. 581.)

**FEDERAL COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION.**—The United States have a right to appeal to the Circuit Court of Appeals from an adverse judgment in the Circuit Court in a suit by a clerk of a district court to recover his fees under act of March 3, 1887. (*United States v. Morgan* [U. S. C. C. of App.], 64 Fed. Rep. 4.)

**FEDERAL OFFENSE—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE.**—A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act of July 2, 1860, section 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the States, is illegal. (*United States v. Elliott*, U. S. C. C. [Mo.], 64 Fed. Rep. 27.)

**HIGHWAYS—DEDICATION—PRESCRIPTION.**—A railroad company built its station on lots bounded by two streets, and left vacant a strip of land parallel to each street, to be used as an approach to the station. This strip was paved by the company. The railroad officers testified that there was no intention to dedicate this land to the public. *Held*,

that although such land had been so left open for more than twenty years, and had been used by the public as a part of the street, there was neither a common law dedication nor a prescriptive title in the public. (*City of Chicago v. Chicago*, R. I. & P. Ry. Co. [Ill.], 38 N. E. Rep. 768.)

**HUSBAND AND WIFE—DOWER—RELINQUISHMENT.**—An agreement by a husband with his wife to take a specified sum of money named in her will in lieu of his dower interest in her lands, provided that she allow the will to stand as made, is valid as against creditors of the husband whose claims were in judgment prior to the agreement. (*Huffman v. Copeland* [Ind.], 38 N. E. Rep. 861.)

**INJUNCTION.**—A preliminary injunction is properly refused when there exists no reasonable ground for apprehending that the injury against which the injunction is sought will be attempted. (*National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co.* [N. J.], 30 Atl. Rep. 580.)

**LIMITATION OF ACTION—ASSUMPSIT.**—A warranty in a conveyance by another of lands belonging to the United States is broken the instant it is made, and a right of action on it then accrues, against which the statute of limitations at once commences to run. (*Pevey v. Jones* [Miss.], 16 South. Rep. 252.)

**LOST WILL—SUIT TO ESTABLISH.**—In an action to establish a will, allegations of the execution of the will, the intestacy of the testatrix, and the destruction of the will after her death sufficiently show the existence of the will at the death of testatrix. (*Jones v. Casler* [Ind.], 38 N. E. Rep. 812.)

**MASTER AND SERVANT—NEGLIGENCE OF MASTER.**—While plaintiff, a servant, was being carried to his work on a flat car, he was thrown to the ground by the car being suddenly stopped. The car couplings were worn, and the train was stopped by applying the air-brakes to the engine without warning. *Held*, that plaintiff could not recover, as the evidence did not show the car couplings to have been dangerously defective or that the engineer acted negligently. (*Cooper v. Wabash R. Co.* [Ind.], 38 N. E. Rep. 823.)

**MORTGAGE—PRIORITY.**—A trust mortgage to secure bonds thereafter to be issued will stand as a security therefor from the date of its record, and will take precedence over subsequently accruing lien claims. (*Central Trust Co. of New York v. Bartlett* [N. J.], 30 Atl. Rep. 588.)

**NEGLIGENCE—INJURIES TO ADJOINING OWNER.**—One who erects a chimney on his land is liable for injuries to an adjoining owner by its fall, when it is not the result of inevitable accident, or wrongful acts of third persons. (*Cork v. Blossom* [Mass.], 38 N. E. Rep. 945.)

**NEGOTIABLE INSTRUMENTS—LEGAL ASSIGNMENT—RIGHTS OF SURETIES.**—Where a master in chancery takes notes in settlement of deferred payments for land officially sold by him, the fact that he unlawfully assigned the notes, and received the money from the assignee, which he embezzled, does not give the sureties on his official bond, who have been compelled to make good the loss, a right to compel the makers of the notes to pay them a second time, after they have paid them, in good faith, to the assignee. (*Latham v. Foley* [Ill.], 38 N. E. Rep. 557.)

**PARENT AND CHILD—ACTION BY STEPFATHER.**—One who marries a widow, and treats her child as his own, stands in *loco parentis*, and cannot recover for necessities furnished the child while a minor. (*Livingston v. Hammond* [Mass.], 38 N. E. Rep. 968.)

**RAILROAD COMPANY—INJURIES AT CROSSING—EVIDENCE.**—In an action against a railroad company for personal injuries caused by a collision with a train at a crossing, evidence that another wagon crossed just before plaintiff attempted to do so, and that some unknown person told him to "come on," is admissible as *res gestæ* to disprove negligence on his part. (*Austin & N. W. R. Co. v. Duty* [Tex.], 28 S. W. Rep. 463.)

**SPECIFIC PERFORMANCE — SALE OF PATENT RIGHT.**—A contract between plaintiff and defendant provided that defendant was to work for plaintiff in perfecting certain electrical devices, and that when a company should be formed to manufacture them, 50 shares of stock were to be issued to defendant, or a sum of money paid in lieu thereof, in consideration of which defendant agreed to convey to plaintiff his patent rights in the devices. Defendant perfected the machines, and the company was formed, but no stock was issued to defendant, nor was any money paid to him: *Held*, that plaintiff was not entitled to specific performance of the contract to convey the patent rights. (*Electric Secret Service Co. v. Gill Alexander Electric Manuf'g Co.* [Mo.], 28 S. W. Rep. 486.)

**UNITED STATES SUPREME COURT—JURISDICTION.** Where, in an action in a State court, the parties plead and claim rights under statutes of a foreign State, but the defeated party does not plead the construction given such statutes by the courts of such foreign State, or put in evidence the laws of the printed books of the adjudged cases of such State, or prove the common law of such State by the parol evidence of persons learned in that law, as required by the law of the State where the action is tried, such party cannot appeal from the highest court of the latter State to the Supreme Court of the United States on the ground that such court did not give the full faith and credit to the public acts, records, and judicial proceedings of such foreign

State which the Constitution and law of the United States require, and that, therefore, a Federal question is presented. (*Lloyd v. Matthews*, U. S. S. C., 15 S. C. Rep. 70.)

**VENDOR'S LIEN — ENFORCEMENT AGAINST PURCHASER.**—Where a deed of land acknowledges receipt of the full purchase price, though notes were given for a part thereof, the grantor cannot, as against a subsequent purchaser without notice that the price is not all paid, claim a vendor's lien. (*Maryland Land & Permanent Homestead Ass'n of Baltimore County v. Moore* [Md.], 30 Atl. Rep. 605.)

### New Books and New Editions.

**COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS BY SEYMOUR D. THOMPSON, LL. D.**

It is announced that this work will be published very shortly and that the first three volumes will be ready about March 1, 1895. The prospectus contains an analysis of the work, which will contain the following subjects: Organization and Internal Government; Capital Stock and Subscription thereto; Remedies and Procedure to enforce Share Subscriptions; Shares Considered as Property; Liability of Stockholders to Creditors; Directors; Rights and Remedies of Members and Shareholders; Ministerial Officers and Agents; Formal Execution of Corporate Contracts; Notice, Estoppel, Ratification; Franchises, Privileges, and Exemptions; Corporate Powers and the Doctrine of Ultra Vires; Corporate Bonds and Mortgages; Torts and Crimes of Corporations; Insolvent Corporations; Dissolution and Winding Up; Receivers of Corporations; Actions by and Against Corporations; Foreign Corporations. This work will be published by Bancroft-Whitney Company, San Francisco, Cal.

**INCOME TAX LAW OF 1894, BY JOHN A. GLENN, OF PHILADELPHIA, PENN.**

This is a very well arranged treatise of the different sections of the income tax, and by its arrangement should explain many of the difficulties experienced in putting a proper construction on the law. Each section is subdivided so that the articles taxed appear most clearly. The index digest is alphabetically arranged according to the subjects, and the plainness with which it demonstrates the different subjects of the law makes it a most valuable addition to the work. The work is compiled by John A. Glenn, who was formerly corporation tax clerk in the auditor-general's department. It is published by T. & J. W. Johnson & Co., 535 Chestnut street, Philadelphia, Penn. The price is 25 cents.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ON January 21, 1895, the Supreme Court of the United States, Chief Justice Fuller writing the opinion, finally determined the Matter of the United States v. E. C. Knight Company, Spreckels Sugar Refining Company *et al.* The facts of the case have been discussed in the former opinions in the appeals which have been argued before the United States courts and are that the American Sugar Refining Company entered into an agreement with the defendant companies whereby it agreed to buy the property of the defendant companies, issuing as the purchase price stock of the American Sugar Refining Company. It was claimed that this agreement was contrary to the act of Congress July 2, 1890, which was an act to protect trade and commerce against unlawful restraints and monopolies, and the bill prayed for a cancellation of the alleged illegal agreement and injunction restraining the defendants from entering into said agreement. The opinion is most interesting, as it thoroughly discusses what is a monopoly, and is as follows:

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890. The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for

general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested. In commenting upon the statute, 21 James I, c. 3, at the commencement of chapter 85 of the third institute, entitled 'Against Monopolists, Propounders, and Projectors,' Lord Coke, in language often quoted said:

"It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamental laws of this Kingdome. And therefore it is necessary to define what a monopoly is. A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindred in their lawful trade."

"Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which 'one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure,' whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress is not confined to the common law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared



to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life. In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

"The fundamental question is whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted

from the community, is subject to regulation by State legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse.' It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. (*Gibbons v. Ogden*, 9 Wheat. 1210; *Brown v. Maryland*, 12 id. 419, 448; *The License Cases*, 5 How. 599; *Mobile v. Kimball*, 102 U. S. 691; *Bowman v. Railway Co.*, 125 id. 465; *Leisy v. Hardin*, 135 id. 100; *In re Rahrer*, 140 id. 545, 555.)

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a

secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however pressing and emergent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, the articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in *Coe v. Erroll* (116 U. S. 517), in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to

the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said: 'Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. \* \* \* There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination.'

"And again, in *Kidd v. Pearson* (128 U. S. 1, 20, 24,) where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: 'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation.'

\* \* \* If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power

to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management. \* \* \* The demands of such supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, would only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments, and more provocative

of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine.' And see *Veazie v. Moor*, 14 How. 568, 574.

"In *Gibbons v. Ogden*, *Brown v. Maryland*, and other cases often cited, the State laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd v. Pearson* the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and State legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

"Contracts, combinations or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy. Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining and other productive industries, whose ultimate result may affect internal commerce, comparatively little of business operations and affairs would be left for State control. It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanc-

tioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers, yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce. The Circuit Court declined, upon the pleadings

and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree."

In many of the Northern States, where the harvesting of ice is carried on and the property in ice is so valuable, it may be of value and interest to lawyers to read an opinion which has recently been given by Judge Herrick, of Albany, in relation to this subject. The subject was very fully discussed in an article which appeared in this journal (48 Alb. L. J. 504), written by Arthur Babbitt, of Beloit, Wis., in which the author dealt with the nature of property in ice, rights in and of, and the remedy and measure of damages. The opinion of Judge Herrick was written on the vacation of an injunction granted to the plaintiff restraining defendant from harvesting or cutting or interfering with the ice which had been first marked out by the plaintiff for his appropriation, and is as follows:

"The granting of injunctions preventing the cutting of ice or interfering with ice in the Hudson river, under chapter 388 of Laws of 1879, has been common. The Hudson river, at the point in question, is a navigable stream, and under the law of this State riparian owners have no right in the bed of such streams. And I think it may be regarded as the law of this State that the riparian owners upon navigable streams have no title to the ice which forms on such streams as an incident of their ownership of the bank; but that the ice belongs to the first appropriator. The Legislature of the State, by chapter 388 of the Laws of 1879, has conferred upon the owners or occupants of ice-houses and premises upon the banks of the Hudson river proprietary rights in the ice to the center of the channel thereof, upon such owners or occupants complying with certain conditions therein set forth; and the plaintiff seeks to bring himself within such statute; it is a statutory right that he is seeking to enforce. The statute, after providing as to who may exercise this right of proprietorship, provides as follows: 'Any person trespassing upon or taking the same for commercial purposes shall be liable to the owner or occupant for the value of the ice so taken or for any injury done to the same.' It thus provides a remedy which he shall have for a violation of his rights; the remedy it provides

is one at law, 'for the value of the ice so taken or for any injury done to the same.' Such a liability is one to be enforced by an action for damages, not by an action in equity. It is a rule of construction of statutes, when rights are conferred by statute, and remedies provided therein for their protection, that such remedies are exclusive. (*Jessup v. Carnegie*, 80 N. Y. 441; *Matter of N. Y., L. E. & W. R. Co.*, 110 id. 374; *City of Rochester v. Campbell*, 123 id. 405.) I do not undertake to say at this time that when the statutory remedy will afford no redress, or when the defendant is pecuniarily irresponsible, an injunction may not be granted. It is not necessary to decide that question, for there is no claim here that the defendant is not pecuniarily responsible and no allegation of irreparable damages. It was claimed upon the argument, that in addition to the rights under the statute, the plaintiff was also entitled to be protected in his possession of the ice under his rights at common law as the first appropriator of the ice. Without stopping to consider the question as to whether he has any such rights to be protected, but assuming that he has, the question arises whether he is, under such circumstances, entitled to protection by injunction, the general rule being that an injunction will not be granted when the plaintiff has an adequate remedy at law. That the owner of ice can recover damages against one wrongfully appropriating it, has been established in this department in the case of *Mould v. Van Rensselaer* (77 Hun, 553), as well as in other reported cases in this and other States. (See *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229; S. C., 38 Am. Rep. 246.) The difficulty to establishing by proof the amount of the plaintiff's damages in any case where his property or rights have been interfered with, I believe, has never been taken into consideration by the courts in determining whether an injunction should or should not be granted. The violation of some right of a party which is not susceptible of being measured by damages, which has no intrinsic value, but is sentimental in its nature, as the desecration of a family graveyard or the appropriation of family heirlooms, and rights of that nature, not commercial, and not measurable by money, may appropriately be restrained by injunction. But the right in question here is purely of a com-

mercial nature, and the injury to the owner thereof can be compensated by money. Without discussing the other questions raised in the case, I think, for the reasons above stated, that the injunction should be vacated."

The designation of Judge Joseph F. Barnard, of the Second District, to sit in the Supreme Court at Special Term, raises some interesting questions with regard to the scope and meaning of the revised Constitution. Section twelve, after providing that no compensation shall be allowed to judges hereafter elected, whose term of office is abridged by reason of arriving at the age of seventy years, provides: "But any such judge or justice may, with his consent, be assigned by the governor, from time to time, to any duty in the Supreme Court, while his compensation is so continued." How far and to what extent does a designation by the governor of a judge who has passed the Constitutional limit, confer the powers of a justice of the Supreme Court? The words "any duty in the Supreme Court" seems to be quite general. From it, naturally flows the inquiry, when a judge is assigned to Special Term duty, does it include power to act at chambers? Does "Special Term duty" include the power to hear and decide equity causes or other actions which might be brought before him? May he hold a trial term for the hearing of equity causes, or are his duties simply to sit for the hearing of motions? These questions may be of very serious importance since the exercise of any power or authority outside the jurisdiction actually conferred by the appointment under the Constitution will be illegal and void. How far and to what extent can Judge Barnard discharge the duties of a justice of the Supreme Court other than those strictly appertaining to the duties of a justice holding Special Term? This is one of the very numerous questions arising with reference to the construction of the new Constitution, and we should be glad to have the views of the readers of the JOURNAL upon the legal aspects of the matter.

In *Danahy v. National Bank of Denison*, decided in the U. S. Cir. Ct. of Appeals, it was decided that Federal courts have no jurisdiction of an action by a national bank on a note, where the record does not show diverse citizenship.

## HYPNOTIC INFLUENCE IN CRIMINAL CASES.

BY H. M. BANNISTER, M. D., CHICAGO.

THE recent acquittal of a self-confessed homicide in Kansas on the plea of hypnotic influence, and the conviction by the same jury of his alleged hypnotizer, the raising the same defense in several other noted cases in different States, and its rapid adoption in other cases as reported in the daily press, all show that there is likely to be a comparatively new element frequently introduced into criminal practice in the immediate future. It is not absolutely new, since the same plea has been utilized on several occasions in Europe and its dependencies, and it is only very recently that its successful employment in a case not involving life, in Bavaria, has been reported. The precedents have, therefore, been set, and there is little doubt but that the plea will be brought up rather frequently for at least a certain time in the immediate future.

The subject of hypnotism is one in regard to which there is a certain difference of opinion among physicians, and this, by itself, will tend to increase its popularity. The divergencies of opinion, moreover, apply more or less directly to the medico-legal questions involved, more especially to the possibility of crime by what is called "post-hypnotic suggestion."

There is no doubt but that criminal acts may be committed by persons in a condition of somnambulism, and the resemblance of the hypnotic trance condition to somnambulism is very close in many respects, so much so that it may be considered as a sort of induced or artificially-provoked somnambulism. It may perhaps be admitted as a possibility, therefore, that crimes may be provoked in the hypnotic subject in the actual condition of trance, though in many cases, and probably in the vast majority, this would be impossible. Indeed, it is denied by some good authorities that this could occur with an individual of good moral tendencies, with no predisposition or inclination to criminality. The higher moral inhibitions existing in their normal intensity in the waking state would in all probability still be somewhat active, even in the hypnotic condition. The experiments reported that would seem to indicate the contrary are not conclusive, as they do not realize the actual conditions. The subject has a certain consciousness that the part he is acting is not real, and where this has been absent it has been found that the criminal suggestions fail. It would be a very bold and criminal hypnotizer who would suggest an actual crime if he thought there was any danger of its being carried out. Of course any actual criminal inclination on the part of the subject would alter the case, and would also materially affect the question of his responsibility.

Simply immoral or improper acts might also be done under suggestion by those who would refuse to commit actual crimes. Any strong natural propensity — the sexual impulse, for example — might be stimulated, and thus sexual improprieties or crimes might be more likely to be committed or submitted to than other forms of misdeeds. Gilles de la Tourette had, in 1890, collected the reports of five cases of rape committed on persons in the hypnotic state, and other cases have probably since been reported. There is more danger of hypnotic subjects suffering from crimes against the person than there is of their actually committing them.

It is not probable that the hypnotic trance condition will often be alleged in the plea of hypnotic influence as a defense for crime. It would make the operator an actual participant, and he might as well be guilty of the deed himself. What is called "post-hypnotic suggestion" is the plea, as we understand, in the cases referred to in the beginning of this article; the suggestion is given to the subject in the trance state, and at a certain time, after he has been apparently long in his normal waking state, he is irresistibly impelled to commit the criminal act. It is a common opinion with uninstructed persons, by whom hypnotism is supposed to be a mysterious force emanating from the operator and subject to his will, that he has simply to wish his victim to do this or that act to have it done. This, it ought to be needless to say, is an error; in every case the suggestion must be given or implied by word or act. Whether the suggestion is direct and immediate or applies to the commission of the acts at a future time, it is the same; it must always precede the performance.

According to Bernheim and the other leaders of what is called the Nancy school of hypnotists, it is possible to so make the suggestions that the actor may have no recollection of it or of the act. The dangerous consequences of this fact, if it is a fact, will be obvious to any one. A man might thus suggest a crime and secure himself absolutely from detection, or at least make it very difficult to trace to him the responsibility. Those who hold this view, however, are comparatively few in number; the balance of scientific authority is decidedly opposed to them. Some even of the followers of Bernheim, especially in this country, are decidedly opposed to his views in this regard. So far, moreover, no such instance has ever been proven, and experiments that have been made do not favor its probability.

It is a curious fact that the subjects of post-hypnotic suggestion will sometimes give specious reasons for the acts they perform, a phenomenon which I believe can be best accounted for by assuming that they have a recognition of the absurdity, and desire to explain it away. Post-hypnotic suggestion

is really auto-suggestion. The subject has a belief that he must perform the act, and therefore does it. If this belief is disturbed the act is not performed, and this has been well shown by the fact that good hypnotic subjects can be spoiled for an exhibitor's purposes by merely explaining to them the medical theory of the condition. In a vast majority of cases, if not in all, the efficiency of post-hypnotic suggestion depends entirely upon the belief of the subject in some mysterious power exercised over him by the operator. If moral impulses are strong, there is very little probability of its being effective for evil; it is, at its best, not equal to the profounder sentiments of our nature.

As a plea in criminal cases, it should be especially distrusted, and the benefit of any reasonable doubt ought to be given to the party accused of instigating the crime. This would necessarily exclude the plea, since reasonable doubt in one case naturally destroys it in the other, and the most it could benefit a confessed criminal would be to raise a doubt as to his responsibility. The Kansas jury exactly reversed the rational procedure, and the verdict was therefore justly set aside in the case of the man convicted. The greatest danger of the plea of hypnotism in criminal cases, if it is to become a popular or frequent one, is that of false accusation, and the escape of an occasional criminal is an unimportant miscarriage of justice when compared to that of the conviction of an innocent individual.

The value of hypnotism for purposes of obtaining testimony or ascertaining the truth is also very dubious. So far as it has been tested by competent observers, the results are negative, and any confessions or admissions made by hypnotized persons ought to be legally excluded. When an individual is fully in the hypnotic condition he can be made to say anything, and even honest questioning may act as false suggestion. It is easy to see, moreover, what would be the possibilities of post-hypnotic suggestion in this regard.

I have endeavored to give in the foregoing the substance of the best medical opinion on the medico-legal bearings of hypnotism. It may be admitted as possible that criminal acts may be successfully suggested in the condition of hypnotic trance, though this is denied absolutely by many good authorities, in case of persons with proper tendencies and impulses. It may be considered as extremely improbable in such cases.

The successful post-hypnotic suggestion of crime is still more dubious, and is fully believed in by but a comparatively small proportion of those who have written upon and considered the subject. As a plea in criminal cases, post-hypnotic suggestions should always be distrusted and the benefit of any doubt should be given to the party accused of

making the suggestion rather than to an admitted transgressor. Reasonable doubts in these two cases are mutually exclusive. One of the greatest dangers of the admission of this plea is that of false accusation of innocent individuals.

The testimony of persons in the hypnotic state is vitiated by their condition, and should by itself alone have no legal value.

Susceptibility to suggestion, even to the extent of affecting bodily functions, does not necessarily imply the hypnotic condition, though the difference is to some extent one of degree only. This must be remembered in considering or estimating the value of testimony; otherwise we would have to, more or less, reject all testimony except expert testimony, as was claimed by the late Dr. Beard in a noteworthy article on this subject. Every one is more or less susceptible to suggestion, but not every one is hypnotizable. The fully developed hypnotic state, implying a marked disturbance of consciousness and the personality is an abnormal one, and may have serious physical results on the subject. Conditions distantly related to or approaching it, but within physiological limits that may be manifested by any one, ought not to be called hypnotism, or at least for legal purposes should be clearly distinguished from it. — *Chicago Legal News*.

#### THE BUILDERS OF OUR LAW DURING QUEEN VICTORIA'S REIGN.

LORD BLACKBURN.

DR. JOHNSON would not allow Scotland to derive any credit from Lord Mansfield, for he was educated in England. "Much," he said to Boswell, "may be done with a Scotchman if he be caught young." Blackburn, like Lord Mansfield, may be said to have been caught young; that is to say, he was sent to school to the famous seat of learning on the banks of "silver streaming" Thames—

Where grateful science still adores  
Her holy Henry's shade.

Eton refined the Gaelic barbarism of Selkirkshire, his native county, and Cambridge completed the civilizing process. The intelligent foreigner in the person of a certain Baron X, has lately been informing us that most of the young men at Cambridge are *jeunes farceurs* given up to boating, cricket, tandem-driving, and so on, with a sprinkling of serious students whom he reckons at about fifty. Blackburn was certainly no *jeunes farceurs* either at Cambridge or in after life. He studied hard, and he emerged a high wrangler. It would make, by the way, an interesting thesis whether mathematics or scholarship form the best training for success in the law. Mathematics seem to have the greater affinity for law. They discipline the mind, they

teach concentration, they form habits of close reasoning, and yet, when we look at the names of the present and recent occupants of the bench, we find far more distinguished as scholars than as mathematicians. On the one side we have Lord Justice Bowen, and Chief Justice Coleridge, and Lord Chancellor Selborne, and Lords Davey and Macnaghten, and Justices Denman, and Kennedy, and Wright, and Chitty, and Reid, A. G., and, on the other side—trained in mathematics—Justices Romer and Stirling and Lord Justice Rigby—eminent judges, but numerically few.

Blackburn joined the middle temple, the working man's inn, and was called one year after her present gracious majesty's accession. He went the Northern Circuit, and attended the Lancashire Sessions, and labored in obscurity. Those early years between a man's call and his emerging, with what hopes and fears, toils and triumphs, and disappointments are they fraught. How little we know of what passes within

Each in its hidden sphere of joy and woe,  
Our hermit spirits dwell or roam apart.

Blackburn spent his period of probation in that exercise which makes the best lawyers—law reporting. Eight portly volumes of Ellis and Blackburn attest his industry, his accuracy, and his learning, and greatly are Lord Campbell's judgments indebted to him for their merits. Few ever thought that the young Scotchman, who day by day seated himself in a back row of the old Court of Queen's Bench at Westminster—his habit, as Serjeant Ballantine tells us—was to become one of the greatest judicial lights of the nineteenth century. By degrees he acquired some practice in mercantile cases and other business of the best kind, and in arguments *in banc*—the true test of a lawyer—the judges owned his skill; but he was still a man unknown to fame. No attorney would have chosen him to conduct a cause which required adroit advocacy or claptrap eloquence. He could not brave it or bounce it in the Buzfuz vien. His circuit knew him not.

Great, then, was the surprise when it was announced on Erle's promotion to the chief justiceship of the Common Pleas that Mr. Colin Blackburn was the new judge. Campbell, who was then the new chancellor, enters in his diary, June 1859: "I have already got into great disgrace by disposing of my judicial patronage on the principle, 'detur digniori.' Having occasion for a new judge, to succeed Erle, made chief justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown, whereas several Whig queen's counsel, M. P.'s, were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the *Times* and other newspapers, but

Lyndhurst has defended me gallantly in the House of Lords. 'Well abused,' indeed. This was the sort of thing. Everybody has been going about town asking his neighbor, 'Who is Mr. Colin Blackburn?' The very ushers in the courts shake their heads and tell you they 'never heard of such a party.' \* \* \* His legal claims to this appointment stand at a minimum. \* \* \* The only reason which can be assigned for this strange freak of the chancellor is that the new *puisse* judge is a Scotchman. \* \* \* A national job is worse than a family job," and so on. But Lyndhurst silenced the cavillers. "I wish," he said, "to call your lordships' attention to a recent appointment to the judicial bench—the appointment of Mr. Blackburn to a *puisse* judgeship in the Court of Queen's Bench. I have been asked who is Mr. Blackburn, and a journal who takes us all to task by turns has asked, somewhat indignantly, 'Who is Mr. Blackburn?' 'Who is Mr. Blackburn?' I take leave to answer that he is a very learned person, a very sound lawyer, an admirable arguer of a law case, and eminently fitted for a seat on the bench. \* \* \*" And the lord chancellor in replying said, "I know nothing of Mr. Blackburn except what I know from having seen him practise in the courts over which I presided. I have no private intimacy, and I declare on my word of honor I don't know of what side he is in politics; but I have known him as a sound, good, and able lawyer, one of the oldest in Westminster Hall."

Lord Wensleydale and Lord Cranworth swelled the chorus of praise, Lord Cranworth adding that neither Tenterden nor Willes had a silk gown when they were raised to the bench. To see modest worth recognized and rewarded in this way to the confusion of blatant ambition is truly refreshing.

No one was more surprised at the appointment than Blackburn himself. When Lord Campbell sent for him and made him the offer, Blackburn thought it was a County Court judgeship which was being offered him, and he had made up his mind to decline.

He soon lived down the detraction of envious rivals, and every year he sat on the bench raised his reputation higher. It was said jestingly that Chief Justice Cockburn learnt his law from sitting with Blackburn, and not only was he (Blackburn) a most learned judge, but he was a most patient and painstaking one. He had the "hard-headed logic," as Lord Russell, of Killowen, put it, of his race, and if he had also something of the Scotchman's dry manner and uncongeniality, it was only as it is with the Scotch, on the surface. He soon became as good at *nisi prius* as in *banc*, "and there was no judge before whom I," says Ballantine, "would sooner have practiced." There is an anecdote told of him which illustrates what may be called his



judicial conscientiousness. He was trying, not long after his elevation to the bench, an action in which damages were sought for an injury to the plaintiff, which had caused him the loss of an eye. The plaintiff's counsel dwelt forcibly on the seriousness of the injury, as blighting the plaintiff's whole future career. "I have lost the sight of an eye, Mr. X.," said the judge, interposing, "and it has not blighted my career, as you see." The jury were much impressed with the judge's remark, and the damages they awarded were trifling. Blackburn was conscience stricken. He thought it over, and the next day he inclosed the plaintiff a cheque for £50.

This judicial scrupulousness was not confined to his own administration of justice. It made him jealous for the law in the mouths of others; witness his brush with Mr. Edmond Beales, the learned judge of the Cambridge County Court. This gentleman had, it may be remembered, encouraged a mob to pull down the Hyde Park railings, and for this spirited vindication of the rights of the people he had been rewarded with a County Court judgeship. One of his directions to a jury, in a case of *Taylor v. Great Western Railway*, came before Mr. Justice Blackburn, and Mr. Justice Blackburn did not scruple to observe that if the learned County Court judge really did rule so, and "is in the habit of making such rulings, I own I think the lord chancellor should be made aware of it." Mr. Beales naturally did not relish being sent up to the headmaster like this for punishment. He received the remarks "with pain and indignation;" but he was much comforted, and his equanimity restored not long afterward, by an address of confidence from the local practitioners.

There was a judge once who is reported to have exclaimed, "Really I cannot have all this noise in court. I have been obliged to decide the last three cases without hearing any of the evidence." Blackburn was not the sort of judge to decide in this way, and it led to an unpleasant fracas on one occasion between him and the high sheriff of Surrey. The scene was the Assize Court at Guildford, a most inconvenient building; at all events, Mr. Justice Blackburn could not hear the witnesses, and he accordingly ordered a portion of the building to be closed against the public. Mr. Evelyn protested, published a placard declaring the proceeding to be contrary to law, ordered the building to be opened, and prohibited his officers from helping to keep the public out. For this Mr. Evelyn was fined £500, and Lord Chief Justice Cockburn, the senior judge, had an opportunity, in inflicting the fine, of delivering an extremely impressive address—quite in his best style—in which he characterized Mr. Evelyn's conduct as "a painfully contumacious contempt of

the court." It is worth recording—showing how history repeats itself—that Evelyn, in his celebrated diary, mentions his father being high sheriff for Surrey and Sussex some 200 years earlier, and his state on the occasion. He had 116 servants in liveries, everyone liveried in green satin doublets, and he too says his son was "most unjustly and spitefully molested by that jeering Judge Richardson for repreiving the execution of a woman to gratify my L. of Lindsey, then admiral; but out of this he emerged with as much honor as trouble." Not so his descendant. ●

There is a merry tale told of S. T. Coleridge. The philosopher-poet had the careless habits of his tribe, and in particular where his waistcoat and pantaloons should have met, a gap of white linen would disclose itself, of which he was often admonished by his tender spouse. Seated at dinner one day by a lady, his eye caught a glimpse of white at his side, and straightway he tucked away the unseemly apparition. Still it appeared, and still he tucked, until at last the philosopher discovered, as the ladies rose to leave the table, that he had tucked in the greater part of his *parti's* muslin dress. "Odds, blushes, and confusion," as Sir Lucius O'Trigger would say. We are reminded of this story by reading an incident recorded by Serjeant Ballantine of Mr. Justice Blackburn, at the trial of the Wallingford election petition. "It was," says the Serjeant, "a ladies' battle, and the warmth of their advocacy was made so apparent upon the first day that on the second they were divided and placed upon opposite sides of the court. Mr. Justice Blackburn had taken his seat and composed himself for the performance of his duties, when a lady, having arrived late, had to pass him to get to her party. Now his lordship's legs being no unimportant portion of his body, her flounces became seriously entangled in her attempted passage, and for the moment the judge was lost sight of by the audience in front, whilst the lady presented the appearance of sitting on his knee. The judge's voice was heard in no musical tones, and, when relieved from his embarrassment, he declared in emphatic language 'that he had never been in such a position before;' and this I am disposed to believe."

Blackburn was not one like our first parent Adam, "fondly overcome with female charms;" rather he resembled that eminent lawyer, of whom Serjeant Robinson tells us, who said that "he was born a bachelor, and in that persuasion he intended to remain." At all events, Mr. Justice Blackburn never married. In 1886, he was appointed on the commission to digest the criminal law. The following year, 1887, he resigned—a victim to that sad disease which often attacks the strongest brains.

At the time of his retirement Lord Blackburn was

unquestionably esteemed the highest exponent of the principles of our common law. It is impossible to do anything like justice to his luminous exposition of those principles in judgments which are spread over a judicial career of close on thirty years, but we may take a few samples.

*Pharmaceutical Society v. London and Provincial Supply Association*, 43 L. T. Rep. 389; 5 App. Cas. 857, was a case in which the Pharmaceutical Society made a strenuous attempt to squash the stores as vendors of drugs. To do so they had to prove that the association was a "person" within the Pharmacy Act. Of course, a corporation may be a "person," but nobody in common talk, as Lord Blackburn said, "if he were asked who was the richest person in England, would say the London and North-Western Railway Company. The thing is absurd." That metaphysical entity, a corporation, is indeed a puzzling thing, but Lord Blackburn was not for lightening its responsibility. "A corporation," he says, "cannot in one sense commit a crime and cannot be imprisoned; a corporation cannot be hanged or put to death, but a corporation may be fined, and a corporation may pay damages. I totally dissent from what Bramwell, L. J., is reported to have said, that a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action brought against it for libel, or that a corporation which commits a nuisance could not be convicted of the nuisance." This is an important utterance in these days, when more than half the business of life is carried on by limited companies. *Debenham v. Mellon*, 43 L. T. Rep. 678; 6 App. Cas. 24, is another case in which he lays down very lucidly the position of tradesmen dealing with a married woman. To put it shortly, they have no right to presume from the fact of a wife living with her husband that she has authority to pledge his credit. They must, to be safe, get an actual authority. Of course, the husband may have held the wife out as authorized to pledge his credit, and then the case is different. Notice of revocation of authority must be given.

*Orr-Ewing v. Colquhoun*, 2 App. Cas. 839, is important to riparian proprietors. Lord Blackburn there laid it down that the owner of the banks of a non-navigable river may without any illegality build a milldam across the stream within his own property and divert the water into a mill lade without asking the leave of the proprietors above him, provided he does not obstruct the water from flowing as freely as was its wont, and without asking the leave of those proprietors below him, if he takes care to restore the water to its natural course before it enters their land.

Estoppels, says Lord Bramwell, are odious; but

Lord Blackburn takes a juster view. "Sometimes," he says (*Burkinshaw v. Nicolls*, 39 L. T. Rep. 808; 3 App. Cas. 1004, 1026), "there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense; but the moment this doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Other noticeable decisions of his are, that the marriage of a man with the daughter of the half-sister of his deceased wife is null and void (*Reg. v. Inhabitants of Brighton*, 1 B. & S. 447)—to such extravagant lengths is this strange prohibition carried; that a public document means a document which is made for the purpose of the public making use of it (*Sturle v. Freccia*, 43 L. T. Rep. 209; 5 App. Cas. 623); that a statutory power to build a hospital does not give a right to build it so as to be a public nuisance (*Hampstead Small Pox Hospital case*, 43 L. T. Rep. 225; 6 App. Cas. 193); that a description of a horse as "a clever hack and good hunter" is not an implied warranty of soundness (*Cleobury v. Tattersall*, 3 Sol. J. 715); that though a loss by a woman of the good opinion of her neighbors, *consortium amicorum*, is no special damage sufficient to support an action for slander of chastity, loss of the voluntary hospitality of friends is (*Davies v. Solomon*, 25 L. T. Rep. 799; L. R., 7 Q. B. 112)—refined distinctions now rendered happily obsolete by the recent act (54 & 55 Vict. chap. 51); that partridges reared under a hen are the subject of larceny; that the words "it shall be lawful" give a discretion unless intended to effectuate a right (*Julius v. Bishop of Oxford*, 42 L. T. Rep. 546; 5 App. Cas. 214). In the much vexed case of *Angus v. Dalton* (6 App. Cas. 740) he delivered the most elaborate of all the many elaborate judgments given. *Reg. v. Hickin* (11 Cox C. C. 19), "The Confessional Unmasked," was another *cause célèbre* which came before him; so was *Reg. v. Governor Eyre* (18 L. T. Rep. 511), a case in which party feeling ran very high, one side regarding Gordon as an injured saint, the other as a "pestilent firebrand."

The following remarks in *Orr-Ewing v. Colquhoun* (2 App. Cas. 839, 863) illustrate his good sense: "I am not inclined," he says, "to reject the evidence

of practical men as to a fact merely because they give a bad theoretical reason for it and I am not able to furnish the right one. I have been told that some years ago the pilots in the English Channel uniformly asserted that there was a current setting toward the French shore, and, to allow for that supposed current, they always steered to the north of the course which by the chart and compass they should have held. It was ascertained that there was no such current, and some ships were lost because their commanders disregarded the rule of the pilots because their reason for it was wrong. On further investigation it was found that the deflexion of an unadjusted compass from the action of the iron in most ships was such as make it right when the ship's head lay either east or west to steer to the north of the course by chart as indicated by that compass. The pilots were quite right in the fact which they had observed, though quite wrong in their reason." The good old man who was examined by Sir Thomas More thought that the building of Tenterden Steeple was the cause of the Goodwin Sands, but the Goodwin Sands are a fact all the same.—*Law Times*.

#### THE LAW OF EXTRADITION.

ONE of the best arguments in favor of some national legislation to bring the crime of train robbing and wrecking within the Federal jurisdiction was the trial for the extradition of Morganfield, the leader of the gang that robbed the Adams Express in Virginia—"within the shadow of the Capitol"—only a few months ago, which has just taken place in Cincinnati courts.

Morganfield is, from personal appearances, a very desperate character. Although he has been identified by a link of indisputable evidence as one of the men who held up the train, he maintained a stolid indifference, and even laughed at some of the evidence brought forth, as though it would have no effect. It was rather a dramatic scene when he was brought into Judge M. F. Wilson's court. As will be recalled, he was captured through an accident. Smart criminal that he is, he had an idea that the authorities would look for him upon the arrival of the trains at the depots, so he jumped from the car when a short distance from the city, but, being early dawn, he made a miscalculation, and, instead of landing on level ground, found himself dumped into a ditch twenty feet below the track. When found next day with a broken leg, the fact that several thousand dollars were on his person aroused suspicion. Further inquiry developed that he was the train robber. He was placed under arrest, and for two months has, by reason of his injured limb, been obliged to remain a hospital prisoner.

As stated, Morganfield is a desperate man, and he has found means to employ good legal talent to resort to every technicality of the law to avoid his extradition to the authorities of Virginia. There have been a number of trials, and the object of his counsel is clearly that of delay, and we see now the extraordinary spectacle of a case, where the identity of the prisoner is clearly established, taken from court to court, and thus defeating the ends of justice. The counsel's last effort was an application for a writ of *habeas corpus* before Judge M. F. Wilson, of the Common Pleas Court of Hamilton county, one of the most eminent jurists versed in criminal law, and he held that Morganfield should be surrendered to the agent of the State of Virginia. An appeal has been taken to the next higher court, but the ultimate result is definitely settled, and that is that Morganfield will be sent back to Virginia. It is in one sense gratifying that this question of jurisdiction has been raised, because it demonstrates that, at the present time, train robbers center their operations at or near State lines, so that they can escape to the adjoining State, and thus avoid immediate arrest or conflict with the officers of the State in which they operated. In this way many of the robbers have escaped punishment, while awaiting the slow routine of requisition papers or other steps which are the necessary preliminaries to an arrest.

The logic of these proceedings is that it is imperative to enact, as speedily as possible, the legislation now pending before Congress, making the crimes of train robbing and wrecking a national offense, to be tried in the United States courts, and calling into service United States marshals, the secret service, and, if necessary, the United States army—and above all of having the effect of inspiring that natural fear which all criminals have of the stern dispensation of justice in the Federal courts.

The legal fight regarding the extradition of Morganfield was stirring, and has attracted so much interest and the points brought forth by the defense were of such a nature as to justify publication in full of the decision ordering the surrender of the prisoner to the State of Virginia.

The first case that I will decide will be the one resting on the arrest of the prisoner on a warrant of extradition. In that case the only points for the court to determine are as to the regularity of the papers and the identity of the prisoner; *i. e.*, is the prisoner the person who is indicted in Stafford county, the one whom the State of Virginia demands as a fugitive from justice? The State of Ohio requires that the demand shall be accompanied by an affidavit that the demand is not made for the purpose of collecting money. That has been complied with in this case by the prosecuting attorney of Stafford county with an affidavit to that effect.

The law also requires that there shall be sworn affidavits that the man is a fugitive from justice, and that also has been complied with by the prosecuting attorney. The law furthermore requires that the demand shall be accompanied by a copy of the indictment, certifying to its authenticity, by the governor of the demanding State. The papers in the case show that the governor has certified that the copy of the indictment, hereto attached, is authentic. In addition to that, a copy of the indictment is certified to by the judge and clerk of the court of Stafford county in accordance with the act of Congress.

One objection made to the indictment is that it does not appear that it was returned by the grand jury, but the certificate of the clerk of the County Court recites that the copy to which he refers is that of an indictment returned by the grand jury. Another objection made is that the indictment does not appear to be certified to as a true bill by the foreman of the grand jury. On the back of the copy the words "A true bill," signed by the foreman, will be found; but, in addition to that, the prosecuting attorney of Stafford county has called my attention to the case 21 Grattan (Price v. The Commonwealth) page 846, where the Court of Appeals of Virginia decides that it was not necessary that the indictment should be signed by the foreman of the grand jury.

It is also objected that the copy does not show that the indictment was signed by the prosecuting attorney of Stafford county. The prosecuting attorney has again called my attention to a case in 86 Virginia (Brown v. The Commonwealth) page 466, in which the Court of Appeals decides that it was not necessary for an indictment to be signed by the prosecuting attorney. The papers, therefore, are regular and in proper form.

Now as to the identity of the prisoner there can be no doubt. (The court here quoted at length the testimony in the proceedings establishing the fact of identity.)

As to the second case—that of *habeas corpus*. The return of the sheriff shows that he holds the prisoner by virtue of an extradition warrant issued by the governor of the State of Ohio, and a copy of which warrant is annexed to the return. This makes a *prima facie* case in favor of the lawfulness of the detention of the prisoner. To overcome this *prima facie* case the prisoner has offered in evidence a record which endeavors to show certain points which he claims *res judicata* as to his arrest.

It appears that previous to the serving of the extradition warrant an affidavit was filed against the prisoner in the Police Court of Cincinnati, charging him with being a fugitive from justice. The case was continued in order that the authorities of the States of Virginia might be notified that Morgan-

field was being held here. Afterward a warrant of *habeas corpus* was obtained, and upon a hearing of same, the prisoner was discharged. It is claimed by the prisoner's counsel that these facts are *res judicata*, and that he cannot, therefore, be rearrested, and must be discharged.

Whatever the law of *res judicata* might be in case of *habeas corpus*, it does not apply to extradition proceedings. The one question involved in those proceedings is as to the regularity of the indictment and the identity of the prisoner. If the prisoner is once discharged because the demand is irregular, that does not prevent the demand being made in proper form; and if once discharged because his identity is not sufficiently established, that does not prevent his rearrest and the introduction of further proof as to his identity.

That a plea of *res judicata* does not apply to proceedings of this kind is decided in 22 Florida, page 36. This same point was also virtually decided in the case of John Larney, otherwise called "Mollie Matches," who was arrested as a fugitive from justice from the State of Illinois, and the courts of Ohio discharged the prisoner on the ground that the extradition warrant issued by the governor of Ohio was invalid because it had been signed by the governor in blank. Afterward another extradition warrant was properly issued. On the hearing of a writ of *habeas corpus*, Judge Harmon, of the Superior Court of Cincinnati, held that the former proceedings were not a bar to the rearrest, and that the former discharge could not be pleaded in bar, and was not in the nature of *res judicata*. The case was taken to the Supreme Court of Ohio, and the decision of Judge Harmon was confirmed.

But it is claimed that by section 5747 of the Revised Statutes of Ohio that a prisoner who was set at liberty upon a writ shall not again be imprisoned for the same offense unless by the legal order or process of the court wherein he is bound by recognition to appear, or other court having jurisdiction of the case; or the offense prevents a rearrest of the prisoner. This section does not apply, however, in this case because the prisoner was not, by the affidavit filed against him in the Police Court, one who is now charged with committing any offense. The words "committing offense" evidently intending committing any offense in the State of Ohio.

The writ of *habeas corpus* will be dismissed, and the prisoner will be remanded to the custody of the sheriff to be delivered in accordance with the governor's warrant to the agent of the State of Virginia.—*Express Gazette*.

A paper certified by the secretary of state, under his seal, to be a true copy of a description of routes of a trolley line, filed in his office, is not evidence. (State v. Board of Public Works of City of Camden [N. J.], 30 Atl. Rep. 581.)

### Abstracts of Recent Decisions.

**ACCORD AND SATISFACTION — RATIFICATION.**—Where plaintiff agreed to a settlement of a claim for injuries while in a condition of physical pain which rendered the agreement voidable, and there was no evidence that the agreement was procured by fraud, an acceptance of the amount of such settlement by her attorney with her consent, at a time when she fully understood what she was doing, is a ratification of the settlement. (*Drohan v. Lake Shore & M. S. Ry. Co.* [Mass.], 38 N. E. Rep. 1116.)

**ATTACHMENT—DISSOLUTION.**—Where a judgment creditor has levied upon personal property subject to the attachment of another party, he is entitled to come into court and move to discharge the property from the attachment, if the writ has been improvidently or improperly obtained. (*Bank of Santa Fe v. Haskell County Bank* [Kans.], 38 Pac. Rep. 485.)

**CARRIERS — PASSENGERS.**—Where a passenger after being warned by the conductor not to do so, entered a car standing at the usual place at a station, and open so as to receive passengers, and which was designed for the train on which he was about to leave, but which was not then coupled to said train, he was guilty of contributory negligence as to any injury sustained by him by reason of boarding said car. (*Tillett v. Lynchburg & D. R. Co.* [N. Car.], 20 S. E. Rep. 480.)

**PASSENGER — ALIGHTING FROM MOVING TRAIN.**—The mere fact that a train fails to stop, as is its duty to do, or as the conductor has promised, does not justify a passenger in jumping off from it while moving, unless notified to do so by the carrier's agent, and the attempt is not obviously dangerous. (*Burgin v. Richmond & D. R. Co.* [N. Car.], 20 S. E. Rep. 473.)

**CERTIORARI.**—The office of the common law writ of *certiorari*, when issued to review the proceedings of such court, in order that the Superior Court may determine therefore whether the inferior court acted within its jurisdictional powers, or whether its procedure was essentially regular, and in accordance with the requirements of law. (*Jacksonville, T. & K. W. Ry. Co. v. Boy* [Fla.], 16 South. Rep. 290.)

**CORPORATION — ILLEGAL PREFERENCES.**—Where an insolvent corporation executes a judgment note to one of its stockholders for a debt due partly to him and partly to two of its directors, a judgment entered thereon, under which all of the corporate assets are seized, is void as to the corporation's other creditors, as being given to hinder and delay them. (*Atwater v. American Exch. Nat. Bank of Chicago* [Ill.], 38 N. E. Rep. 1017.)

**COURTS — ENTERING ORDER AFTER TERM.**—An order of court should not be entered *nunc pro tunc*

years after it was said to have been made, when there is no written evidence that any such order was in fact made. (*Tynan v. Weinhard* [Ill.], 38 N. E. Rep. 1014.)

**CRIMINAL LAW—HOMICIDE.**—An instruction that former threats against defendant not only cannot excuse defendant, if there was nothing indicating a deadly design against defendant at the time of the killing, but are evidence of special spite and special ill-will on the part of the defendant, is erroneous. (*Thompson v. United States* [U. S. S. C.], 15 S. C. Rep. 78.)

**DECEIT—SALE OF LANDS.**—Neither an agreement to sell land and cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants, which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vendor for false and fraudulent representation as to his title, where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although, in fact, they are both invalid. (*Union Pac Ry. Co. v. Barnes* [U. S. C. of App.], 64 Fed. Rep. 80.)

**EXTRADITION—INDICTMENT—CONSTITUTIONALITY.**—The courts of a State from which a fugitive from justice is demanded on extradition do not deny to such person any rights secured to him by the Constitution and laws of the United States by refusing to pass on the constitutionality of the statute of the demanding State under which the indictment against such person is sufficient. (*Pearce v. State of Texas* [U. S. S. C.], 15 S. C. Rep. 116.)

**FEDERAL COURTS — JURISDICTION — NATIONAL BANKS.**—Federal courts have no jurisdiction of an action by a national bank on a note, where the record does not show diverse citizenship. (*Danahy v. National Bank of Denison* [U. S. C. C. of App.], 64 Fed. Rep. 148.)

**FEDERAL OFFENSE — CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE.**—A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act of July 2, 1860, section 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the States, is illegal. (*United States v. Elliott*, U. S. C. C. [Mo.], 64 Fed. Rep. 27.)

**HIGHWAYS — DEDICATION — PRESCRIPTION.**—A railroad company built its station on lots bounded

by two streets, and left vacant a strip of land parallel to each street, to be used as an approach to the station. This strip was paved by the company. The railroad officers testified that there was no intention to dedicate this land to the public. *Held*, that although such land had been so left open for more than twenty years, and had been used by the public as a part of the street, there was neither a common law dedication nor a prescriptive title in the public. (*City of Chicago v. Chicago*, R. I. & P. Ry. Co. [Ill.], 38 N. E. Rep. 768.)

**HUSBAND AND WIFE—DOWER—RELINQUISHMENT.**—An agreement by a husband with his wife to take a specified sum of money named in her will in lieu of his dower interest in her lands, provided that she allow the will to stand as made, is valid as against creditors of the husband whose claims were in judgment prior to the agreement. (*Huffman v. Copeland* [Ind.], 38 N. E. Rep. 861.)

**INJUNCTION.**—A preliminary injunction is properly refused when there exists no reasonable ground for apprehending that the injury against which the injunction is sought will be attempted. (*National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co.* [N. J.], 30 Atl. Rep. 580.)

**INSURANCE—ACTION ON POLICY.**—A policy of fire insurance which has been regularly issued, and has not expired, or been canceled, must, in the absence of a showing to the contrary, be treated as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs and the requisite steps to establish it have been taken. (*Moody v. Insurance Co.* [Ohio], 38 N. E. Rep. 1011.)

**LANDLORD AND TENANT—COVENANT TO REPAIR.**—A covenant by a lessee to pay rent, and a covenant by the lessor to deliver the premises in good condition and repair, and to make the alterations and repairs required during the term by any law, are independent covenants. (*Thomson Houston Electric Co. v. Durant Land Imp. Co.* [N. Y.], 39 N. E. Rep. 7.)

**LIMITATION OF ACTION—ASSUMPSIT.**—A warranty in a conveyance by another of lands belonging to the United States is broken the instant it is made, and a right of action on it then accrues, against which the statute of limitations at once commences to run. (*Pevey v. Jones* [Miss.], 16 South. Rep. 252.)

**LOST WILL—SUIT TO ESTABLISH.**—In an action to establish a will, allegations of the execution of the will, the intestacy of the testatrix, and the destruction of the will after her death sufficiently show the existence of the will at the death of testatrix. (*Jones v. Casler* [Ind.], 38 N. E. Rep. 812.)

**MANDAMUS TO OFFICER—CONTRACTS.**—*Mandamus* will not lie to an officer to do only such ministerial

duty as existed when application for *mandamus* was made, and will not lie to him to sign a contract in accordance with an advertisement for public work and a bid therefor. where, before the application, the work was readvertised, and the same person made a lower bid, under which he obtained a contract for the work. (*United States International Contracting Co. v. Lamont* [U. S. S. C.], 15 S. C. Rep. 97.)

**MASTER AND SERVANT—NEGLIGENCE OF MASTER.**—While plaintiff, a servant, was being carried to his work on a flat car, he was thrown to the ground by the car being suddenly stopped. The car couplings were worn, and the train was stopped by applying the air-brakes to the engine without warning. *Held*, that plaintiff could not recover, as the evidence did not show the car couplings to have been dangerously defective or that the engineer acted negligently. (*Cooper v. Wabash R. Co.* [Ind.], 38 N. E. Rep. 828.)

**MECHANIC'S LIEN — EXCESSIVE CLAIM.**—In an action to enforce a mechanic's lien, evidence that a statement of the claim filed with the register of deeds contained charges for hire labor at higher prices than plaintiff paid therefor, though to some extent explained by plaintiff's testimony, will support a finding that plaintiff willfully and knowingly claimed more than was due. (*Walls v. Ducharme* [Mass.], 38 N. E. Rep. 1114.)

**MORTGAGE—CANCELLATION—FRAUD.**—The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore cannot be avoided in the hands of a person who in good faith advances money thereon. (*Dixon v. Wilmington Saving & Trust Co.* [N. Car.], 20 S. E. Rep. 464.)

**PRIORITY.**—A trust mortgage to secure bonds thereafter to be issued will stand as a security therefor from the date of its record, and will take precedence over subsequently accruing lien claims. (*Central Trust Co. of New York v. Bartlett* [N. J.], 30 Atl. Rep. 588.)

**NATIONAL BANKS — INDEBTEDNESS.**—Under Rev. St. U. S. § 5202, providing that no national bank shall "be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in except on" circulation, deposits, special funds, or declared dividends, a national bank is prohibited from contracting debts or liabilities, other than those within the four classes named, except to the extent of its paid-up, unimpaired capital stock; but, to that extent, there is an implied authority to become indebted upon any contract within the scope of its powers, no matter what may be the amount of its debt or liability upon demands within such four classes. (*Weber v. Spokane Nat. Bank* [U. S. C. C. of App.], 64 Fed. Rep. 208.)

**NEGLIGENCE—INJURIES TO ADJOINING OWNER.**—One who erects a chimney on his land is liable for injuries to an adjoining owner by its fall, when it is not the result of inevitable accident, or wrongful acts of third persons. (*Cork v. Blossom* [Mass.], 88 N. E. Rep. 945.)

**PATENTS—DAMAGES FOR INFRINGEMENT.**—An infringer cannot escape liability for actual profits made, on the ground that his superior skill and scientific methods in conducting the business enabled him to reap greater profits than others would have done by the infringement. (*Lawther v. Hamilton*, U. S. C. C. [Wis.], 64 Fed. Rep. 221.)

**PRINCIPAL AND AGENT—UNAUTHORIZED ACTS OF AGENT.**—Where an agent, whose authority is limited to the taking of orders for future delivery, without the knowledge of his principal receives in payment of goods sold chattels which he appropriates to his own use, the principal is not liable for the chattels, nor bound to deliver the goods ordered until they are paid for. (*Sioux City Nursery & Seed Co. v. Magnes* [Colo.], 88 Pac. Rep. 330.)

**RAILROAD COMPANIES—ACCIDENTS—CONTRIBUTORY NEGLIGENCE.**—Where deceased was killed at a crossing where his view of the approaching train was obstructed, and the engineer did not see him till he was twenty feet from the crossing, and the engine sixty feet from it, *held*, that the question of contributory negligence was for the jury. (*Northern Pac. R. Co. v. Austin* [U. S. C. C. of App.], 64 Fed. Rep. 211.)

**CROSSING—INSTRUCTIONS.**—It was proper to refuse to charge that "if plaintiff, by stopping at a point forty or fifty feet distant from the crossing, and looking and listening, could have discovered the train he collided with, and did not do so," to find for defendant, such instruction taking from the jury the question of contributory negligence. (*Lake Shore & M. S. Ry. Co. v. Anthony* [Ind.], 88 N. E. Rep. 831.)

**LIABILITY FOR MAIL AGENT'S NEGLIGENCE.**—A notice with respect to throwing United States mail bags off moving trains of the Pennsylvania Railroad Company uses this language: "It must be distinctly understood, however, that this does not in any way relieve baggage masters and mail agents from using all possible precautions against liability of injuring any one in throwing off mail." *Held*, that on trains carrying a mail agent the failure of baggage masters to observe how the mail agent performed his duty did not, under this notice, make the railroad liable to one injured by a mail bag carelessly thrown by the United States official. (*Pennsylvania R. Co. v. Russ* [N. J.], 30 Atl. Rep. 524.)

**REAL ESTATE AGENT—COMMISSIONS.**—Plaintiff who had contracted with a real estate agent to co-

operate with him in selling to a third person certain property, with knowledge that such person was willing to purchase at a certain sum, induced the owners to sell for less, so that he could make the difference. *Held*, that he could not recover from the real estate agent his agreed proportion of the commissions. (*Talbott v. Luckett* [Md.], 30 Atl. Rep. 564.)

**SALE—BREACH OF WARRANTY—DEFENSES.**—Payment of a note given for the purchase price of chattels is not a bar to an action by the maker for breach of warranty on the sale, though, at the time of payment, the maker had discovered the breach of warranty. (*Gilmore v. Williams* [Mass.], 38 N. E. Rep. 976.)

**SPECIFIC PERFORMANCE—PARENT AND CHILD.**—A parol agreement between father and son for the conveyance of land will not be specifically enforced after the death of both of them, where the only evidence of the agreement consists of rambling and fragmentary conversations occurring years before the trial. (*Shovers v. Warrick* [Ill.], 38 N. E. Rep. 792.)

**VENDOR AND VENDEE—FALSE REPRESENTATIONS—RESCISSION.**—Unfulfilled representations of the vendor of land as to improvements he intends to make in the neighborhood are no ground for rescinding the contract, since they refer only to future acts. (*Day v. Fort Scott Inv. & Imp. Co.* [Ill.], 38 N. E. Rep. 567.)

**WILLS—VESTED REMAINDER.**—An illiterate testator, by holographic will, gave his wife certain land during widowhood, and on her death directed that it be sold, and the proceeds divided equally among his four sons named, "or" their heirs. If his widow married, he directed that the land be sold, and one-half the proceeds should be hers, to be used for her benefit and comfort during her life, and then "revert back" to his children, and that the other half of such proceeds should be equally divided among his children. The sons survived the testator. *Held*, that the fee of such real estate vested in the sons on testator's death. (*Miller v. Gilbert* [N. Y.], 38 N. E. Rep. 979.)

Not very long ago, troubles in a well-known Washington family were the cause of divorce proceedings. The wife got a judgment, though the husband had filed a strong cross-bill. In a few months the ex-wife was again married, this time also to a Washington man. One evening, recently, at a large reception, the two met unexpectedly, and an acquaintance, not well up in the family history, was proceeding to introduce them. "Oh, we've met before," said the last husband; "we're husbands-in-law."—*The Barrister*.

# The Albany Law Journal.

ALBANY, FEBRUARY 16, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish this week a timely and carefully considered paper on the "Revision of the Code," by George A. Benham, of the Troy bar. It is an exceedingly thoughtful paper, in that it goes to the root of the matter upon the question of revision, and substantially lays down the proposition that the Code should be adapted to the present practice in its simplest form, rather than to attempt to revise the practice to conform to the views of theorists upon the subject. Since the adoption of the first Code of Procedure in this State, in 1848, a system of practice has grown up, following not only the letter of the Code, but the spirit of judicial interpretation. In the earlier days of code practice the judges were decidedly opposed to this innovation upon the common-law methods. Their interpretation was narrow, cramped and technical, so that very many of the decisions are based upon very narrow and technical considerations. During the past twenty-five years an entirely different spirit has existed, and the Code has been construed with much more liberality. It is exceedingly rare now that a suitor is turned out of court or mulcted in costs by reason of any error not affecting the merits. This is as it should be, and the Code should be revised in conformity with the spirit of recent decisions. We need no change in the practice as such. In fact, we know of no advocate of Code revision who does favor any radical change. What is necessary and desired by the most ardent advocates of Code revision is a clear and concise system of rules which shall govern procedure as it now exists, stripped of technicalities and unnecessary and confusing details. A revision upon these lines would be in accordance with the views which Mr. Benham has clearly and cogently presented. It is to be hoped that some action will be taken by the Legislature looking to such a revision at a very early date, so that the revision may be carried on and completed as early as possible.

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The existence in this State of a Code of Civil Procedure, a Code of Criminal Procedure and a Penal Code, the discussion of the revision of the first-mentioned, the condensation of the statutes by a statutory revision committee, and the "reforms" which have been discussed so frequently at meetings of bar associations, may, perhaps, have given the impression to the public at large that at least in this State law was becoming very practical in its applications, remedies and results, and was throwing off its former dross of peculiar mysticisms and cumbersome-nesses in reaching a practical determination of legal controversies. The statement that in this State the lawyer too often seeks the remedy rather than the result in litigation has almost become a truism, and we have generally advocated the greatest simplicity in practice which can be procured, and the utmost expediency in reaching a final and satisfactory ending of a cause. We would rather welcome the allegation that the law has become commercialized, if the latter word is used in the sense of becoming adapted to business interests, and would not defend such a charge unless it was made against the integrity of the individual members of the legal profession. It was with great pleasure that we read the excellent paper of William B. Hornblower, of New York, which was published in the February number of the *Forum*, on the subject of "Has the Law become Commercialized?" The article is, if anything, a defense against the accusation that lawyers have rather turned their attention from the love of law to a desire for the financial return which their practice may bring unto them, and in that light we desire to add to the thought expressed in the article to which we have referred, that we think the commercialization of the profession, which consists in the elimination of the old forms of pleading and unnecessary delays, is a step in advance, even though it brings with it the concentration of business in large firms and in a systematic manner. There are many excellent features in Mr. Hornblower's paper, which present in a clear and concise manner numerous points which the average lawyer may never have properly considered. In speaking of the growth of the profession, he says: "We cannot expect that the lawyers of the present day should follow the methods of the lawyers of the end of the eighteenth century any more



than we can expect the same of physicians, or even of the clergy. *Tempora mutant et nos mutamur* applies to members of the legal profession as to all other men. Daniel Webster, traveling in a stage-coach, is subject to an entirely different set of conditions from the modern leader of the bar, whirled, as he is, from city to city on the limited express. The high pressure of life in this day and generation must affect the work and spirit of lawyers as well as of other busy men. Much work must be got through with in little time, and labor-saving appliances are becoming more and more necessary." Comparing the labors of the time of Chancellor Kent with to-day, he says: "The multiplication of law reports is a marked feature of to-day. Chancellor Kent doubtless had read every decision of importance reported in the various State and Federal reports of his time. He certainly had read, and probably knew almost by heart, every reported decision in his own State. Such a thing is now physically impossible. No lawyer in the State of New York can have read, or, if he has, can remember, all the reported decisions of the various courts of this State. It is almost incredible that any one, unless of phenomenal application and memory, can have mastered the cases even of our Court of Appeals since 1846, as found in the 142 volumes of New York Reports, not to speak of the volumes of Johnson (Law and Chancery), Paige, Cowen, Barbour, Hun, and a dozen or more other series of reports. When we add to this the 154 volumes of United States Supreme Court Reports, vast numbers of State reports, as well as the English reports, the mind is bewildered by the very enumeration of their titles, not to speak of their contents. Text-books and digests of decisions are of *absolute necessity* at the present day, and skilled assistance in collecting and analyzing decisions and preparing briefs is almost equally a necessity to a lawyer in very active practice."

It is not uncommon to hear of the successful lawyer in New York city of whom it can be said that his income mounts up among the thousands, and of his tremendous fees from some corporation or trust. We cannot more fittingly answer the proposition that lawyers receive too large fees for cases which on their face seem simple than by giving the words of Mr. Hornblower on this subject: "Then, too, the ex-

penses of a lawyer in active practice in one of our great cities are heavy. High rents must be paid, especially in New York city, for offices in convenient localities. Other necessary expenses are also to be incurred. The modern law-office, equipped with stenographers, typewriters and telephones, must, of course, be a much more highly-organized business enterprise than the old-fashioned law-office; just as the modern railroad train must be more highly organized than the old-fashioned stage-coach. There are to-day, nevertheless, thousands of able lawyers who do a large professional business in a quiet, simple, old-fashioned way. These men do a referee business, or the business of a master in chancery, or exclusively a court business. In our great cities, however, it is usual to have firms of lawyers, combining the functions of solicitors and counsel, where usually one or more members of the firm appear in court, while others attend to the office work, the drawing and preparation of papers, the conferences with clients. These different functions in England are separated between distinct classes of the profession — the solicitor and the barrister. In this country these two classes are combined in the same individual, though one man will, by natural selection, take up the work of the advocate or barrister, while the other will more naturally take up the work of the solicitor or attorney. The distinction is not, of course, a hard-and-fast one, for many of our ablest lawyers do more or less of both kinds of work. But the combination of the two functions in our great law firms is sometimes overlooked in measuring the magnitude of the fees received by such firms."

Another quotation will also prove of interest on this subject: "It follows, then, that intellectual individuality must be, and must continue to be, the paramount force in the higher ranks of the profession in the trial and argument of causes before courts and juries—especially in the cold, dry atmosphere of appellate tribunals. Not only so, but in office work, the man of constructive ingenuity, with the grasp of mind to master complicated details, with the soundness of judgment to measure the practical workings of a scheme, with the knowledge of legal principles necessary to avoid dangers and pitfalls, with the patience and industry to perfect and carry out his plans, is the man who is

sought after in organizing great corporate or commercial enterprises; in reorganizing and reconstructing insolvent railroads and other corporations; in drawing important contracts involving large pecuniary interests."

We cannot, nor could Mr. Hornblower, more fittingly close his article than with some mention of the "young men." From a man of Mr. Hornblower's recognized position, it is no more than proper that he should be allowed to call to the attention of the younger members of the bar that a city like New York, or some other place, may or may not be their Mecca, and that men, like water, find their proper level. To some the excitement and stir of a great city gives more satisfaction than the quiet enjoyment of a smaller place, but the young legal conqueror of the metropolis should remember —

"Fear not, lest Existence,  
Closing your account and mine,  
Should know the like no more.  
The eternal Saker  
From the bowl has poured  
Millions of bubbles  
Like us, and will pour."

Concerning such a young man, and his opportunities in a great city, Mr. Hornblower writes: "The young man, too, as already indicated, finds in some respects a readier opportunity than of old. It is true that, starting by himself in a great city, without influential friends or connections, 'hanging out his shingle,' as the old phrase goes, he has a hard and long struggle for recognition. He is lost in the crowd. There is, however, a great demand for 'bright young men,' as I have already remarked, as clerks and junior partners in large law firms where the seniors are overworked and are more than ready to turn over a large part of their work to their assistants, and are, as a rule, ready to recognize and encourage any special ability that may be displayed in the management of such work. I hesitate to write this, for I do not like to say anything to stimulate the *hagira* of young men to our great cities, and especially to the city of New York. My belief is that the average young man will do better, in the long run, in a smaller community, where character and attainments are sure, sooner or later, to win recognition; and where the rewards of a successful lawyer in social importance and influence are relatively greater, and where a moderate professional income procures a larger degree of comfort and independence.

In our great cities opportunity has much to do with success; but opportunity is of no avail without an ability above the average, enabling the man to impress himself upon his seniors at the bar as a man of force. The pecuniary rewards of success are, of course, much greater in our large cities than in smaller communities; but the average rewards are less and the possibilities of failure greater. In other words, the 'struggle for existence' is more severe."

We cannot but conclude from the article, and from our view of human nature among the legal profession, that law has not become commercialized in the sense in which Mr. Hornblower would indicate, but rather that it has become systematized, and, we hope, will become simplified in procedure, so that greater expediency may be inculcated into legal controversies, and business interests may be assisted by a speedy determination of all litigations, and not injured by unnecessary delay in reaching a final adjudication, and by endless and useless technicalities in methods of practice.

Lawyers and laymen alike should give special attention to the ideas contained in the letter recently written by Judge William J. Gaynor, of Brooklyn, to the State Board of Mediation and Arbitration. As we suggested in the JOURNAL of February 2, it is not proper to seek the cause of labor difficulties only in the action of workingmen, and it is fair to assume that there may be some particulars in which trusts and corporations should be limited in the power and privileges granted by the public. We would not advocate any limitation of the power of corporations which would tend to limit their legitimate business operations, but only such as would prevent reckless speculation at the expense of their employees. The bill which we have spoken of in these columns, which has been introduced in Congress, for the unification of certain laws would, at least, bring to the attention of the public the difficulties which are now experienced by some States granting unusual privileges, which may be exercised by individuals or corporations in other States where such grants are not allowed under the law. In Judge Gaynor's letter it is shown that the corporation formed under and by virtue of the laws of Virginia, is now exercising privileges in

the State of New York which could not have been granted under the laws of this State except under certain conditions, which are avoided. The facts which Judge Gaynor calls attention to are, that the Brooklyn City Railroad Company, up to about three years ago, had three millions of bonded indebtedness and three millions of stock. When the road changed from horse power to electric the bonded indebtedness was increased to six millions and the capital was extended and increased to twelve millions of dollars. It was then leased for 999 years to a little street road, called the Brooklyn Heights Railroad, which had a capital of two hundred thousand dollars, and a mile or less of track running to the Wall street ferry. In the agreement it is said that the Brooklyn Heights Railroad Company agreed to pay interest at six per cent on the six millions in bonds, and ten per cent on the twelve millions in stock, of the Brooklyn City Railroad Company capital. Subsequent to this lease, a corporation was formed under the laws of the State of Virginia, in March, 1893, called the Long Island Traction Company, which had a capital of thirty million dollars. This company obtained possession of the Brooklyn Heights Company and of the leased lines. This, in short, is the history of the Long Island Traction Company. Judge Gaynor, in speaking of the action of this corporation, says: "But it is said that all these transactions were strictly lawful. I admit it. They were in strict accordance with statute laws, as any court would have to decide. But what of that? Is the law always right in what it permits? If that were so, we would never need to change. Jesus was tried in an august court, and convicted according to law; and in our own day and generation the poor fugitive slave, Dred Scott, was taken and remanded back into human slavery by the Supreme Court of the United States in strictest conformity to law. The one occurrence did not retard the moral growth of the human race; nor did the other postpone the coming liberation of the slave. The human race is moving forward, and does so chiefly by making laws and conditions better. To say that a thing is done according to law, or that there is no law forbidding it, does not always relieve it from moral odium. The transactions which I have called your attention

to are not singular to Brooklyn. Their like are to be found in nearly every locality in our country. They have come to be the order of the day. In place of being checked by laws, they are often fostered by laws. If this condition were to continue, what the end would be no one who has studied over causes and effects in history can fail to perceive with clear vision. The prime object of government is to promote distributive justice, and thereby make the governed stable and content, and no government which does not do this may, in the nature of things, long endure. That our government, through the instrumentality of the people, educated in our common schools, is not to fail in this in the end, is not to be doubted, though it may not be perceived in the present political outlook. There is no jealousy against wealth in this country. On the contrary, those who accumulate wealth in any legitimate calling, professional, mechanical, mercantile, agricultural or other, are subjects of emulation and honor. When I was a boy, if a farmer got along so that he could afford to paint his house we all respected him; and if he got along still further, we honored him more; and all my life I have seen the same feeling prevalent in this country. It is wealth got by this means and by that, by trick and device, but all the while according to law, which is under the ban of the splendid intelligence and moral sense of the people of this country. In the immediate dispute which led to the conflict between the companies and the men, I see nothing worthy of serious attention. The dispute was too small not to have been settled easily, except for the inflamed condition which I have described to you, brought on by the attempt to create vast inflated wealth on the one side, being met by justly aroused uneasiness and apprehension on the other. Under healthy conditions, the dispute would not have lasted an hour, if it arose at all. I remind you that in the case of the other two large companies here the same dispute was settled at once. Until the cause is removed it is idle to try to prevent the effects. I submit this in the hope that it may promote thought and do some good."

There seems to be no doubt but that large companies tend to decrease the price of necessities and articles of consumption, and as such are a benefit when legitimately operated, both

to the employe and to the owners of property. But we fail to see the justice of any improper increase of alleged capital of a business enterprise at the expense of the employes, and which can only result detrimentally to the welfare of all parties necessary to carry on the operations of the enterprise.

A rather peculiar case has arisen in Kentucky over the statute of that State allowing a shortening of the term of imprisonment of any convict for good behavior. The case arose on the application of John L. Scott for a writ of *habeas corpus* to compel Henry George, warden of the Kentucky penitentiary, to release one Foster, who was confined in the prison under a sentence of the Circuit Court, for bigamy, for three years, and whose term, if his time for good behavior was allowed, should have been terminated some time before the petition for *habeas corpus* had been made. The petition for *habeas corpus* set up that no charge of violating the prison rules had been made against Foster, except in one instance, and that such charge sustained against him was false; but, admitting such charge to be true, it only deprived him of his good time of five days in that month allowed him by law, and that by giving him credit of five days' good time in every other month, as allowed him by law, his term of imprisonment expired at a day before the petition was made, and consequently his detention had been wrongful and illegal, and that he was entitled to be released from the penitentiary. The warden produced Foster, and at the same time filed a written response, setting forth the fact that he had not discharged Foster on the day on which it was claimed he should have been freed on account of the occasion in question, and that as said charge had been sustained against Foster, all his good time had been forfeited, and that therefore his term of imprisonment had not yet expired. The counsel for Foster demurred to the response of the warden, and insisted that the response was insufficient. Thereupon the case was submitted, the warden declining to further respond, and the court determined that Foster was illegally and wrongfully detained by the warden; but as the warden asked for an appeal to the Court of Appeals, it was granted, and the judgment of the court declaring Foster entitled to his discharge was suspended for thirty days. In the

motion to advance the case in the Court of Appeals that court held, that as the court below had decided that the imprisonment was "wrong and illegal," it decided (very logically) that if his imprisonment was both wrong and illegal, that it ought not to extend such imprisonment for thirty days, and, therefore, entered an order setting aside the part of the judgment of the lower court holding Foster for thirty days pending an appeal of the warden. It will be most interesting to watch the determination of the constitutionality of the "good-time" statute of that State, and it is pleasant to note, on the part of the appellate court, that practical results are the real accomplishments of any court of justice, without stopping to consider any legal technicalities which would tend to avoid such results.

The "Legal Effect of Retraction," by Julius Rosenberger, LL. D., which was written for the *Daily Press* of a recent date, will prove of some interest in relation to the case of *State v. Osborn*, which we commented on in these columns. In writing on this subject the author says: "It is the prevailing doctrine, though the authorities upon this point are not harmonious, that the reiteration of a libel or slander after suit brought may be proved on the question of malice and damages. If the plaintiff can give in evidence language published or uttered subsequently to the commencement of the action, and for the purpose of aggravating damages, the Court of Appeals of New York declares, in the recently-decided case of *Turton v. New York Recorder Co.*, it seems quite reasonable that the defendant ought to be permitted to give in evidence a fair and honest retraction of the charges promptly made subsequently to the commencement of the action, in mitigation of damages. Commenting on the case of *Association v. Tryon*, 42 Mich. 549, where it was held that a retraction of a libelous article, published after suit is begun for the libel, cannot be considered in mitigation of damages, the court says that case does not appear to have been much considered, and there the retraction seems to have been published long after the suit was begun. Where the suit is commenced without any request for the retraction of the libelous charge, if the defendant, promptly after the suit is commenced, publishes a fair and full retraction, such publication ought to be permitted."

be proved and submitted to the jury to be considered by them upon the question of exemplary damages. Under such circumstances, a retraction after suit brought may be as valuable and effective as one published before, and there is the same reason for the submission to the jury of the one as the other. But while taking these views, favorable to publishers, the court particularly holds that where the publisher's attorney wrote a note to the attorney for the other party offering to publish any retraction of the article he would write, and the offer was declined by the latter, the trial judge was right in holding that the mere offer to publish such retraction as plaintiff's attorney would write was incompetent for any purpose. The reason given is that the writing of such a retraction would not have been within the line of the duty of plaintiff's attorney as attorney in the action. If the defendant had procured him to write the retraction, he would have acted as its agent, and not as the agent of the plaintiff. The plaintiff would in no way have been responsible for any thing that was written by the attorney in response to the offer, and could in no way be affected by the refusal of the attorney to write. The offer and refusal was a transaction between the defendant and the plaintiff's attorney, which did not legally concern the plaintiff. But even if the defendant could have had the benefit of a retraction published after the commencement of the action, the mere offer to publish it gave it no benefit or advantage. It should have published the retraction in good faith, promptly upon the commencement of the action, and then it would have been in a position to claim whatever benefit could legally flow from such publication. Another point made was, that inasmuch as the publisher or publishing company was in such haste to publish the matter in question that it made no inquiry whatever of the plaintiff or his firm, or of any one else, as to the truth of the charges made therein, the trial judge did not transcend the bounds of a proper judicial discretion in saying to the jury that the article was published 'wantonly, recklessly and with an utter disregard as to whether it was true or false.'"

In the case of *State v. Osborn* (38 Pac. Rep. 572) the Supreme Court of Kansas have held

that where the defendant dictates a slander or furnishes a malicious statement to a reporter of a newspaper for publication, and with the intention and understanding that it will be published, and such reporter afterward commits it to writing and causes it to be published as given to him, the defendant is responsible for the libel, although he may not see what is written until after the same is published; and especially is this true in a case where the defendant subsequently indorses the publication as correct and adopts it as his own. Judge Johnston, in writing the opinion in regard to this subject, says: "It is next contended that the facts in the case are insufficient to sustain a conviction. It appears that H. H. Fowler, who was a reporter on the *Topeka State Journal*, and had frequently visited the office of the defendant, who was then secretary of state, in quest of news for publication, went to the office on April 15, 1893, and inquired if he had any news for him. The defendant replied: 'I have something for you this time, but I don't know whether I will tell you or not.' He then proceeded to state the defamatory words that were afterward published in the paper, and that were afterward set forth in the information. The defendant then told Fowler that he could prove all that he had stated and a great deal more, and that he would furnish him a further statement in a few days. Fowler went immediately to the *State Journal* office, and reduced the statement which he had received from the defendant to writing, using the exact language of the defendant, except, possibly, as to one or two unimportant words. The article was published in the *State Journal* of that day, and, when the reporter called upon the defendant two days later, he said to him: 'Well, Mr. Secretary, I think you have stirred up the animals this time.' In reply, he said: 'I will give them some more.' Two other reporters, D. O. McCray and M. Bunnell, called upon the defendant a day or two after the publication in the *State Journal*, when he told them that the publication was substantially as he had given it to Fowler, and that it 'was not all he had to offer,' and that he 'would have some more items to give out to the press.' On April 19 he wrote a letter to the *State Journal*, and which was published on the same day, in which he substantially adopts the first publication as

his own. He said: 'As I hoped, I have stirred up the nest of venomous serpents of the Republican party in a little interview I had with the *Journal* reporter a day or two ago, and I am gratified and highly amused to find them come back at me with the answer, 'liar, liar.' \* \* \* My authority for my statements in the *Journal* is the best element within the Republican ranks, who claim these things stated to be true,' etc. It is contended that as the defendant did not specifically request the publication of his statement, and did not see it until it appeared in the paper, and as he had no connection with the *State Journal*, he cannot be held liable for the libel. While the defendant testified that he did not make the statement for the purpose of publication, or with any idea that it would be published, the evidence of the State fairly tends to show that the statement was made with the expectation and understanding that it would be published. Taking the evidence of the witnesses for the State, it would show that he gave him the statement for publication; that the statement he made was written and published as it was given; and that, after it was published, he admitted its correctness, and promised that an additional statement would be made in a few days; and that, finally, in a few days afterward, in a written statement to the *State Journal*, he admitted making the statement which was published, and specifically said that it was his own statement. All who are concerned in the making and publication of a libel are alike guilty under the law. If one composes and dictates a false, defamatory statement, knowing that it will be written and published, and it is written and published, by another, each are equally liable for the writing, and both may be prosecuted and punished for libel. Our statute provides that 'every person who makes or composes, dictates or procures the same to be done, or who willfully publishes or circulates such libels, or in any way knowingly and willfully aids or assists in making, publishing or circulating the same, shall be punished by imprisonment in the county jail not more than one year or by a fine not exceeding \$1,000.' (Gen. Stat. 1889, par. 2445.) Of course, a person who casually makes a false statement to another, with no purpose or intention that it shall be written, printed or published, even though the other person be a re-

porter for a newspaper, and the statement should afterward be printed or published, will not be guilty of libel. On the other hand, if a person knowingly dictates a slander to a reporter for publication, and knowing that it would be published, and it is afterward published as given by him, he is responsible for a libel, and may be punished equally with the one who aided or united with him in making the same. (Queen v. Cooper, 8 Q. B. 533; Clay v. People, 86 Ill. 147; Adams v. Kelly, 1 Ryan & M. 158; Clifford v. Cochrane, 10 Ill. App. 577; Wilson v. Noonan, 27 Wis. 598; Miller v. Butler, 6 Cush. 71; Townsh. Sland. & L., § 115.)"

The appearance of the New York Law Review demonstrates most clearly that knowledge and ability will show itself sooner or later; the author of the first article on "Corporation Legislation in New York, Recent and Perspective," and the consulting editor is the Hon. Charles A. Collin, who was recently a member of the Statutory Revision Commission, legal adviser to the Governor and the great originator of most of the important legislation which emanated from the granite building on the hill at Albany. In the lecture room, as counsel, as a writer and as a creator of laws, there is always present in Professor Collin, that indomitable spirit and perservance which has been omnipresent in all his work and which is so seldom met with in the latter-day lawyer. His theory is always resultant in practice, which too seldom is seen nowadays. The article which Professor Collin has contributed to the first number of this new periodical is most interesting and instructive, as it shows most concisely and in a very clear manner the ideas which have existed in creating and framing the statute law of the State and especially the corporation laws as they now stand. There are several other very interesting articles, and a general tone of kindness in the leading editorial comment on legal journalism. The astuteness of the writer in patting each and every periodical on the back and saying in so many words, "You are a good fellow, but just give us a chance and you will wish you had never been born," is too apparently from the pen of a gentleman whom it might not be hard to mention. To this protege from Cornell, we extend a welcome to the mystic circle.

## ON THE CONSTITUTIONALITY OF THE INCOME TAX.

By CARMAN F. RANDOLPH, Author of "The Law of Eminent Domain."

IN section 27 of the Revenue Act recently passed by Congress it is provided that " \* \* \* There shall be assessed, levied, collected and paid annually upon the gains, profits and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein \* \* \* a tax of two per centum on the amount so received over and above \$4,000 \* \* \* " There are other provisions relating to the taxation of incomes and there is more of this section, but the excerpt sufficiently presents the question—whether the imposition of this tax violates the constitutional declaration that direct taxes shall be apportioned among the several States on the basis of population? Several objections have been taken to the constitutionality of the law, notably these: The income tax is a capitation tax and, according to the letter of the Constitution, should be apportioned. Assuming the tax to be indirect generally it is unconstitutional, nevertheless, so far as it relates to income from land, because this is in effect a tax on the land itself and a land tax is held by the Supreme Court to be a direct tax. Assuming the tax to be indirect it is not uniform within the meaning of the Constitution. The radical question in respect to the act is the one I shall consider—whether an income tax is a *direct* tax within the meaning of the Constitution?

### I.

The Supreme Court have twice held that an income tax is not a direct tax. Therefore it is not permissible to discuss the question seriously unless there can be shown a probability at least that the rule *stare decisis* is not necessarily operative so far as these decisions are concerned.

The decisions of the Supreme Court relating to the imposition of direct taxes are few. In the first case, *Hylton v. United States* (3 Dall. 171,) it was held that Congress might impose a uniform tax on carriages. While much of the reasoning employed in this case has been approved in decisions involving an income tax, the case is not a direct authority for the present law. A tax on carriages may be readily differentiated from the present tax. It is a tax on expense, on consumption, while the present tax is a tax on income, whether devoted to expenditure or investment, and not only on income as commonly understood, but on all gains and profits whatever. It is not the decision in the *Hylton* case but certain definitions accompanying it which have served as the basis of the income tax decisions. These definitions are subject to a grave infirmity. The court assumed that the phrase *direct taxes* was ambiguous.

The question was whether the tax on carriages was *direct*. The court decided that taxes on expense or consumption were not direct, which was sufficient to sustain the particular tax in question. But the court went further and suggested a general definition of direct taxes. This suggestion was, of course, a mere dictum. It was, moreover, improper, for no rule of judicial conduct is more salutary than that which imposes self-restraint upon the faculty of generalization, especially in constitutional questions.

Passing by the opinion in *Veazie Bank v. Fenno* (8 Wall. 533), and *Scholey v. Rew* (23 Wall. 331), which approve incidentally the constitutionality of an income tax, we come to the cases of *Pacific Insurance Co. v. State* (7 Wall. 433), and *Springer v. United States* (102 U. S. 586.) In these cases the Supreme Court held that an income tax was not a direct tax. Is there anything in these decisions or in the circumstances of their delivery that weakens the presumption of impregnability attaching to the judgments of the Supreme Court? Now it must be admitted that the fact that the former income tax was a war tax in nowise differentiates it from the present one. The doctrine of one Constitution in war and another in peace is untenable. It is much like saying—no Constitution in war. But the effect of a struggle for national existence upon the minds of those charged with the interpretation of laws intended to strengthen the government is real albeit imponderable. Questions thus decided may be in calmer times re-examined without disrespect to their authors, and discarded without detriment to the great principle behind the doctrine of *stare decisis*.

A familiar rule for the construction of public laws is that the law shall speak for itself if possible, but that in case of ambiguity the intent may be gleaned from "the history and situation of the country," to use the phrase of Chief Justice Marshall in *Preston v. Browder* (1 Wheat. 121), or as Chief Justice Taney expressed it in *Aldridge v. Williams* (3 How. 24), from the "public history of the times." The inquiry into contemporary history and opinion justifies itself only by the accuracy of its results. If the question to be settled is not a mere technicality but a broad principle of constitutional law, the inquiry must be upon broad lines. Both of these principles of construction have been violated in the *Hylton* case and in the income tax cases. The search for truth seems to have been superficial. The results are petty. Indeed, there is much reason for believing that the Supreme Court's classification of taxes rests upon a statement made by Alexander Hamilton, as counsel for the government in the *Hylton* case.

### II.

The Constitution declares that "no capitation or other direct tax shall be laid unless in proportion to

the census or enumeration hereinbefore directed to be taken." (Art. I, § 8.) The census clause referred to reads: "Direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, \* \* \* ." (Art. I, § 2.)

What is meant by a *direct* tax as the word is used in the Constitution? Two definitions may be extracted from the decisions of the Supreme Court.

(a) In the *Hylton* case Justice Chase said: "I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution are only two, to-wit, a capitation or poll tax, simply without regard to property, profession or any other circumstance, and a tax on land."

Justice Paterson said: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and tax on land is a questionable point" and, further, "I have never entertained a doubt that the principal, *I will not say the only objects*, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land."

Justice Iredell said: "There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases. \* \* \* A land or a poll tax may be of this description" (*i. e.* direct).

These observations are followed by the formal declaration of the court in *Pacific Insurance Company v. Soule*, and *Springer v. United States*, that the only direct taxes are taxes on real estate and capitation taxes. This definition will be tested by the opinions of political economists and then by the meaning of the word *direct* as it appears to have been understood by the framers of the Constitution. Turgot, the most famous French economist and statesman of the pre-revolutionary period, wrote: "There are only three [taxes] possible—the direct on land—the direct on persons \* \* \* the indirect tax, or tax on consumption." (Plan d'un Mémoire sur les Impositions. Daire II, 394, 396.) Of all the leaders of French political thought no one appears to have been better known or more appreciated in this country than Turgot. Indeed, the above classification of taxes is suggested in a paper he prepared for Franklin's use. (See Dunbar—The Direct Tax of 1861, Quart. Jour. Econ. III, 438).

Adam Smith who represented, indeed almost personified, English economic science in the last century, did not draw any definite distinction between direct and indirect taxation, but wrote this striking paragraph: "The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes on consumable commodities; the State not knowing how to tax *directly* and proportionately the revenues of its subjects endeavors to tax it indirectly by tax-

ing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." 3 *Wealth of Nations*, 381, Rogers' ed.

Later economists, whether defining a direct tax as one demanded from the very person who it is intended shall pay it, or as being other than a tax on consumption, or as a tax levied on constant and recurring occasions, agree substantially in this, that an income tax is a direct tax. Although a definition of the economists is certainly not binding on a court, perhaps hardly a precedent in point of law, it is nevertheless worthy of serious attention especially when as in the present case it is backed by the weight of economic authority.

We will now review briefly our fundamental laws on the subject of apportionable taxes. The Constitutional Congress resolved that the United Colonies be pledged for the redemption of bills of credit which had just been emitted and "that the proportion or quota of each respective colony be determined according to the number of inhabitants, of all ages, including negroes and mulattoes in each colony." (Dec. 26, 1775, 1 Jour. Cong. 215.)

In Jefferson's sketch of the debates on the Articles of Confederation (iv. Elliott, IX) we learn that it was proposed to incorporate substantially the foregoing resolution in the articles as art. VIII. In the course of discussion Dr. Witherspoon asserted that value of lands and houses was the best estimate of the wealth of a nation and that it was possible to obtain such a valuation. Witherspoon's opinion seems to have borne fruit for art. VIII, as adopted, reads: "All charges of war, and all other expenses that shall be incurred for the common defense and general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury which shall be supplied by the several States, in proportion to the value of all land within each State granted to or surveyed for any person as such land, and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint."

The following references to apportioned taxes are contained in the plans for a Constitution formally presented or known to the Constitutional Convention. Hamilton's First Plan (art. VII, § 4.) "Taxes on lands, houses and other real estate and capitation taxes shall be proportioned, in each State, by the whole number of free inhabitants \* \* \* " Patterson's plan provided for requisitions upon the States in proportion to the number of free inhabitants. In Brearly's draft of the report of the committee of August 6, 1787, it is provided that "No capitation tax shall be laid unless in proportion to the census hereinbefore directed to be taken."



It appears then that the convention had before it these suggestions: That the taxes to be apportioned among the States should be poll taxes or land taxes or poll and lands taxes—all very definite and exclusive terms. The convention adopted none of them, but did adopt the phrases *direct taxes* and *capitation or other direct tax*. The adoption of a generic definition rather than the specific ones suggested shows conclusively that direct taxes might be other than taxes on heads and land. Indeed, the fundamental distinction between direct and indirect taxes was suggested by Gouverneur Morris, who it seems introduced the word *direct*. He proposed that taxation should be in proportion to representation, but modified his proposition by limiting it to direct taxes, admitting that "with regard to indirect taxes on exports and imports and on consumption the rule would be inapplicable. (Elliott IV, 302.)"

In *Springer v. United States*, Justice Swayne says: "Perhaps the two most authoritative persons in the Constitutional Convention touching the Constitution were Hamilton and Madison. \* \* \* In another letter of the 7th of February, 1796, referring to the case of *Hylton v. United States*, then pending he (Madison) remarked. 'There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court as it is by me.' Whence the despondency thus expressed is unexplained." Had the learned justice carefully studied the letter from Madison from which he gives an extract where I have placed asterisks, he would have found the source of Madison's despondency in his belief that the carriage tax was direct and therefore unconstitutional as levied. The letter is to Jefferson, dated May 11, 1794. Referring to the report of a committee on taxation he writes: "It particularly included, besides stamp duties, excises on tobacco and sugar manufactured in the United States, and a tax on carriages, as an *indirect* (italicized by Madison) tax \* \* \* and the tax on carriages succeeded, in spite of the Constitution, by a majority of twenty, the advocates of the principle being reinforced by the adversaries to luxury (this is the sentence quoted by Justice Swayne) \* \* \* This is another proof of the facility with which usurpation triumphs where there is a standing corps always on the watch for favorable conjunctions, and directed by the policy of dividing their honest but undiscerning adversaries. \* \* \* By breaking down the barriers of the Constitution and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defense in the shield of justice."

With regard to the other statesman to whom Justice Swayne refers as an authority on the question of direct taxes—Alexander Hamilton—it is true that he wrote in 21 *Federalist*, "Those (taxes) of a direct

kind which principally relate to land and buildings may admit of a rule of apportionment." But a careful reading of this important paper will show that nothing was further from Hamilton's mind than a classification which would place the present income tax within the category of direct taxes. He writes: "There is no method of steering clear of this inconvenience (that is, the inconvenience of quotas and requisitions) but by authorizing the national government to raise its own revenues in its own way. Imposts, excises, and in general all duties upon articles of consumption may be compared to a fluid which will in time find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. \* \* \* It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess. \* \* \* Impositions of this kind usually fall under the denomination of indirect taxes. \* \* \*"

Upon reviewing the debates in conventions and the opinions of the statesmen of the time, we cannot find any solid ground for the assertion that the phrase *direct tax* as it appears in the Constitution is to be divested of its apparent force as a general definition and reduced to a specific definition by interpolating the words *capitation and land taxes*. It is true that we find statements to the effect that direct taxes are land and capitation taxes, but these are not to be understood as general definitions but as statements of things within the knowledge of their authors. They are not to be taken as excluding income taxes for the very good reason that the taxation of incomes was not in evidence at that period. The tax was practically unknown in England in the eighteenth century, at least before 1798. An attempt to tax incomes in Queen Anne's reign was unsuccessful. (2 *Sinclair's History of the Public Revenue*, 18.) While it seems that a sort of income tax had been resorted to in Massachusetts in the early days, it is worthy of note that Theodore Sedgwick of Massachusetts, in the debates in Congress on the carriage tax, spoke of an income tax as a direct tax. Although the question of revenue was the most burning of all civil questions, although everything relating to ways and means was studied and discussed by the statesmen of the day, there appears to be no reference to the taxation of incomes in the voluminous writings of Hamilton, Franklin, Adams, Washington, Madison and Gallatin. When statesmen spoke of direct taxes as land and capitation taxes they are not to be understood then as defining such taxes but as illustrating them by the only examples within the range of their knowledge and experience.

I shall conclude this part of the investigation with

the most convincing proof of the position of income taxes drawn from the opinion of Judge Paterson in this very case of *Hylton v. United States*. He rounds out his opinion, the most elaborate of all those delivered, with the quotation from Adam Smith which has been already quoted but will bear repetition here. "The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." 3 *Wealth of Nations*, 331, Rogers' ed.

From the passage itself we gather that the proof that taxes on income were not a part of that scheme of public finance most familiar to the framers of the Constitution, and that the first of English economists viewed a tax on income as in principle essentially direct.

From the quotation of the passage by Justice Paterson we may infer his approval of its principles and may be well assured that had the present law been before him he would have pronounced it direct.

(b) Another definition of a direct tax appears in the opinion in the *Hylton* case and in *Pacific Insurance Co. v. Soule*. It is that direct taxes are such as can be apportioned. This statement is literally true in this sense that indirect taxes, that is, taxes on consumption, cannot be apportioned because they are not finally paid by the person from whom they are collected but by the chance consumer of the commodity taxed. They are not apportionable because it is not known where their burden is to rest. The statement is not literally true in regard to the income tax. It can be apportioned but not equitably. Indeed its apportionment would be a monstrous injustice to the poorer States.

We find then that the Supreme Court mean that direct taxes are such as may be fairly apportioned. This proves too much. Apart from a poll tax, which has I believe never been imposed by the Federal government because of its intrinsic unfairness, direct taxes are usually incapable of fair apportionment. The Federal income from taxes down to 1886 was in round numbers nine thousand one hundred and twenty millions of dollars; of this sum but twenty-eight millions was raised by direct taxation (exclusive of the war income tax). To the argument that the framers of the Constitution could not have intended to have deprived the government of recourse to an income tax, which as we have seen was practically unknown to them, it may be replied that they practically deprived it of recourse to the land tax which was one of the most important and best

known sources of revenue. If an income tax is indirect because it cannot be fairly apportioned, a land tax is none the less so.

The Constitution says that taxes which are direct shall be apportioned. The Supreme Court say that taxes which can be fairly apportioned are direct. There is an obvious discrepancy here.

### III.

The inquiries into the political history of the Constitution and the opinions of political economists are not intended to furnish an independent basis for any conclusion of constitutional law. They have been undertaken in order to offset erroneous impressions which have unfortunately become the basis of conclusions of law. Their purpose is simply to clear the ground for a fair interpretation of the direct tax clauses of the Constitution on their merits.

The meaning of an important general provision of the Constitution must be based, if possible, upon a principle not on a circumstance. Now the circumstance that the direct taxes most familiar to our forefathers were poll and land taxes is the slight foundation for the conclusion that these only are direct taxes—and this despite the fact that the convention, as we have seen, discarded this specific definition for the generic one—direct tax.

The meaning of the *direct taxes* of the Constitution can be found only, and it can be found readily, in the forces behind the Constitution, especially the clauses in question. A familiar, perhaps the most familiar fact relating to the genesis of the Constitution is that its adoption was due to the helplessness of the confederation in the matter of revenue. The quotas of the States were not paid and Congress had no means of compelling payment. There were those who sought a firm union as desirable, those who accepted it as necessary, others who thought it neither desirable nor necessary. In the bitter struggle over the Constitution two objects stand out distinctly: One, the fear lest the Federal government should prove an instrument of tyranny; the other, the fear lest exactions for Federal purposes should be unequally imposed upon the States.

In *Springer v. United States*, Justice Swayne mentions that Gouverneur Morris expressed the hope, in the Constitutional Convention that the clause relating to direct taxes would be stricken out, and continues: "All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted." If, as it would seem, these words are intended to convey the idea that the clause was adopted without much attention, the historical learning of the justice is open to suspicion. This suspicion is strengthened by his later remark in the same

opinion. "The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions by whom the Constitution was adopted which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York and North Carolina expressed very strong disapprobation of the power given to impose such burdens."

This statement minimizes what was really an intense interest in the clause.

The conventions of Massachusetts, South Carolina, New Hampshire, New York and Rhode Island, in ratifying the Constitution, proposed an amendment to the effect that Congress, in levying direct taxes, should first require each State to pay its quota, the State to raise the amount by such means as it deemed best. If the State neglected to pay, then Congress should levy the direct tax.

The conventions of North Carolina and Virginia went further, recommending that when direct taxes or *excises* should be levied that each State should be informed of its quota, and if the State Legislature should pass any law effectual to raise the amount at the time required by Congress, the Federal tax or excise should not be levied.

The great interest in the clause relating to direct taxes had, and could have had, but one source—the fear lest the Federal government should so levy forced contributions upon the resources of a State that it should pay, through its inhabitants, more than its proportion of the burden of the common defense and general welfare. The term "forced contribution" is important. It was not intended that duties, imposts and excises should be apportioned—so far as these are taxes on expenses they are in a sense voluntary—so far as they are taxes on consumable commodities they are not only voluntary, but are, as we have seen, incapable of apportionment because they are paid by the chance consumer. Taxes which may be described as voluntary do not create an unavoidable burden upon the States, for their incidence, though varying greatly in the several States, depends, after all, upon the habits and tastes of the people. But a general tax upon real estate or personalty or upon income imposes in fact a definite, unavoidable burden upon the States whence it is collected.

The administration of the present income tax law will inevitably result in the unequal distribution of the burden of Federal taxation among the States. The fact that the tax is aimed at a few persons, and those the well-to-do, has distracted attention from its far reaching burden. Any tax, no matter how levied, forcibly diverts the money collected from its normal channels of expenditure, and thus affects the

community whence it is taken. Hence any exaction upon property within a State over and above the just proportion of that State is a detriment, whether the subjects of taxation are few or many. That the inequality of the present tax is designed, adds nothing to its unlawfulness, but draws attention to the provision of the framers of the Constitution in so wording that instrument as to preclude a combination of States from extorting tribute from other States.

To hold that the framers of the Constitution did not intend to incorporate the great principle of the equalization of burdens among the States according to their population, but merely a partial application in the case of heads and lands, is to pervert the record of their achievement.

The present tax is comparatively mild, but it contains the principle which, if approved, may lead to a far different union of the States than that contemplated by the Constitution. If the principle of this law is upheld, it might be lawful for Congress to impose upon a few States nearly the whole burden of Federal expenditure. This could be done by a carefully graded income tax. Whether it would be done is immaterial, for it has ever been our well founded boast that the equal rights of our States are based on the plain provisions of the written law.

FEDERAL COURTS—DIVERSE CITIZENSHIP—HABEAS CORPUS.—A petition for a writ of *habeas corpus* by a citizen of one State seeking release from illegal restraint by a citizen of another State, is a suit or controversy between such parties; and the Circuit Court has jurisdiction, upon the ground of diverse citizenship, to issue the writ and determine such controversy, where the question involved is that of the petitioner's legal right to a discharge from restraint, and not one of discretion as to the place or character thereof. (*King v. McLean Asylum, etc.* [U. S. C. C. of App.], 64 Fed. Rep. 381.)

TELEGRAPH COMPANIES—INJURIES BY BROKEN WIRE—EVIDENCE.—In an action against a telegraph company for injuries to a boy 10 years old, it appeared that the boy took hold of a broken call wire hanging from the crossbar on one of defendant's poles, and received a severe electric shock; that there was an electric light wire on the pole, below the crossbar; that the electric light plant was not owned by defendant; and that soon after the accident the broken wire was repaired: *Held*, that evidence was admissible that nine months after the accident there was no guard or dead wire between the call wire and the electric light wire, as was usual in such cases, and that the call wire was then defective by reason of long use and rust. (*Western Union Tel. Co. v. Thorn* [U. S. C. C. of App.], 64 Fed. Rep. 287.)

## THE REVISION OF THE CODE.

BY GEORGE A. BENHAM.

THE revision of the Code of Civil Procedure is a very obtrusive subject, and will undoubtedly receive considerable attention from the present Legislature. Having made a general shake-up of all the laws, it would seem proper for the Legislature to attack the subject of procedure and practice next.

That the Code of Civil Procedure should be revised and condensed is fully conceded by all. This Code is one of the most remarkable compilations in modern jurisprudence. It is remarkable on account of its great proportions rather than as a model exposition of procedure—of quantity rather than quality. It is a great mass of incongruous, heterogeneous matter, upon which large excrescences have formed, until the original *corpus* is almost obscured from view. Like the books of Talmud, or the Koran, our Code almost passeth the understanding of average men. For years our lawyers and judges have studied it patiently and severely, and have subjected it to the light of reason, to the rigid scrutiny of analogy, but have been utterly unable to comprehend its true meaning when taken together as an exponent of the science of procedure. It is a labyrinth through whose mazes the most subtle and penetrating minds have wandered hopelessly.

Our courts have surrounded the Code with a wealth of profound learning, and yet what do we know of it? It has been pounded and expounded, and subjected to the search-light of some 10,000 carefully considered decisions,—and the average lawyer, after many years of persistent research, and a faithful analysis of the decisions bearing thereon, is tolerably well posted on some of the sections. Mr. Carter, in one of the ablest and most instructive and entertaining addresses\* ever delivered in this country—a production which cast a flood of light upon many difficult and perplexing legal problems—pointed out the errors into which we had stumbled through the absurdly constructed Code, and he noted with apprehension the great number of decisions which its imperfections have necessitated. And this was several years ago,—and the number of such decisions has constantly increased at an alarming rate. As illustrating this subject, it may be mentioned that a book of several hundred pages was compiled from a single section of the Code.†

A bright young man, about to take examination for admission to the bar, expressed to one of the examiners grave doubts as to his fitness upon the

Code. "Why," said the examiner with extreme frankness, "I don't know anything about that Code myself." A successful lawyer, who was very clever in finding technicalities in practice, said: "I have practiced law ten years, but I don't understand this Code of Civil Procedure." These expressions will doubtless find hearty approval among many capable and well-read lawyers.

One of the strongest objections to the present Code is its lack of continuity and completeness in many subjects, thus requiring the co-ordinate use of different and oftentimes irreconcilable provisions to meet the necessities of a given case. This is painfully noticeable in the chapters on Surrogates, for instance. This standing aggravation might be ameliorated to some extent if we had some convenient mode of finding readily all the provisions applicable to one or more subjects, but we have not, and it might require extraordinary constructive genius to devise some such method. A distinguished lawyer of this city told me that he spent half an hour in a vain search for a provision in the Code of Civil Procedure which he was thoroughly familiar with, and had used on previous occasions.

In approaching the subject of Code revision, we are confronted at the very threshold with a very serious and perplexing question. How shall we effect a thorough, systematic and satisfactory revision without destroying or impairing the value of the great number of decisions which have construed its provisions? It would be a consummate piece of folly—I was about to say vandalism—to make a revision of the Code which will render these decisions practically useless. After struggling along with this Code for a long period, and overworking our judges, and thereby impeding justice, in ascertaining an interpretation of its provisions, after we have attained a fair solution of a great number of questions arising from its imperfections, we cannot afford to cast away the accumulated results of years of fruitful labor. Shall we shatter by one destructive blow a monument of learning erected by patient study and research? Shall we overthrow and cast into oblivion the monuments of wisdom and truth set upon enduring foundations? Shall we rob the Temple of Justice of its priceless treasures embellished by the sages of jurisprudence?

We adopted a Code of Procedure apparently consistent to our times and conformable to the enlightened spirit of progressive ideas. We have employed the greatest legal talent of the age, both upon the bench and at the bar, to interpret this Code, and to formulate therefrom a system of rules of procedure consonant with the great principles of natural justice and equity, and in harmony with our modern institutions. The labors of these eminent jurists have been greater, more intricate and perplexing, and the results are less perfect and sym-

\* "The Province of the Written and Unwritten Law," an address delivered before the Virginia Bar Association, by Hon. James C. Carter, LL. D.

† Section 829, Privileged Communications. "The Competency of Evidence," by William H. Morrill.

metrical, because of the incongruous and unwieldy matter upon which they have worked. The Code has been like a roughly designed and ill constructed edifice, and the work of the decorators has been, necessarily, tedious and difficult. The task of reconstructing crude and defective parts and polishing off rough places has occupied precious time, which ought to have been devoted to finer and nobler work. The results attained by the interpreters of the Code are vastly superior, both in quantity and quality and in practical utility, than the original work itself. We have in this great bulk of decisions an unwritten code of procedure, which is much more valuable than the written Code.

Under such circumstances, it becomes our duty to profit by the experience of the past, and to conserve the best results of that experience. We ought not to abandon the old Code and set up a new one in its place. We ought not to attempt to patch up the old Code—in short, to put new wine into old bottles. The duty before us is very plain. We have a written Code, which, in practical use, has proved to be crude, unreliable and productive of vexatious litigation and grievous delays. This Code was largely an experiment. It was not the product of time and ripe experience, but a creature of the spirit of innovation. It was simply a skeleton of reform procedure turned loose to fatten upon the hapless victims which fell within its relentless grasp. "And what meat hath it fed upon!"

This Code was the product of two fertile minds, whose owners have gone to rest, and we have gently strewn the flowers over their graves and enveloped their shades with the mantel of charity. Our courts, after years of patient study and arduous labor, have constructed an unwritten code of procedure, which is an enduring monument of jurisprudence. Now, the most rational method to pursue is to take this unwritten code, which has been formulated to meet the exigencies of the times and the peculiar requirements of specific cases, and construct therefrom a code which will be uniform and stable and conformable to the demands of the profession, and with the speedy and orderly administration of justice in the present and future. In effecting this object we should retain only so much of the old code as the decisions of our courts have held to be proper and applicable in actual practice. In short, we should frame a code just as we would a treatise on pleading or practice—upon the authority and in harmony with the decisions of the courts. Then we should have a code which the courts will not have to construe and make over again piecemeal—"line upon line, precept upon precept; here a little and there a little." Instead of framing a code and then asking the courts to perfect it and supply omissions and discrepancies,

thus delaying justice through technicalities, we should endeavor to construct one from the materials already furnished us in great abundance by the courts in construing the old code and along the lines laid down by these tribunals. Our procedure and practice ought to be well settled by this time. So what we need now is an authentic, uniform and reliable exposition thereof in the shape of a code worthy of the name.

I apprehend that there are but very few important questions arising under the mode of procedure and practice prescribed by the code which have not been the subject of careful and repeated adjudications by our highest courts—and by means of such adjudications most excellent and uniform rules have been enacted for our guidance in procedure and practice. The courts, with all the facts before them, in a multitude of cases, covering almost every conceivable question, and after ripe experience, and in the exercise of plenary powers and sound discretion, have taught us the true and only rational mode of procedure, and upon their adjudications, conspicuous in hundreds of reports, we should found a Code of Civil Procedure which will be like a vestal light to illumine the devious and labyrinthic pathways of legal procedure.

TROY, N. Y., *February 6, 1895.*

### Abstracts of Recent Decisions.

**ALTERATION OF NOTE — BURDEN OF PROOF.**—The burden of proving that a note was altered after delivery is on the person who claims that the alteration was made. (*Farmers' Loan & Trust Co., v. Olson* [Iowa], 61 N. W. Rep. 199.)

**ATTACHMENT — EQUITABLE INTEREST IN LAND.**—A levy of an order of attachment on real property by posting a copy thereof is not effective, as against third parties, when there is an occupant of such property. (*Shoemaker v. Harvey* [Neb.], 61 N. W. Rep. 109.)

**BANKS — PAYMENT OF CHECK TO UNAUTHORIZED PERSONS.**—Where the general fiscal agent of a building and loan association, who, while not by its by-laws the custodian of its funds, was the custodian of its securities, and authorized to make its collections and transact its banking business, deposits a check to the order of the association to his own credit, the bank on which the check was drawn is not liable for his misapplication of the money, though by the by-laws of the association the treasurer was the only person who could pay out its funds. (*Gate City Bldg. & Loan Ass'n v. National Bank of Commerce* [Mo.], 28 S. W. Rep. 638.)

**CARRIERS OF PASSENGERS — CONTRIBUTORY NEGLIGENCE.**—A passenger who unnecessarily and negli-

gently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the danger to which he is exposed. (Illinois Cent. R. Co. v. Davidson, [U. S. C. C. of App.], 64 Fed. Rep. 301.

**CONSPIRACY — PLEADING.** — A complaint in an action for criminal conspiracy which alleges that defendants were members of a brewers' association formed to compel retailers to pay accounts due such members, and that they combined to coerce plaintiff to pay a certain sum falsely alleged to be owing to a member, and that, by notifying all such members that plaintiff was so indebted, they prevented him from obtaining a supply of liquor and from carrying on his business, which was thereby wholly destroyed, is insufficient as not alleging absolutely that plaintiff did not owe such sum. (Schulten v. Bavarian Brewing Co., [Ky.], 28 S. W. Rep. 504.

**CONTRACT — CONSTRUCTION.** — A condition, in a contract to purchase land, that a manufacturing company "transfer" its "works" to certain land, does require that the identical buildings and machinery be removed. Hanna v. South St. Joseph Land Co., [Mo.], 28 S. W. Rep. 662.

**CORPORATION — OFFICERS — COMPENSATION FOR SERVICES.** — When a president and director of a corporation, for whom no salary is provided, of his own accord renders services to advance its interests, being a large owner of its stock and of the stock of other corporations which would be benefited by its prosperity, without expectation on his part of compensation, or knowledge on that of the corporation that he expected payment, he cannot recover therefor or for personal expenses connected therewith for which he had no purpose to charge. (McMullen v. Ritchie, U. S. C. C., [Ohio], 64 Fed. Rep. 258.

**CRIMINAL EVIDENCE — MURDER — RES GESTÆ.** — When a witness testified that deceased procured a pistol and followed defendant, a statement by deceased to the effect that defendant had better go, or defendant would whip or kill him, was admissible as part of the *res gestæ*. — Gibson v. State, [Miss.], 16 South. Rep. 298.

**EMPLOYER AND EMPLOYE — DISCHARGE — DAMAGES.** — Where a contract of employment provides that it may be terminated by the employer on one week's notice, the employee is entitled to only one week's salary as damages on refusal of the former to continue his employment. — Derry v. Board of Education of City of East Saginaw [Mich.], 61 N. W. Rep. 61.

**ESTOPPEL — WHAT CONSTITUTES.** — Defendant in an action to establish a boundary is not estopped from

denying the location as claimed by plaintiff because a surveyor, in the presence of defendant, ran the line, in accordance with a deed to defendant, as claimed by plaintiff. Lovelace v. Carpenter, [N. Car.], 20 S. E. Rep. 511.

**FEDERAL COURTS — CIRCUIT COURT OF APPEALS — JURISDICTION.** — The United States have a right to appeal to the Circuit Court of Appeals from an adverse judgment in the Circuit Court in a suit by a clerk of a district court to recover his fees under act of March 3, 1887. (United States v. Morgan [U. S. C. C. of App.], 64 Fed. Rep. 4.)

— **REVIEW OF DECISION OF STATE COURT.** — A Federal court cannot entertain jurisdiction of a bill of review seeking a rehearing of a cause in a State court. (Graver v. Faurot [U. S. C. C., Ill.], 64 Fed. Rep. 241.)

**GUARANTY — RELEASE OF GUARANTOR.** — A guarantor of the payment of goods furnished a merchant is released by a delay of three years in notifying him of default. (Myers v. Reedy [N. Car.], 20 S. E. Rep. 521.)

**INSURANCE — ARBITRATION.** — An insurance policy required, in event of a disagreement as to the amount of loss, an appraisal. On demand of the insured, made without giving the insurer a reasonable time to accept the proofs of loss, appraisers were appointed. No steps were taken looking to an adjustment. *Held*, that the insurer could not claim that the appointment was premature. (Brock v. Dwelling House Ins. Co. [Mich.], 61 N. W. Rep. 67.

#### PROFESSIONAL MISCONDUCT.

TWO recent decisions bring home to the minds of solicitors the many ways in which their responsibilities are capable of abuse. The comparative rarity of this abuse among so many thousands of solicitors makes the public surprised that these things can occur; on more mature reflection they feel still more surprised that their occurrence is not more frequent. Professional misconduct is somewhat difficult to define tersely in a few words, for it is comprehensive of not only what is misconduct for the world in general, but also of all offenses against the professional code of honor, whatever the profession may be. In the case of *Re a Solicitor*; *Ex parte* the Incorporated Law Society (Dec. 19, 1894, and Jan. 21, 1895), a solicitor prepared a post-nuptial settlement and inserted in it the names of two trustees, who had never agreed to act and never executed the deed. At a later period the solicitor got an advance out of the trust money from the trustees, he giving no security in return, and in no way informing the trustees that they were committing a breach of trust. The committee of the In-

incorporated Law Society acquitted the solicitor of any fraudulent intention, but they held that the neglect to inform a client of the breach of trust to be committed, and the facts of the whole case, amounted to professional misconduct. The Divisional Court suspended the solicitor for three months. In the case of another solicitor (11 Times L. Rep. 169) the facts there were as follows: A widow instructed a solicitor to recover £12 6s. 8d. upon a promissory note in April, and he did so within the week. Not until the June following did he repay the sum to her, and then only after hearing of her application to the magistrate and of her appeal to the Incorporated Law Society. The widow was a poor charwoman. The Divisional Court, who were asked to condemn this as professional misconduct, refused to do so, holding that no misrepresentation or deceit was disclosed. "If the committee had found as a fact that the solicitor only paid the widow because of application to the magistrate, there would have been professional misconduct," said Mr. Justice Wills. Solicitors, if they have not done so already, will be interested to read the judgments of Lord Esher, Lords Justices Lopes and Davey in a fairly recent case—(Allinson v. General Council of Medical Education and registration, 70 L. T. Rep. 471.) The Medical Council struck off the plaintiff's name from their rolls on account of "infamous conduct in a professional respect," as they were entitled to do under the Medical Act (21 and 22 Vict., chap. 90). The plaintiff applied for an injunction to prevent them so doing. During the hearing of the case Lord Justice Lopes drew up a definition of the words, which ran as follows: "If it is shown that a medical man, in pursuit of his profession, has done something in regard to it which would reasonably be regarded as disgraceful or dishonorable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he is guilty of professional misconduct in an infamous respect." This definition the master of the rolls adopted, and he went on to explain that there were some acts which would not be infamous in any other person, but which may be considered infamous in a professional man. To generalise the facts of a case, and so apply the misconduct in one profession to another, is somewhat difficult; but we may take it that Lord Esher condemned the defaming of one professional brother by another, and so enticing a person to leave the one and consult the other. Lord Justice Lopes argues upon the same lines, but he also touched upon another set of facts. The plaintiff wrote a circular, which he had subsequently to withdraw at the instance of the medical profession. The circular was issued then by a society, and he advised people to consult that

society. That was conduct which Lord Justice Lopes condemned as "infamous in a professional respect." Lord Justice Davey explained that the court did not, in this latter case, base its judgment upon the nature of the views, but upon the manner of spreading them. It is hardly necessary to dwell upon the difference of the words "professional conduct in an infamous respect," as used in the Medical Act, and "professional misconduct" as used by the Solicitors' Incorporated Society. In point of expression the former is stronger than the latter; in point of construction the former is far wider than the latter, if we take as examples the case of Allinson v. General Medical Council of Education and Registration (*supra*), and the case of the solicitor reported in 11 Times L. Rep. 169.—*Law Times*.

### Correspondence.

#### THE INCOME TAX.

*Editor of the Albany Law Journal:*

I have read with interest the various arguments printed in your columns tending to show that the recent United States income tax is unconstitutional. I am one of those who wishes that it were, for I regard it as inequitable and impolitic. But I am surprised to find that most of those who attack the law in question as unconstitutional because it is not "uniform" fail to make the important distinction between *equality* and *uniformity* of taxation. Equality in the distribution of taxes is an "absolute impossibility." (Cooley on Tax. 164.) Exemptions, either express or implied, are inevitable. (171.) If, therefore, by requiring that taxes should be "uniform throughout the United States" the framers of the Constitution meant that all classes should be treated with perfect equality, and no exemptions should be granted on any account, they meant to prohibit Congress absolutely from laying any tax whatsoever. If, however they meant that the equalities and inequalities of the burden should be the same throughout the United States, so that in all parts of the country the same conditions should produce the same liabilities and the same causes should everywhere produce the same effects, then they imposed a limitation upon Congress which sane men can regard as reasonable. Which interpretation is likely to be adopted? It seems to me (especially in view of the previous decisions rendered in the construction of previous legislation) that lawyers ought to find no difficulty in answering this question. It is certainly dangerous to assume that the recent income tax law is necessarily in derogation of the principle of "uniformity," simply because its operation is unequal, or even unjust.

Yours truly,

NEW YORK CITY.

LEO. G. ROSENBLATT.

# The Albany Law Journal.

ALBANY, FEBRUARY 23, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE Court of Appeals has recently handed down a very important decision and one of considerable interest in the case of the People, *ex rel* Mechamcus v. Warden in which a police power of the Legislature is discussed and its constitutionality determined. The statute under discussion was chapter 602 of the Laws of 1892 providing for the examination and registration of employing or master plumbers within the locality named in the bill and making it a misdemeanor for any person to engage in that trade, business or calling without such registration. Four of the court agree in the decision while Judge Peckham, writing the dissenting report, is concurred with by Judges O'Brien and Bartlett. We are very much in favor of the reasoning in the dissenting opinion by Judge Peckham, as we think it is right, equitable and shows a true appreciation of a certain, to say the least, ill advised legislation. The question really is whether an employing or master plumber must be obliged to submit to an examination and registration, while another person in the same trade can follow his vocation without any such necessity. The majority of the court take the ground that persons who employ others to do plumbing work, who have to possess skill in the performance of their labor, and who must have some regard to the public health and comfort, should be forced to be skilled persons and parties who understood their calling, so as not to endanger others by unskillfulness in the performance of their work. An individual, however, may do the same work, under the existing law, and yet be as unskillful as a directing or overseeing man might be and still follow such a vocation, and he is not required to take out such a certificate as has been mentioned. The theory of the majority of the court might have been that a man employing others to work under him, in order to hold such

a position, should be required by statute to have some extra knowledge of the subject of his operations, but as the public health may be injured as much by an individual plumber in doing his work poorly as by an unskillful man who employs others who are skillful, there seems to be no reason to believe that the public health will be in any way bettered by the carrying out of the provisions of the existing law. On the other hand, the practical working of such a system is obviously to create a monopoly as the examiners are most likely to be plumbers who desire to have only a few of their calling among those who hold certificates, and possibly, under the operations of the law, to prevent a skillful man from obtaining such a certificate by an arbitrary act of the board of examiners. The two propositions therefore seem to be that the act does not require all plumbers to take out certificates and hence does not protect the public from the unskillfulness of all in the calling, while it is most possible that great injustice may be done by the board of examiners who could prevent certain individuals who were not friendly to them, from following their calling and employing men to work for them. Therefore the dissenting opinion of Judge Peckham appeals to us most strongly. He says: "It is said this act is proper and right in order that the public may have some assurance that the master or employing plumber is not alone capable of following his trade as such, but that he has sufficient knowledge of the laws of health, as applicable to plumbing, to enable him scientifically to follow that trade as a master plumber. It is to be observed that the examination does not necessarily call for any such knowledge. The act can be complied with so far as this examination is concerned, if the applicant has but a most ordinary knowledge of the laws of his trade and the proper way to follow it practically. It is true the board may demand much more than that and much more than was ever necessary to practically pursue the trade. If such additional knowledge were exacted it would be in fact adding to the known and ordinary qualifications necessary to carry on the well-recognized trade of a plumber, whose other and entirely different and much superior qualifications necessary in one who intended to conduct the professional business of a sanitary expert with regard to systems and general plans of



plumbing. The Legislature has no power to impose such a condition upon one desiring to exercise such a trade. \* \* \* This board has the very greatest and entirely arbitrary discretion as to what qualifications it will exact from the applicant. \* \* \* It seems to me very absurd to treat this statute as one which in any possible manner affects or which was really intended to affect the public health, and when it is seen that the work of the master plumber may be performed by journeyman, who have been subjected to no official examination and whose work need not be examined by any one, not even by the master plumber himself, the radical failure of the act to really protect the public health is quite apparent. \* \* \* Taking the act as a whole, it would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter except as he may pass an examination the requisites of which are not stated, and where his success or failure is to be determined by a board of which some of their own number are members. In order to be at liberty to exercise his trade as a master plumber he must pass this examination and become a member of this favored body. It is difficult for me to see the least resemblance to a health regulation in all this. I think the act is vicious in its purpose and that it tends directly to the creation and fostering of a monopoly." The strength and boldness of this argument, it seems to us, cannot be refuted, for it is obviously impossible to thoroughly protect the public health in a scientific and proper manner by the present law and as is particularly attempted by the bill, unless all plumbers, irrespective of whether they employ others or not, are forced to pass a proper examination to prove their efficiency and to demonstrate that they are able to care for sanitary conditions of the community where they work.

A case which has been exciting considerable interest and comment abroad is that of Madame Joniaux, who was recently convicted and sentenced to death for poisoning. A number of these cases have occurred in England and on the continent, but this one seems especially worthy of notice, as it is claimed that the evidence hardly conforms to the proof which

should be required in such a case. In speaking of it, the *Solicitor's Journal* says:

"We doubt if a prisoner has ever been sentenced to death for poisoning upon narrower evidence than that on which Madame Joniaux was condemned, after a trial of three weeks, early on Sunday morning. One has, of course, to remember that the trial took place abroad, and that the English newspaper reports of it may not have been complete. But, assuming their accuracy, we think that the case deserves a foremost rank among the problems of circumstantial evidence. Let us consider the three charges against Madame Joniaux, first separately, and then with reference to their conjoint effect. Léonie Ablay, the sister of the prisoner, died suddenly at the house of the latter in Antwerp on the 25th of February, 1892. Her death was certified, upon information supplied by Madame Joniaux herself, to have been due to gastric disorder accompanied with fever. Her body was exhumed and submitted to post-mortem examination two years later, viz., on the 2d of March, 1894. The experts for the prosecution found no traces in the remains either of any vegetable poison or of any disease which would account for death, and they properly declined to express any definite opinion upon its cause. Léonie Ablay was insured for the benefit of Madame Joniaux's daughter, and with a view to provide for the liquidation of a family debt of honor. But there was nothing to show, either that the prisoner had administered to the deceased food in which morphine (alleged by the prosecution to have been the poison employed) might have been contained, or, indeed, that she was in possession of morphine at the time. It is inconceivable that Madame Joniaux would have been convicted of murder here if the case had stood alone.

"Then take the case of M. Van Keochane. He died at Madame Joniaux's house on the 18th of March, 1893, shortly after a dinner at which he had admittedly drunk to excess. It was alleged that Madame Joniaux expected to inherit his fortune, and at this time, as at every critical point in the case, she was undoubtedly in a state of great financial embarrassment. But the post-mortem examination, which was held on the 18th of March, 1894, revealed no traces of morphine, and the chief crown expert admitted that the death might have been

due to alcoholic poisoning. On these facts, again, Madame Joniaux would have been, we take it, entitled to an acquittal. The third case, that of M. Alfred Ablay, who also died at Madame Joniaux's house in February, 1894, was a much stronger one. Here the post-mortem examination followed the death within ten days, and chemical analysis detected morphine and atropine in the intestines. Moreover, M. Ablay, like his sister, was insured practically for Madame Joniaux's benefit. But, on the other hand, there was some evidence that he was in the habit of taking morphine, and the medical experts for the defense stoutly contended that the death might have been caused by heart disease, and that in any event the quantity of morphine alleged to have been found in the remains was insufficient to have caused it. Had there been no other charge against Madame Joniaux than this, we conceive that she would have been acquitted, all the more so as there was no direct evidence of administration. When we consider these cases collectively, however, they undoubtedly present a formidable indictment. From 1891 to 1894 Madame Joniaux was in a condition of chronic financial difficulty. The three persons with whose murders she is charged died in her house; she had something to gain by the death of two of them, and was alleged to have had expectations in regard to the will of a third. In two cases she had negotiated the insurances of which she was to have the benefit. In each case she had opportunities of administering morphine; on one occasion, at least, she was in possession of that drug, and the evidence went to negative the assumption that she injected it into her own person. On the whole, we incline to the view that the balance of the evidence justified a conviction, and nothing more."

Before we part with this interesting *cause celebre*, there are two general observations which must be made. If, as seems probable, Madame Joniaux's capital sentence is commuted to penal servitude, our Belgian *confreres* should set about getting the death penalty formally abolished, in order to save their criminal system from the ridicule of Europe. Again, they ought also to consider the question whether their present methods of conducting criminal inquisitions are not now a little out of date.

Madame Joniaux was bullied and browbeaten both by judge and prosecutor in a manner on which it is difficult to express oneself calmly, and which, whether it was in accordance with precedents or not, was anything but a credit to those who took part in it.

The amendments to the income tax which are now pending in Congress in some ways rather tend to lessen the arbitrary character of this law. It is only proper and fitting that the time for filing the returns should be extended from the first Monday of March to some later date, as there is very little knowledge of the provisions or of the operation of the law. As the tax will not have to be paid by individuals until the first of July, there seems to be no good reason why the proposed amendments should not be passed. Another feature of the amendments which will undoubtedly give greater certainty and accuracy in the filing of returns and in computing the amount of tax to be paid by individuals is one exempting persons who receive dividends on stock, whether the tax has been paid on the net profits of the corporation or not, from computing the amount of dividend on any stock in estimating their annual income. There will be less trouble and difficulty in estimating the amount of the tax and the amount of income on which the tax should be levied by the passage of these amendments to the income tax, and it will result in much greater satisfaction to all who come within the provisions of the law. Another amendment which we think of and suggest, and which would be received with general favor, would be the repealing of the enacting clause of the original act.

The English *Law Times*, in commenting on the excitement occasioned by the rumors and statement of the condition of the New Zealand Loan and Agency Company, speaks of a decision which was rendered by Mr. Justice Vaughan Williams in November, 1894, and which was rendered in an action to continue a misfeasance proceeding against certain directors of the above-named company. The *Law Times* further comments as follows:

"Under the scheme of arrangement with the sanction of the court, by which the assets of the company had been transferred to a new one, any rights which it might have against its

directors were reserved. But, though this reservation was made, the new company stood in the position of a purchaser of the claims against the old directors, and had the right *prima facie* to determine whether this asset should or should not be realized. It took the view that, whatever might be recovered by the misfeasance proceedings, it would lose far more than it would gain by fishing in the dirty waters of an inquiry into the alleged frauds. The directors resisted the summons on this ground, and asserted that in so doing they had no ulterior intentions of acting in the interests of the incriminated directors, and screening them in any way from the consequences of any improper conduct of which they might have been guilty; but from a fair and honest estimate of the effect upon their company's commercial position. The question was, whether there was any reason or obligation upon grounds of public policy, as intended by the Winding-up Act, 1890, which should override these purely mercantile considerations. The reservation in the scheme of arrangement left this matter in the hands of the official receiver; but did it therefore shut out altogether the views of the directors of the new company, provided they could show that their action was taken honestly and *bona fide*?

"The object of section 10 of the act under which the official receiver was proceeding is not in itself intended for the punishment of delinquents, but for the realization of assets. The company might well be entitled to contend that they should not be called upon to act as the asserters and upholders of public morality by indirect action in the form of proceedings for recovering an asset of the company; and to do this at their own cost, as it was admitted they would have to do, in a matter in regard to which they had no other than a commercial and pecuniary interest. They might plausibly argue that this duty should be performed, if at all, directly and frankly by the proper authorities upon whom the law places it by virtue of their office. The new company did put forward such views as the above, and Mr. Justice Vaughan Williams decided in their favor. He said: 'It is my duty not to permit the abandonment of this asset if the abandonment is shown to any extent, or in the smallest degree, to be

designed to screen any one from the consequences of his misfeasance; but I do not think I ought to give the reservation an effect which would injure the commercial interests of the new company, if once I am satisfied that the desire of the company to have these proceedings stayed is honest, and in no degree tainted with the corruption which the reservation was intended to prevent.'

"This seems to be an eminently reasonable decision. The directors of a new company formed by taking over the assets of an old one have no such duty towards the public as calls upon them to sacrifice its pecuniary interests; and all they can be properly required to do is that, in consulting those interests, they shall throw no obstacle in the way of the detection and punishment of frauds perpetrated in and about the affairs of the company to which they have succeeded; and that no action of theirs shall have that tendency. If that is admitted, then they are, or should be, the best judges of the comparative value of the assets, as tested by the expense to be incurred by proceedings for their recovery, together with the indirect injury which might be inflicted upon their going concern. It comes then to be a purely business question, and the judge might well feel justified, as he did in this case, in giving more weight to their opinion than to his own. This latter seems to have been that, in the long run, it would be better for the interests of the new company that the most disagreeable facts in the past history of the management of the old company should be disclosed, than that the truth should not be arrived at. That raises a very perplexing question. It is not necessary to be a director to appreciate the difficulty of deciding in many cases whether in any given position it is better to remain quiet or to permit a full disclosure, when the question of morality is not sharply raised, and we may be only concerned with a balance of inconveniences. 'Truth and light never do much harm,' said the learned judge. That is a very pious opinion; but every man in his daily life has to use his judgment as to how much truth and light may properly be turned on; and it is agreed that he may often refrain, and that honestly, from turning them on to the full. However, Mr. Justice Vaughan Williams did not act upon his academic opinion, and allowed the practical considerations of the directors to prevail."

The Chicago *Legal News*, in an article on "Simpler Law and Procedure," joins with us in making an attack on the present complicated system of pleading and practice in the different States. The *News* begins its article by saying: "It goes without saying that any reforms in the way of simpler laws, less cumbersome and technical instruments, and the more speedy administration of the law, must be for the benefit of the community at large, but yet possible, not more so to the layman than to the money-grabbing legal practitioner, whose chief interest in them might be their effect upon his income. Next to building up a reputation for great ability and strict integrity, the reputation most to be desired by a lawyer is that of having the habit of disposing of business expeditiously. But how can this latter reputation be earned in Chicago to-day?" It is apparent that a lawyer cannot acquire the name of being prompt and business-like in his methods under the present *regime*, which allows dilatory motions and permits legal quibbles to force themselves in place of legal rights and justice. Mr. James DeWitt Andrews, in a letter on this subject to the Chicago *Legal News*, says:

"I do not believe, however, that we can do away with the doctrine of *allegata et probata*, and the consequent rules as to substantial variance, without destroying the whole system of issues and *res adjudicata*. If, as pointed out by Mr. Moses, plain provisions, now existing, are lost sight of and ignored, what reason is there to suppose that a new act would fare better? Would it not open new doors for construction, or, if the courts and lawyers simply waive the law and ignore it, why will they not do the same with a new act? Does not the evil really lie deeper, and is not the remedy to be sought in another direction? Students should learn and lawyers and courts should observe the stages which mark different degrees of strictness as to amendments. Amendments before trial, upon the trial, and after verdict, and after judgment or on appeal. Before the time for the defendant to plead, the plaintiff ought to be allowed to amend as, of course, the codes generally provide for one such amendment without motion. After plea filed, terms should be imposed, but amendments allowed liberally. Upon the trial the doctrine of variance first appears and it would not be fair to allow an allegation of one thing and proof of another substantially different; but amendments should be granted upon terms, and the plaintiff should be compelled to try the case he started out to try, not in form but in substance. I believe all

courts agree upon this question. After the trial the statute of amendments and jeofails often becomes self-executing by what is called *aider* by verdict or judgment, or the trial or appellate courts may and should order amendments, or allow them within reasonable limits.

"The real cause for the many slips, and the confusion into which many cases are thrown, is not found in the law. Mr. Moses says that he has never had reason to be caught in any of the alleged pitfalls of the law. Why? Simply because he has probably studied them. No system of procedure can be devised which will enable farmers, mechanics, tradesmen or bankers, to come into court without any study of the law and try their cases. Nor has any system of procedure been devised which will enable lawyers to obtain justice for clients speedily, surely and inexpensively, without studying the rules of pleading, of which the law of amendments and the doctrine of variance form important, one may say, vital, parts. A professor of a prominent law school in New York teaches his students as follows: 'Under the new procedure the average lawyer being hurried, careless, or lazy, can safely issue his single form of process for commencing his action, without knowing anything at all about the facts or law of his case, and without preparing his pleadings until after actions commenced. In preparing his pleading, he can allege facts enough to constitute a cause of action, relying on amendments if a different state of facts should be developed establishing a different cause of action. On the trial he offers all the evidence which he thinks will help him, without any distinct theory of his cause of action or defense, and raises objections and takes exceptions liberally, leaving the trial judge to string the disconnected evidence upon some theory in the charge to the jury. After this lawyer has been beaten on the trial, and has begun to prepare his argument for a new trial or appeal, then, for the first time, he usually begins to study his case, as the lawyer under the old procedure had to before commencing his action.

"One can scarcely believe that he is serious, but the serious fact is, that he actually is in earnest. He uses the word 'safely.' Yes, the lawyer is pretty safe, but heaven help his client. Of course, if he is beaten, and such a lawyer generally is, he curses the court, denounces the technicality of the system, but never thinks himself to blame for not studying up a little. What could reform legislation do in the face of such teaching and learning. The law does not encourage the careless and lazy. The impres-

sion conveyed by the learned professor is really at the bottom of the confusion in New York practice, and explains why over one-half of the time of the courts is taken up in correcting mistakes of lawyers. By the statistics we are not so bad off here, but when it can be said truly that special pleading is a lost art, we shall be. Individually, I protest the learned judge may confess that he never knew, or has forgotten, the art, but the writer knows personally quite a number of lawyers that are first rate special pleaders, and judges, who are masters of the art, and while he agrees with many things, indeed most of what is said in the articles mentioned, he believes that a great deal can be done to simplify the use of our procedure by studying it. Of course, that is a good deal like saying, 'Go wash seven times in the Jordan,' but if the statute of amendments and jeofails was bound in our statutes with the practice act, and the applicants for admission to the bar required to pass a good examination upon pleading and practice, it would save them much future trouble, their clients money, and much of the time of the court, to say nothing about the waste of public funds on account of appeals and retrials.

"They have legislated and simplified for almost fifty years in the Empire State, while the reformers have said, 'It is no use to study pleading.' In Connecticut they have legislated a little and studied much. The result is that the practice act of the latter is held up as a model, while the Code of Procedure is pointed to 'as an example to be avoided,' and the Legislature is now laboring to reconstruct it 'in a spirit of true reform.' No State in the Union ever spent one-fifth so much as New York upon its procedure. For fifteen years the Code commission was kept up, and drew volumes of acts and salary without stint. In a few more years this fabric was torn to pieces against the protest of Mr. Field, by another reviser, and later there were nine chapters added to the history of practical simplicity in procedure, and then thirteen more, and sections *ad infinitum*, and now they have more Solons, selected by the governor's appointment, and they have begun inquiring, 'Whence came we, and whither have we drifted?' Samuel Warren said in 1855, which is quite as applicable to our procedure in 1895: 'Never was it so absolutely indispensable as now to study law systematically and master principles, in order to avoid being overwhelmed by changes of detail and administration, and steer through them with safety and comfort. He who does not pursue this course will find himself tossed about, without rudder or compass, on a wild sea of change.'"

## THE CONSTITUTION OF THE UNITED STATES AND ITS RELATION TO THE SUBJECT OF TRADE-MARKS.

AS legal science progresses, much that has been said concerning "written Constitutions" is seen to be of superficial importance. The fact that the organic provisions are expressed in formulated clauses and paragraphs and in particular words is nothing more than a distinct announcement that the provisions exist. The provisions are not the more organic because they are set down in written words. Before they can be defined they must exist. And to state and ratify the definition is simply to make a formal statement and assertion that they are operative and of controlling force.

The influences which produced the common law of England produced what is called the English Constitution and, also, the Constitution of the United States. Owing to the incidental fact that George the Third was a narrow-minded and unreasonable tyrant, the American colonies were driven into rebellion; and, after their separation from England had been accomplished they formulated a written summary of their convictions—a Constitution in which they embodied that which was generic and that which was specific. The generic provisions came of the same influences which have made the English Constitution, and the specific provisions were adopted "from reflection and choice." In its details, in that it made provision for the special conditions of the thirteen colonies and for a definite union upon certain terms it was, perhaps, unique. But in its spirit and substance it was in no essential respect unlike the unwritten Constitution of the nation from which there had been a separation. Then, as now, the influences which had created the Magna Charta and that which followed it were operative in both England and the United States.

From a period earlier than we recognize these influences had been moving as they are now moving with unflinching progress. In England they found expression in rules which have not been reduced to a system of written clauses and paragraphs. In the United States they found expression, first, in the great Declaration of Independence (as broad and inclusive in its postulates as if it existed only in the minds of those who published it) and later on in the written Constitution of the United States. To that written Constitution we have added a recognition of the fundamental doctrine that the only words of limitation which it contains are those which relate to that which has been demonstrated—the things of the past which have been solved and concluded.

For instance: We adopted the Fifteenth Amend-

ment, by which African slavery was "prohibited" within the United States. The original Constitution recognized African slavery, and to that extent, as we now perceive, it was illogical and inconsistent—a compromise with oppression which denied the truth of the most essential premises. The inconsistency brought about a war of unprecedented magnitude. But the great force which was behind the written words prevailed, and in the end adapting itself to circumstances, wrote the amendment.

The correction is of real root and vigor, not by reason of the struggle which preceded it, but because it states a limitation which was opposed by an evolution—by that which had been concluded and forever settled as distinguished from that which remains to be solved.

In 1787 the Fifteenth Amendment could not be adopted because the operation of the forces and influences which produced it were for a time necessarily delayed. The union of the colonies was a pressing emergency, to which many important considerations were subordinated. African slavery was laid out of sight, and more immediate facts and dangers were made the basis of action. But the logical and natural progress of the forces and influences, which had been in part directed and given form, went on; to agitation was added war, and in the end the imperfection was corrected by the amendment. Nothing was added to the organic law except the recognition of a limitation which the evolution of the past had demonstrated to be an irrevocable decision from which there was no semblance of appeal.

The language of the amendment, *in extenso*, might have been stated thus: "Because by experience, by suffering, by war and its loss of blood and of treasure, by the unwritten will of the American people, it has been made plain that African slavery is contrary to the rules and maxims of civilization, we do again ordain that all men are created equal, and that by our organic law African slavery shall not exist within the United States." It would be scarcely going too far to say that the written Constitution of the United States in all its parts presupposes the existence of the common law of England, and is in many respects constructively subordinate thereto.

I have ventured to offer these generalizations because they are of fundamental importance as affecting, perhaps, all that is generic in our Constitution; and because they are specially significant in connection with the things which that comprehensive instrument is by many supposed to have left untouched. They are of unusual and very pointed importance in considering the bearing which it has upon the subject of trade-marks.

At the time the Constitution of the United States was formulated trade-marks were almost unknown.

At a much earlier date, what may be designated trade-mark rights had been recognized or referred to in the English courts of both chancery and common law jurisdiction; but the evil of unfair competition was of such small proportions that it attracted very little attention. In North America commercial relations were only beginning to expand. The fact, therefore, that our Constitution contains no specific reference to the subject is not in any degree surprising. There is no reason why it should have contained the word "trade-mark" or any other work which could be construed to refer specifically to marks of origin or identification.

The superficial observer is disposed to find in the fact that our Constitution contains no direct reference to trade-marks evidence that the instrument is imperfect and incomplete. It contains provisions conferring power to legislate upon copyrights, patents and bankruptcy—the popular view appears to be that there should have been a delegation of power to provide for the protection of trade-marks. But to examine the supposed omission and to understand the nature and history of the things involved is to demonstrate that in this respect the supposed defect is the strongest possible evidence of wisdom and consistency.

I think that there is no doubt whatever that the Constitution of the United States contains a delegation of power to legislate on the subject of trade-marks, and that the power which is conferred is as inclusive as it could have been made without assailing distinctions of a fundamental character. I think that in this respect nothing can be logically added to it and that any amendment conferring power analogous to that conferred in respect of copyrights and patents would be a deplorable inconsistency.

Allusion has been made to the now well-defined fact that to our written Constitution has been added the doctrine by which its language is given the greatest elasticity. This doctrine or rule of construction is not, in the abstract, a new one. It comes in part of the inevitable growth and expansion of the use and meaning of words. We realize that the meaning of words changes and that the concept or idea communicated by means of a word in one century differs materially from the concept or idea which the same word symbolizes a century or the fraction of a century later. The words of our Constitution, except to the extent that they have a final value, are to be read in the light of the present and not as inseparable parts of the period in which they were first used. Without this necessary rule of construction it is obvious that they would be hopelessly inadequate and impotent.

The importance and utility of the rule by which the true meaning of the words of our Constitution is determined are conspicuously illustrated in the

judicial deliverances relating to the word "commerce." When the Constitution was adopted, that word meant much less than it means to-day. But the wisdom of the Supreme Court has given it such elasticity that we easily perceive that it is of the most inclusive character.

Telegraphy was wholly unknown in 1787 and the word "telegraph" had not been coined. But it has been held in our national court of last resort, and with obvious wisdom and consistency, that the word "commerce" as used in the Constitution includes telegraphy. Speaking for the court, Chief Justice Waite says: "The powers thus granted are not defined to the instrumentalities of commerce \* \* \* known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, and from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these agencies are successively brought into use to meet the demands of increasing population and wealth." (96 U. S. 9.)

Not less liberal have been constructions which have been placed upon the organic provisions relating to copyrights. These provisions are that "Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is not difficult to understand what the word "writings" meant in 1787; but it has been held by the highest judicial authority to include things which were not in any sense "writings" at the time the word was selected. In the courts of the United States, it means to-day anything and everything which is the result of that kind of mental operation which produces a book or writing. A figure or group of figures in marble or bronze, a design or bas-relief in stone or metal or wood, even a photograph or a negative thereof is a "writing" in the sense of the organic word. Those who have with unimpeached wisdom given this elasticity to the word have read it in the light of the purpose which was intended to be secured, and reading it in that light there is no room for doubt or difference of opinion.

It is thus plain that the words of the Constitution of the United States are under no circumstances to be read as words of restriction or limitation where they apply to the living and increasing growth of the present as distinguished from that which has been finally executed and closed. Where the word relates to that which is executory, it has no boundaries or limitations except those which define the object which is contemplated. The ex-

pression "writings and discoveries" includes everything of which the mind of man is capable, which, being the result of "original thought," tends to promote the progress of science and the useful arts.

There can be no doubt that there are but two provisions in our Constitution which can by any process of reasoning be made to include the power to legislate concerning trade-marks.

The first of these is the provision which has just been mentioned relating to the progress of science and the useful arts. This provision, however, may be at once laid out of sight for almost obvious reasons. It was said by Mr. Justice Miller: "The ordinary trade-mark has no necessary relation to invention or discovery. \* \* \* It may be, and generally is, the adoption of something already in existence. \* \* \* It does not depend upon novelty, invention, discovery or any work of the brain. It requires no fancy or imagination, no genius or laborious thought. It is simply founded on priority of operation." (100 U. S. 94.)

The Constitution is as if it read: Congress shall have power to promote the progress of science and the arts, but only by securing the exclusive right to writings and discoveries.

Manifestly, trade-marks are not in any right sense included within the words "writings and discoveries." They are symbols or commercial signatures, and for this reason they are not within a provision which looks to "fancy," "imagination," "genius" and "laborious thought."

After reading the opinion of Mr. Justice Miller, it is obvious that a trade-mark has no relation to science or the useful arts, and that marks to denote origin cannot be brought within any possible construction of the section relating to literature and the arts.

The other provision of the Constitution which has been said to have a bearing upon the subject of trade-marks is that known as "the commerce clause." And to say that this clause does not include trade-marks is to say that there has been no actual or constructive delegation of power to legislate on that important subject, and, baldly, that the Constitution of the United States is imperfect and incomplete.

But whatever may be our impressions, in view of the history of the last quarter of the present century and the decisions of the Supreme and inferior courts of the United States, it may be said that no doubt remains that the word "commerce" is broad enough to support any legislation that Congress will ever enact.

Perhaps the most important part of the history of trade-marks, and that which is especially instructive, is the fact that they have been made the subject of treaties between nearly all the civilized na-

tions of the world. During the last half a century the United States have made treaties with nation after nation, by which what purport to be reciprocal obligations have been assumed; and whatever power the United States have to make these treaties is derived from the Constitution. They have no power to enter into any agreement or exercise any power with which they have not been invested by the Constitution; they can make contracts only within the limitations of the code from which their capacity to act is derived. They certainly cannot by means of a treaty or in any other way control those things which have been reserved to the several States and the jurisdiction over which has been expressly withheld from the central government. It is necessarily true either that the government of the United States has no power to make a treaty having relation to trade-marks or that it has by virtue of the Constitution been invested with power to make such a treaty; and it is equally certain that unless the power to make such a treaty was conferred by the commerce clause it does not exist.

Unquestionably the word "commerce" includes the use of trade-marks in the same way and for the same reason that it includes telegraphy. And it may regulate the use of trade-marks in the same manner and to the same extent that it can regulate commerce generally.

But, as has been suggested, the decisions of the Supreme Court probably leave no room for doubt. It is possible that the language used in the Trade-mark Cases is suggestive of some uncertainty, but the opinion as a whole may be regarded as a statement that the statute which was held to be unconstitutional would have been found to be within the powers of Congress if it had been accurately limited to those kinds of commerce which are under congressional control.

In the case of *Rider v. Holt*, 128 U. S. 525, and possibly in cases which have been since decided, there is a recognition of the power of Congress to legislate concerning trade-marks used in commerce with foreign nations; and in the Circuit Courts the existence of this power has been directly affirmed (22 Fed. Rep. 823). In recent legislation it has been assumed that the power exists, as well as by what is known as "the silent practice of the courts."

It is not to be doubted, and would seem to be axiomatically plain, that the treaty-making power of the government of the United States necessarily includes the power to make a treaty which shall deal with any and every subject which is a matter of international importance. And in the light of the broad rule by which the possible insufficiency of the letter of our Constitution is subordinated to the spirit and purpose which may have been imper-

fectly expressed we have no difficulty in finding in the word "commerce" all the elasticity that is necessary.

We need not concern ourselves about what that word might have meant at the beginning of the present century. There is no accepted rule or maxim by which it can, at the end of the century, be given a meaning which is narrow and exact.

By the Constitution commerce may be said to be divided into four classes, namely, foreign commerce, commerce with the Indian tribes, interstate commerce and infrastate commerce. Over the first three classes, Congress may exercise control; over the last, "the commerce only between citizens of the same State" (100 U. S. 96), it has been repeatedly held that Congress has no color of jurisdiction. In numerous cases the Supreme Court has emphasized the importance of the limitations by which the power to regulate commerce are restricted. "Commerce among the States," it is said, "means commerce between the individual citizens of the different States," and "there still remains a very large amount of commerce, perhaps the largest, which, being trade and traffic between citizens of the same State, is beyond the control of Congress." (100 U. S. 96.)

These words were uttered by Mr. Justice Miller less than a quarter of a century ago and are an expression of views about which there existed no possible uncertainty.

As we read them to-day we perceive that they have not the same weight and significance which they had at the time they were uttered. This is true because what is designated "commerce \* \* \* among the several States" and infrastate commerce are essentially antagonistic and the former is manifestly of greater energy and momentum. As the institutions and commerce of the United States have increased, the relations between the citizens of the different States have become more intimate and important. The purchase and sale of the necessities of life may be restricted to the limits of a single State, but the production of these necessities and their sale in quantities is of a different character.

It is manifestly true that in 1895 the expression "among the different States" has a meaning which is distinctly different from that which it bore when the expression was adopted. Commerce between New York and California at one time involved impossibilities. The infrastate commerce of California was almost the only commerce which existed within the borders of the State. To-day, by reason of the conveniences of travel and transportation, New York sends her products in large quantities to California, and that wonderful land of plenty returns to New York her fruits, and wines and other products in almost fabulous profusion.



The importance of infrastate commerce depends upon the existence of communities which are separated from each other. Interstate commerce contemplates a broad and perfect union by which the whole country is, to all the intents and purposes, made to be a single community. All the increase which comes of the progress of the different arts and manufactures of the different States must be in the direction of an enlargement of the relations existing between them. And the enlargement and multiplication of those relations will necessarily add to the organic provision and render it effectual in promoting its true objects.

Thus we find that Congress, moved by important considerations, has within a few years enacted statutes by which the Constitution is made to bear a meaning which would certainly have seemed extraordinary before the railroad and the telegraph were known. These enactments relating to interstate commerce are of unmistakably good foundation in the organic law, and are convincing evidence of its elasticity. They illustrate the existence and fundamental value of the great doctrine of construction by which the organic words are made to be truly organic in that they define the power to-day, just as they defined it a century ago. The power and the limitations of the power are the same; the American people and their commerce are not the same; the constitutional provision is none the less now, as it has always been, a valid and effectual rule of action.

It may be said that, under the Constitution, Congress has power to deal with all the influences and agencies by which the interchange of commodities among the States is effected. The channels of trade have their sources in one State and cross and terminate in many States. Congress has power to keep these channels free, and to do so it may enter the jurisdiction of a State. This doctrine is, also, one by which the narrow rule is antagonized, and by which the lines of the international commerce of the States are rendered of doubtful stability.

Certainly we shall never reach the conclusion that the earlier deliverances of the Supreme Court were in any sense erroneous or inconsistent, but there is as little doubt that civilization is progressing; that in this favored land it moves more rapidly than anywhere else, and that even the Supreme Court of the United States moves with it.

But although the lines which separate interstate from infrastate commerce may yield, and continue to yield, in the direction of the expansion of the former; for the present it must be reasoned that to identify infrastate commerce is to absolutely stay and terminate the power of the general government.

In respect of trade-marks used in the kinds of commerce which are under the control of the gene-

ral government, there is no doubt that Congress may legislate the same as it may in other relations. It has power to provide for the registration of such trade-marks and to protect them by remedies both civil and criminal. I do not, however, understand that Congress has power absolutely to prohibit in commerce of any kind the use of lawful trade-marks, a right to the enjoyment of which exists at common law. But for the purposes of the present discussion, I think we need not undertake to fix the exact boundaries of the power. If it is true that trade-marks lawfully in use may be protected, there is jurisdiction to enact whatever statutes are expedient without attacking rights which are beyond dispute.

I think there can be no doubt that there resides in neither the general or State government power to legislate concerning any trade-marks except such as are lawful at common law. In other words, there is no power in either the State or general government to destroy the right to the use of a trade-mark existing at common law.

The right to use such a trade-mark is property, and in the United States that element of sovereignty, so called, by which there may be a confiscation of property in times of peace by legislation has ceased to exist. It has been lost to the States, and by the limitations of the Federal Constitution it does not reside in the general government.

But Congress, under the commerce clause, has power to do all that is necessary, I think, to accomplish the effectual protection in the United States of the trade-marks of all who, directly or indirectly, carry on business within their jurisdiction.

There is little difficulty in reaching a conclusion as to the inadequacy of existing statutes and as to the duty which the United States owe to their own citizens and to foreign nations. What is demanded is a statute which shall provide for the registration of trade-marks used in the kinds of commerce over which Congress has control, the counterfeiting of the trade-mark to be made a crime punishable by fine and imprisonment. The statute should authorize the issuing of a certificate, to be delivered to the registrant upon compliance with reasonable proof of ownership, the certificate to be *prima facie* evidence of ownership in all proceedings in which the right to the trade-mark may be made the basis of action.

I think there can be no doubt that the general government has power to make its certificate *prima facie* evidence of ownership; there is as little doubt, as has been intimated, that neither the general government nor the State government has power to issue a certificate which would be equivalent to a grant and conclusive evidence of title.

The Federal statute would necessarily be limited so as to prohibit only the authorized use, actual or

constructive of the registered mark in connection with transactions relating to foreign, interstate and Indian commerce. To protect the mark in these kinds of commerce would be practically to protect it effectually, for there is no commercial reputation which is worth protecting which is confined to the isolated infrastate commerce of a single State. To preserve the individuality and identity of the mark in the avenues of trade which lead from State to State is to preserve it against any injury which is worth consideration.

There is no doubt that experience has demonstrated that a civil remedy is adequate in those marginal cases where there may be room for difference of opinion as to the plaintiff's exclusive right and as to the question of infringement. But the use of a studied counterfeit or copy of a trade-mark, *malo animo*, involves both misrepresentation and false personation and is, in its nature, a crime. The selling of goods bearing the spurious mark is obviously a species of false pretences involving the use of a false token and substantially the same as forgery.

Perhaps all the civilized nations of the world, with the exception of the United States, have made what is commonly called the forging or counterfeiting of a trade-mark a crime, punishable by fine and imprisonment. In Great Britain, France, the German Empire, Belgium, the Netherlands, Norway and Japan, Italy, Switzerland and other countries, and in effect in Russia, Denmark and the Argentine Confederation, the crime is punished by fine and imprisonment, with or without the confiscation and destruction of the spurious goods.

And there are the most convincing reasons why these several criminal enactments are expedient. A trade-mark represents a personal accountability for the character of the contents of the package to which it is attached, and as the marks of origin are used very largely upon food products and medicinal preparations of every description, it is manifestly a matter of public importance that they be protected.

These laws, which have sought to prevent the crimes to which they relate, have been given international importance by treaties. To the United States have been extended the benefits of the laws of Austria-Hungary, Belgium, Brazil, France, the German Empire, Great Britain, Italy, Russia, Serbia, Spain, Switzerland and the Netherlands. We have accepted and for years enjoyed the privileges and benefits of the statutes of these nations, and in return, by our treaties, have given practically nothing. By proclamation and with much ceremony we have announced the ratification by the high contracting parties of the formalities of numerous treaties, but it is not too much to say that for what we have received we have rendered in return practically nothing.

In 1879 the Supreme Court (100 U. S. 82) decided that the act of 1870 relating to trade-marks was unconstitutional. By a number of treaties, which had been made at the time that act was in force, it was understood that its privileges and remedies were extended to the citizens and subjects of the foreign nations with which the treaties were made. The act was expunged by the court, and thousands of registrations of foreign marks were displaced and rendered nugatory. In 1881 an act was passed which purported to have in view the correction of international relations which were thus unceremoniously disturbed. But, astonishing as the fact may be, the new act had no relation whatever to commerce within the jurisdiction of the United States, except the anomalous commerce with the Indian tribes, in connection with which trade-marks are of very little importance. The act of 1881, now in force, does not purport to include or protect the use of trade-marks in interstate commerce, which is tantamount to saying that it is practically valueless. I doubt if a single case has arisen in connection with which the provisions of the act of 1881 have afforded a remedy or been made the basis of an adjudication in favor of the injured party.

The fact that the United States have accepted and enjoyed the benefits of treaties with all the civilized nations of the world and have specifically given in return nothing which admits of definition is a demonstration that additional legislation is demanded. Our attitude before the world, when it is understood, is not that of a charlatan, but it is one which admits of little justification. In time it will be corrected. But the page of our history which records our persistent inconsistency and procrastination will add nothing to the dignity of the volume of which it is a part.

But in this connection, as in many others, we cannot fail to turn with the greatest satisfaction to the unwritten law which is back of our Constitution and which has been by it protected and preserved. Upon every occasion, our Constitution has operated to add dignity and character to our dealings with other nations and where the legislative and executive branches have failed in their duty, the unwritten law has done much to correct the fault.

The intricate relations existing between the central government and the States have caused misconception and some over zealous representatives of some nationalities have unhesitatingly accused us of bad faith. But these accusations have rarely been well-founded and have had their origin in a want of knowledge of the limitations of our treaty-making power. What, in the plain pursuance of our duty, we have utterly failed and continued to fail to do directly by legislation, we have supplied out of the abundance of our common law and that

which is better than the common law, the equity which it has caused to be evolved.

It has been said the real origin of equity was an application of the inflexible rules of the common law. At the time these rules were originated they would have been almost valueless if they had not been inflexible. As the influences of civilization grew stronger, as the lawless classes lost ground, this inflexibility, once of essential value, was seen to be a defect and the discovery of that defect was the beginning of equity jurisprudence. Because the rule was inelastic it came to be inadequate and thus there was evolved what was called equity, which is innocence and "the correction of that wherein the law, by reason of its universality, is deficient." But the same force which produced the inflexible rule of the common law produced also that equity to which the inflexible rule had no application.

The inflexible precision of the common law was a barrier and safe-guard erected by civilization as it moved forward and it stands and will always stand as a barrier and monument the value and importance of which is too great to be estimated. But after it had been erected, civilization moving forward upon the highway, evolved that which was better and more enlightened, that equity which shall continue to increase until the books of our jurisprudence are directed to be burned. The equity which was thus created depends for its existence upon the common law which is back of it; but it bears the same relation to the common law that the things of one period of evolution bear to those of an earlier period. There is no antagonism except as it may be said there is antagonism between the science of to-day and that of the last and earlier centuries. There is no antagonism, but there is a stronger and a better light.

Where we have failed in our duty to foreign nations in connection with our treaty obligations the unwritten law which our Constitution has made safe and effectual has been an active force and factor. In the matter of trade-marks it has lifted our jurisprudence to the highest elevation of judicial thought. It has opened our courts to all men of all nations and uninfluenced by circumstances has dealt with the issues presented as abstract questions. The court having jurisdiction, the question of alienage has been wholly immaterial, the broad doctrines of equity being the only controlling considerations. There is little room for adverse criticism of that part of the jurisprudence of the courts of the United States which relates to trade-marks and unfair competition. It is a book of the greatest interest and the greatest dignity and value, because it outlines, let us hope and believe, the equity of the coming centuries in which the science of the law shall be classified as a part of the science of ethics.

And it is to be traced, I think, directly to the influences and forces to which reference has been made as those which produced the Constitution of England and the Constitution of the United States, which built up the noble temple of the common law, and finally evolved the light of equity whereby the common law may be read with "the spirit of understanding" and made useful in promoting the ends of civilization.

From the standpoint of the subject of trade-marks we may, I think, satisfy ourselves that our organic law is organic in the broadest and most profound sense, and we may reach the lesser conclusion, that to seek to amend it is to deal with original sources of power no less than with powers which were technically delegated. We may satisfy ourselves that the instrument in every relation is, being understood, whether in the matter of trade-marks or more important things, an expression and embodiment of the noble declaration which preceded it, of the philosophy of Thomas Jefferson and the "reflection and choice" of Madison and Alexander Hamilton. It bears the firm impress of the character and wisdom of John Marshall, of all judges the one to whom the United States and the world owe the most unfeigned gratitude and respect; and we may follow the thought of the great chief justice in the utterances of the late Mr. Justice Miller, in which are disclosed the same broad intelligence, and in the penetration, logic and irresistible conclusion of the late Mr. Justice Bradley.

From these and those who not less worthily have sought to read and understand and in some degree expound the things of the existence of which our Constitution is a demonstration, we may learn, not that it is an instrument which is better than man's history, but that it is a part of the best of man's history; not that it is a perfect expression and definition of the forces which it seeks to make effectual, but that it is an expression which gives energy and form and direction to those forces; not that it is in any sense a final step, but that it is a consistent and logical step in the true evolution, leading upward, of human civilization.

Above all, we may learn that the forces which constitute its spirit and its life have their origin and root in the great truths and problems of civilization which have been finally and completely solved.

ROLAND COX.

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In an action for injuries to plaintiff's horse, caused by a collision with defendant on a highway, evidence that there was a beaten wagon way on each side of the road, and that defendant was driving to his left of the center of the road, warrants a finding that defendant was negligent. (*Luedtke v. Jeffrey* [Wis.], 61 N. W. Rep. 292.)

## THE HERO AS LAWYER.

THE following is the text of a lecture delivered by Mr. J. J. Wright, LL. B., barrister-at-law, under the auspices of the Bradford Law Students' Society:

It is now over fifty years ago since Carlyle discoursed on "Heroes and Hero Worship." You will remember he treated on five or six classes in his lectures: The hero as divinity; the hero as prophet; poet; man of letters; as king, and so on, but singularly enough he omitted to add to his portrait gallery the hero as lawyer. The more remarkable because the lawyer is really an abstract or compendium of all the best qualities of all the heroes enumerated by Carlyle. Nor have I been able to discover upon the strictest search the evidence of an intention on his part to supplement his early lectures by one upon the subject indicated. This much is certain, that if he formed any such intention he never carried it out; for no trace of any complete MSS. on this subject, or even the rough notes of such a lecture, have been found amongst his papers, or at any rate published to the world.

I cannot believe for a moment that to a man of Carlyle's broad and independent intellect any sympathy with vulgar prejudice would have restrained him from doing justice to such a theme. I am rather inclined to the belief that he had brooded over it from time to time during all the years of his life from 1840 — I do not say constantly, but in an intermittent fashion — with the intention of making it his great masterpiece, but had been compelled to abandon his intention by stress of other work. Would to heaven (say I, and so all of you no doubt) he had resisted the solicitations to write other books, and had bent his great mind to the writing of one on the hero as lawyer. Depend upon it we should have had a magnificent apology for the lawyer, characterized by the Titanic power and the flowing imagery of the great sage of Chelsea.

I make no attempt of this sort. My humble task (and yet useful) will be to attempt at least to uproot some of the weeds of prejudice, and remove some of the crust of calumny that have overgrown and almost hidden the heroic figure of the lawyer, and, if fortune favors and the fates permit, to crown that figure with a flower or two.

Gentlemen, much that I say to you to-night you will already know; the prejudice of the multitude that still (more or less) exists against the lawyer you soon get emancipated from, and, therefore, it will need little on my part to convince you of the truth of the sentiments to which I propose to give utterance — words of simple truth and soberness. But I will imagine, if you please, for the nonce, that I am addressing an audience of laymen, some of whom we will further suppose have just been

reading and chuckling over some such passage as this from "Love à la Mode."

"The law is a sort of hocus pocus science that smiles in yer face, while it picks yer pocket, and the glorious uncertainty of it is of mair use to the professors than the justice of it." Glorious uncertainty, indeed! Why, everybody knows that the glory of the law is its certainty.

Now, to my lay friends I say, do not believe what this satirical rogue says of the law and its professors. Ah! gentlemen, I do not want to sermonize, but if you would know something of the charity that seeketh not her own, something of the virtue of resolute self-denial and self-forgetfulness; if you would make acquaintance with the world's great burden-bearers, and enjoy communion and fellowship with the peace-makers of society, just retire for a while from the jostling, eager, self-seeking crowd of business men and pleasure seekers and enter a lawyer's office, and there you shall have your wish fully gratified. To the lawyer comes the smiling recipient of a testator's or a settlor's bounty, and is welcomed with a benediction and dismissed with a cheque. To him, too, comes the man broken in fortune or reputation, some poor devil on the verge of despair, desperate enough and ready for any thing, any folly or crime. He pours into the lawyer's sympathetic ear his tale of woe, his story of suffering, whether in mind, body, or estate, and he goes away refreshed and strengthened. Burdened with his own cares the lawyer is not unwilling for a modest consideration (alas! Mr. Chairman, how modest in these dastard modern days!) to carry those of his clients. Nor does he reckon it a virtue; is it not, indeed, a matter of course, a part of his professional stock-in-trade, to rejoice with those who rejoice, and weep with those who weep?

But that lawyers are forbidden to disclose the secrets of their profession, to say nothing of the restraint imposed upon them by their characteristic modesty, they might tell some strange tales of the visitors they receive and the work they do.

The lawyer's office is, after all, a sort of microcosm — a little world of itself, a theatre where many parts are played, and where the *dramatis personæ* are not mimic actors. It is the best place in the world for enjoying or, at any rate, witnessing a grand variety entertainment. Only the catalogue of Old Polonius can do justice to the variety — tragedy, comedy, history, pastoral, pastoral-comical, historical-pastoral, tragical-historical, tragical-comical, and all the rest of it, or (although this seems satirical, but really isn't) — poem unlimited.

No doubt one sees much of the seamy side of life here — scheming ambition, mammon worship, eager self-seeking often sugared over with a coating of veneer, falsely called principle ("fighting for princi-

ple," which, being interpreted, often means fighting for self—but there, too, you will find, even amongst the clients (and I am speaking of them just now), examples of the manliness that puts another's interest before their own; instances of men who have scorned to take advantage of their legal rights when they have felt that a higher law than the English law would have condemned such conduct as not the most honorable; men who have felt "Because right is right, to follow right were wisdom in the scorn of consequences."

And in the midst of all this, or rather at the head of it all, is the sublime heroic figure of the lawyer, the master mind, advising and controlling all the passions and actions of those who visit him. Not perchance in outward seeming, for he may be a commonplace-looking little man in rusty black, with nothing about him (looked at superficially) sublime or beautiful; but to the seeing eye (by virtue of his office and his almost sacred character) mystic, wonderful. Indeed, one might apply to him the term the great Roman jurist Ulpian applied to himself and his learned brethren, and call him a "priest of justice."

By some strange piece of magic, often in the homely guise of common sense advice, he will lift up the despairing man on to his feet, and fill him with courage and new life. The future that seemed all dark has been illumined by the light of the lawyer's cheery counsel and assistance. The sorrowful maiden, "sighing like furnace" over the faithlessness of her lover, or shedding warm and bitter tears over his heedless desertion, goes to the lawyer, and is comforted by his assurance that the action for breach of promise of marriage is not yet abolished, and that the letters of her cruel swain may, by the Midas touch of a British jury, be turned into gold.

The merchant, the manufacturer, the business man generally, careful and troubled about the many things that vex him in his commercial transactions, comes to the lawyer to help him to unravel the tangled thread of his business engagements. To interpret the contracts he has entered into, or spell out his position in relation to others, from a complex set of circumstances, tortuous, winding and broken, with scarcely any clue to guide him in the labyrinth, and the client clamoring for a straight answer to a plain question, when it may be the facts are so conflicting or so uncertain that such an answer cannot be given except by a quack or pettifogger.

The courage necessary in such circumstances is simply heroic, and it is a courage that cannot be trumpeted from the housetops or the market-place, or be the subject of eloquent leading articles in the newspapers.

The mistakes lawyers sometimes make are blaz-

oned abroad; their quiet but heroic virtues are ignored.

So in the matter of will-making; the egotism, the eccentricities, the vanity of testators, all need wonderful tact and courage on the part of their lawyers in suggesting, advising, and, it may be, condemning.

In a word, in all the relations of life, the lawyer is the guide, philosopher and friend of his fellow man. He must know something of affairs, science, art — above all, human nature; something of everything, and a great deal of many things. Coleridge's description of Shakespeare as "a myriad-minded man" may very well be applied to the lawyer.

Then there are the cranks that visit you — the amateur lawyers who vex your soul by knowing very much more, and much more positively, all about the law, than you can pretend to; the "Sir Oracles" among your clients; and, perhaps, saddest and maddest of all, the "property in chancery people," men and women who are smitten by that most terrible and blighting disease, which shows itself by the symptoms; that they are entitled to vast estates in "chancery" — vague term, and amusing to know what is meant by it — on the strength, perhaps, of some identity of name with, or some fancied relationship to, persons appearing in the next of kin lists that are published periodically. As I say, it becomes a perfect mania, and in some cases paralyzes the energies of the victim for all other work, and wrecks him mentally and financially. Here, too, the lawyer shows his disinterested and heroic character. Instead of taking advantage of this insane folly, he tells "the sufferer" shortly, and sometimes plainly, when he has ascertained the facts, that he must get rid of his craze or farewell to happiness and peace of mind. I remember in my own solicitor days several years ago an aged couple hailing from Mount Folly (suggestive name), near Keighley, coming to me and solemnly assuring me they were entitled to large estates in North Wales, Morpeth prison and grounds, Grantully castle (I think), in Scotland, etc., and I protest I believe they heartily believed it. What led them to the belief I never could quite fathom, because there was not even the pretense of a claim. But no advice or persuasion, no stern condemnation of their madness, could alter their opinion. I tried to pacify them by writing a few letters, and not even the replies I got, that one property had been in the hands of some of the proprietors and their ancestors for centuries, and letters of a similar sort, could cure them of their fever — like a gambling or drinking mania. Whether their fever of folly ever left them I know not, but this I know, that I was not a quack, and so had to confess to them I had no cure for their disease, and that they must try and be reconciled to facts.

Enough perhaps, and to spare, has been said and written about education; but when one comes to think of it, is there any doubt that the moralist, the dramatist, the poet, and the philosopher could attend no better school than the lawyer's office to give completeness to their education; given the seeing eye, the hearing ear, mixed with a certain humility of spirit, and, of course, poets and philosophers are always furnished with these.

To return, however, to the character of the lawyer. It is, perhaps, as a peacemaker that he is most to be admired and loved, that the lawyer's heroic qualities shine out most resplendently. "Good heavens!" say our lay friends aforesaid in astonishment, "are you going to dress up the wolf in sheep's clothing? Lawyers peacemakers! Are they not the men who promote and foster litigation? Are not fat lawsuits the very breath of their life? Does not the great Milton himself assert that "most men are allured to the trade of the law, grounding their purposes not on the prudent and heavenly contemplation of justice and equity which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat, contentions, and flowing fees?"

These, also, of course, are slanders. In truth and in fact, the lawyer is the thrower of oil upon the troubled and stormy waters of men's quarrels; he speaks peace to the warring passions of his clients and their foes, or heroically tries to do so.

A man visits you, smarting under some real or fancied wrong, which to his heated imagination or all-engrossing egotism is of more consequence than political revolutions or national or international disasters. He presses you in hot haste to embody all he feels in that queen's missive to his opponent, called a writ—nothing but that will satisfy his fiery indignation. Then it is that his faithful legal adviser calmly reasons with him; shows him the proper proportion of things, that the world will go spinning along in space in spite of the wounded vanity; and a cold douche of common sense has a marvelous virtue in bringing a man to his senses, especially where the question of the pocket is involved.

"I solemnly believe that the lawyers of this country (I include both branches) are the means of preventing, by their splendid courage and advice, thousands, and perhaps, millions of their clients' money being squandered in lawsuits, in spite of (mark that!) in spite of and contrary to the strong desires of their clients themselves. And yet, only so recently as the last summer assizes, Mr. Justice Cave was questioning the wisdom of two litigants in calling in their solicitors to attempt a compromise and to compose their quarrels. Can you wonder at the prejudice of the public when a judge can, from the bench, give utterance to such sentiments?"

The lawyer is the great advocate of the *via media*. He is the high priest of compromise. Not, to be sure, because he worships "a middle course awesome fetich," but because, upon the whole, he thinks it will be best for his client to be guided by the commonplace and homely principle of giving and taking, rather than ruin himself insanely in a disastrous fight for his rights, real or supposed. This is a striking contrast to my friend Noodle, who does most powerfully and potently believe in the absolute and necessary perfection of the *via media*. One combatant (X) protests that the course in the direction A—B is right. Another (Z) is equally confident that the direction A—C is the only proper course to take. No, says my friend, mine is the proper direction, between the two. He is a kind of incar-

nated diagonal of a parallelogram. Now my friend's mistake is not in saying that X is wrong or that Z is wrong (this may be quite true), but in protesting that necessarily the course between them is right. The lawyer has too much common sense to make mistakes of this sort; he knows well enough (nobody better) that one party to the quarrel may be in the right and the other in the wrong, and he knows which is which, but he equally well knows that the successful litigant may only escape the legal fight in rags and tatters that very often only the lawyers—through no fault of theirs, of course—will get the milk in the quarrel about the cow; that in the fight about the oysters the parties may only succeed in getting the shells. And so, like the selfless man and stainless gentleman he is, he sets about the work of composing the quarrels of opponents. Bless you, what are fat lawsuits and flowing fees to him when compared to his great mission of peace-making? What is a forensic success compared to the success of making atonement between two enemies?

Of course, to the superficial observer, the common-sense advice I have been landing may not seem very heroic.

Now, just think of the temptations to litigiousness that beset a lawyer: the zest with which the old Adam in the lawyer enters upon a legal fray; the enthusiasm he feels about some interesting and difficult legal point never perhaps before decided; the litigious and long-pursed (and it may be long-eared) client, edging him on regardless of expense, to say nothing of the profit financially, and then for the lawyer to hold out against them all. I think you will agree with me, it is a magnificent spectacle. We want some great artist to represent it on canvas, or a new poet laureate, when he comes, to immortalize it in verse.

If it be true that he who conquers his own spirit is greater than he that taketh a city, then indeed the victories obtained in war are not worthy to be compared to the victories of the lawyer as he sits quietly and unostentatiously in his office dispensing advice. The place is both a battle-field and a temple, but men's eyes are hidden that they cannot see.

And yet, alas! such is the perversity of human nature—its uncharitableness, its inveterate blindness to the radiant virtues of the members of our great profession—it is notoriously and lamentably true that lawyers have been made the butt of divines and moralists, poets and novelists, men of the world, and, alas!—tell it not in Gath, publish it not in the street of Askelon—of brother lawyers themselves. For is it not to Lord Brougham we owe the following well-known but pitiable definition of a lawyer? "A learned gentleman who rescues your estate from your enemies and keeps it to himself."

Truly the archers have sorely grieved him, and shot at him, and hated him, but it must be confessed with joy and wonder that the bow of the lawyer still abides in strength. If all the things said against him were to be written down, it would take a big book to hold them all. Take a few illustrations, not arranged in any particular order either as to time or source, but simply to mark a widespread prejudice.

Here is the devil's opinion of lawyers (according to Southey, in the address to Bishop Basil):

The law thy calling ought to have been,  
With thy wit so ready and tongue so free,  
To prove by reason, in reason's despite,  
That right is wrong and wrong is right!  
And white is black, and black is white!  
What a loss I have had in thee.

But then, Mr. Chairman, I have never heard of the devil being a witness of truth. Indeed, is it not proverbial that he is the father of lies?

In another poem or ballad ("The Devil's Walk") we are told that

From his brimstone bed at break of day,  
A-walking the devil is gone,  
To visit his snug little farm of the earth,  
And to see how his stock goes on.

And, among other things,

He saw a lawyer killing a viper  
On a dunghill beside his own stable;  
And the devil smiled, for it put him in mind  
Of Cain and his brother Abel.

The innuendo in this libel being, I suppose, the brotherhood of the lawyer and the viper!

The policy of the estimable Jack Cade (of pious memory) in relation to lawyers was, like Strafford's in relation to the Irish, "thorough." One always remembers the scene from Shakespeare's Henry VI, when Cade and his comrades on Blackheath are about to inaugurate a socialistic millennium, and Cade promises there shall be no more money, and seven half-penny loaves shall be sold for a penny, and all shall eat and drink on his score. He is interrupted by Dick the butcher with the cry, "The first thing we do, let's kill all the lawyers." To which the gentle Cade replies, "Nay, that I mean to do!" And then, being evidently in a somewhat sentimental or pensive mood, he indulges in a little moralizing: "Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled over, should undo a man! Some say the bee stings, but I say 'tis the bee's wax!" (amusing confusion of beeswax and sealing-wax) for I did but seal once to a thing, and I was never mine own man since."

It is a far cry from Jack Cade to Sir Thomas More, morally and intellectually, but even Sir Thomas More must needs make it one of the delights of Utopia that the inhabitants "have no lawyers among them," the opinion of the Utopians being that the lawyers are "a sort of people" (think of that, Mr. Chairman) "whose profession it is to disguise matters and to wrest the laws, and therefore they thought it much better 'that every man should plead his own cause' — 'Every man his own lawyer' with a vengeance!

Is there not a proverb born of good common sense and the wisdom of the ages which saith that "the man who is his own lawyer hath a fool for his client?"

I very much wonder what the Utopians would say about some of our lady litigants who appear in person before our Courts.

Ben Jonson, too, does not scruple to rail against our heroes as men "who can speak to every cause, and things indeed contrary, till they are hoarse, yet all be law;" as men "who can give forked counsel, take provoking gold from either side, and put it up."

And men as diverse in opinion as Dr. Johnson, John Wesley, Cobbett and Charles Dickens, and many other names, have all joined in the hue and cry against the lawyers.

The fact is, most of the critics have some one or more individual lawyers in their minds, and they are too prone to make these types of the whole profession. One black sheep is discovered, and with sweet reasonableness and marvelous logic the whole flock is condemned!

You are all familiar with the fancy picture of some rural paradise where all was peace and joy and love. Where nature brought forth abundantly to feed the innocent dwellers there: a state of things

almost excelling the golden age. Where a serpent entered in the shape of a lawyer, and then, exeunt peace and prosperity! Euter strife and disaster. So much for fancy, may I not say fiction! Go to the bottom of the whole story, and what do you find the facts to be? The place described as a paradise, upon inquiry, was found to be a badly drained, badly cultivated, quarrelsome country village; and the lawyer, with magnificent self-denial, and the courage of a Hercules, set about its reformation and transformation, and eventually succeeded; and yet, because of the mere unavoidable incidents or accidents of a few lawsuits in the process, the truth is hidden and the lawyer slandered. The fancy pictures of lovely and innocent Arcadias are as wide of the truth as are the glowing reports of the golden age figured by the poets. Depend upon it, primitive man, and man more recent than primitive, needed the regenerating presence of law and the lawyers to fit him for decent and respectable society.

Do lawyers get angry at these hard sayings about themselves: at the evil and bitter attacks made upon them? I think not. Genius can well afford to calmly ignore the minute criticisms of minute philosophers. Beauty can smile at the sour slanders of her less fair sisters. Giants don't feel the puny blows of the pigmies. The sun—

But why multiply examples to illustrate the obvious fact that lawyers, conscious of their pre-eminent virtues and indispensable usefulness, hear and read of these attacks with a quiet and amused scepticism as to the sincerity of those who make them. And, indeed, clients themselves will sometimes confess as much, and express their gratitude in words if not in deeds.

Why, sir, I remember myself once getting a present of a china moustache cup from a pot hawker, in addition to my full costs, for getting him out of some trouble. In the face of that, who shall say that gratitude is extinct?

Gentlemen, I have only been putting the case to some extent negatively, warding off blows; the positive good lawyers do is incalculable. They really prevent this world of ours from becoming subjected to the reign of Chaos and Old Night again.

On a festive occasion of this sort, it would be a shame to inflict upon you a longer paper. I have only broken ground a little upon the subject, or, to change the figure, given you a few outlines and suggestions, which you can fill in for yourselves.

I venture to say this: if you study the history of our own and other countries in their relations, you will find that in public affairs lawyers have not been amongst the least able or the least noble champions of freedom and good government, and that in the private affairs of life they have been, and are, sources of strength and comfort to their unfortunate clients.

You, and others like you, are the coming men, so far as the solicitor's branch of the profession is concerned, and if in the active life of your profession you scorn to do a mean act, or to engage in a shady professional transaction, you will, in the course of time, compel a more popular recognition of the pre-eminent worthiness of our great profession, and the public will by-and-by be compelled, in relation to that profession, to echo the words of Marcellus with all their hearts and with repentant tears:

We do it wrong, being so majestic,  
To offer it the show of violence,  
For it is as the air invulnerable,  
And our vain blows malicious mockery.

# The Albany Law Journal.

ALBANY, MARCH 2, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE Chicago *Inter-Ocean*, failing to appreciate the change in the legal profession necessitated by the advance of the times and the increased volume and promptness of business, begins an interesting editorial on Judge John F. Dillon's paper on "Property; Its Rights and Duties in Our Social System," by attacking lawyers generally, and takes the position that a person qualified to serve the interests of the community as a lawyer should be broadened by a careful study of the pandects rather than quickened and sharpened by a practical experience. O Tempores, O Mores, why should an observant paper attempt to persuade the layman or the legal practitioner of the almost forgotten shibboleth that the profession should adhere to the time-worn customs and relations of the past? Such a theory may be fascinating, like an Egyptian mummy, because it has an indescribable historical aroma of the almost forgotten ages; it may be persuasive, because any attack on any class of individuals receives affirmative consideration from the public at large, and it may be pleasing to those who are dull and stupid, because they fail to appreciate the advanced business interests of society; but it finds no comfort and justification in the minds of the thoughtful. In procedure to-day, there exist too many of the fallacies of the ancient law,—too many technicalities which delay and hinder material prosperity, and too many complications which detract from the utility which the law should have in redressing wrongs and upholding rights. What benefit accrues to the dead where the delay of the law has prevented a person from gaining justice until he has passed to a place where it is said his property and earthly goods cannot follow him? What advantage does the litigant obtain when his suit is finally won after years of worry and anxiety? Yet, these are the very factors of the law which have been handed down from the past, which

are essentially part of it and which a too great study of the pandects and a lack of practical knowledge must surely give as certain result. There is no sympathy in these columns for the "sharper" who degrades the legal profession and who sees in it no other pleasure than a monetary return, and still it must be recognized more fully among the lawyers that the property of the country can be better protected by a little less theory and a good deal more of practical methods and of simpler procedure. The part of the editorial referred to is as follows:

"De Tocqueville, the first and most philosophic commentator upon the Constitution of the United States, dwelt upon the conservative influence of the lawyers of the republic. It is true that in his day the standard of the legal profession was higher than now, and this simply because it then was purely a profession, whereas it now largely is a trade; then there was no tradition, much less a historical fact, of lawyers soliciting cases as merchants solicit custom; then the lawyer, all but without exception, was a man who could read, and who had read, the pandects in the original Greek, or at any rate in the Latin translation, made contemporaneously with the original text for the benefit of the provincial lawyers of the Western empire. Then the lawyer had that wide knowledge of the growth, the slow growth, of the applied principles of equity that made him indeed a lawyer, and not a mere practitioner of law. Then no great lawyer would have found cause to speak, as General Butler a few years ago spoke, and justly, of the great mass of the bar as "attorneys whose intellects have been sharpened, but not widened, by a study of text books and reports." It is unfortunate, but true, that Butler himself was a sad, almost an awful, example of the degradation of intellect that follows upon the study of law as a trade merely; yet there was a natural width and height of Butler's intellect that the power of evil circumstances could not wholly destroy, though it did largely diminish it."

In regard to Judge Dillon's work it says: "However, it still remains true that the study of law, even when undertaken from debased motive, enlarges any intellect capable of enlargement, that of the average 'eminent criminal lawyer' being, perhaps, incapable of enlargement. And occasionally, even now, we



read a decision or hear a discourse by some true lawyer wherein the causes and the eternal relations of men to things is made clear. Of this sort is Judge Dillon's paper on 'Property; Its Rights and Duties in Our Social System,' read before the State Bar Association of New York. A somewhat lengthy syllabus of the judge's essay was printed on the tenth page of the *Inter-Ocean* of yesterday, and to a perusal of it we commend all our readers. Truth ever lies between extremes, and the truth of the rights and duties of property lies between the assumption of the extreme individualist, who boasts: 'This is the great fortune that I have built; it is mine to have and to hold, to will and to devise as I see fit. To no one do I owe it, by none can I be controlled in its use.' And the sophism of the extreme socialist, who declares: 'No man achieves fortune without the aid of other men, and without the protection of the State; therefore the majority of other men and the law of the State are paramount claimants of the fortune of the individual.' The right of a man to entail his property for the perpetual support of a hereditary plutocracy now is denied by all thinking persons. In short, Judge Dillon's scholarly and logical address is one of these all-too-rare happenings that confirm the thoughtful citizen in the abiding truth of De Tocqueville's reflection on the conservative influence of the lawyers. We again commend the address to the careful consideration of our readers."

In *The Nation* of February 21 the following editorial is written in reply to a question which is first given :

Supposing the predatory income tax to be declared constitutional, will you kindly tell your readers what steps the Government would be obliged to take to collect it, and what you think its success would be if persons liable to pay the tax generally possessed enough of the old tea-party spirit to ignore it? I understand that a great many propose to try the experiment.

There is no doubt that the income tax has been imposed for predatory purposes, that is, for the purpose of compelling one set of people to bear the burdens of another set of people. But nevertheless it is law, and consequently a general refusal to pay it would be anarchical and a direct encouragement to anarchy. It is true it is an attack on property, but then the only guarantee we have for the security of any property at all is the readiness of the people to

obey even laws of which they disapprove. If we were to allow ourselves to select from the statute book the enactments which we would treat as binding, and disregard the others, the confusion would be frightful and the State would not long hold together. It is quite true that occasions may arise when disobedience to law becomes a duty, but they can arise in a free country only when there is no hope of repeal or legal redress. When we see how frequently popular opinions vary and power passes from one party to another in America, we should have to be very despondent indeed in order to conclude that the income tax would be perpetual. We, too, who voted to put the Democrats in power, must stand up like men and take our medicine. Nobody in this part of the country who voted for them had the smallest idea that they had an income tax in their pockets, for they took care not to mention it. They played a trick on us, but we have no right now to upset the government to atone for our own credulity. The work before us is to try to get the Republicans to abolish the tax, as the most effective tool ever put in the hands of anarchists, socialists, Populists, and money cranks of every description. We say all this on the supposition that the Supreme Court will again declare it constitutional. It has already declared it constitutional by using the term "direct tax" in a sense unknown to the philologists, to the people, and to economists, which is in itself a dangerous thing. If we cannot tie courts up to the dictionary, we are at the mercy of judges.

At the recent meeting of the Publishers' Association held in New York, one of the most interesting features of the occasion was the remarks of Azel F. Hatch, Esq., of Philadelphia, on the subject of the law of libel. Mr. Hatch had been requested to make a compilation of the laws of the various States on this subject and we give a few suggestions which he made from a very careful study of the laws of the different States:

"In his remarks, Mr. Hatch limited himself to some suggestions as to what action it was best for the association to take. He said that it was not wise to try to secure a general revision of the libel laws in all of the States, because so much opposition would be created

that the effort would probably prove ineffectual. A better way was to select such general features of the law as could most likely be changed, and work for their amendment. What should be secured is a law which shall make a plea of not guilty join issue upon all material allegations of an indictment or complaint. As the law now stands, a plea of not guilty is simply a plea that the pleader does not publish the newspaper in which the alleged libel is said to have been published. It is not a denial of malice. If there is any defense, a special pleading must be made to recover it. In England, Mr. Hatch continued, the law required that malice and the material allegations must be proved. Here it was only necessary to prove the fact of publication. Mr. Hatch suggested that the State associations should be encouraged to take up the question of amending the laws in their own States, the general association to supply to them the material with which to carry on the campaign. He said that under the old English law the action of libel is founded on the theory that a libelous publication has a tendency to cause a breach of the peace, and that, therefore, such publications should be suppressed. It did not matter whether the publication was true or false. Under the old English law the fact that the publication was true was not a defense. But Mr. Hatch argued that the proper theory was that the right of publication was given to newspapers because it was for the benefit of the community. Individuals and newspapers had the right to say what was the public benefit. Personal reputation was a personal right, and entitled to the protection of the law just as much as property. But whenever the public interest demanded that personal reputation be assailed for the public good, then the newspaper had the right to assail. A law founded upon these principles would eliminate the necessity of proving the truth of the publication. It would leave simply the question of what was for the public welfare to be determined. The safety of institutions and the character of individuals were preserved by newspaper publication. Free speech and a free press were the foundations of public protection."

At the annual banquet of the Des Moines Bar Association, which was held on the 22d of

February, Hon. James H. Rothrock, judge of the Supreme Court of Iowa, delivered an address which was most thoughtful in the consideration of the development of the law within the last few years and in relation to the administration of the law in the courts:

"The learning and ability of the profession is not to be estimated by the boundaries of States, or by the North or South or East or West. Unquestionable legal ability is to be found wherever business interests demand it. It is not vain boasting to say that Iowa, with its two millions of inhabitants, enormous wealth and boundless resources, has many resident lawyers who are equal in ability and learning with those of any other State. And Iowa men are not unknown to the profession in the larger centers and more populous sections of the country. It has furnished to the Federal judiciary the ablest jurist who has occupied the bench of the Supreme Court since the close of the career of John Marshall. It has given to the country that distinguished lawyer, jurist and author, John F. Dillon. It has sent out into the broader fields scores of men who stand in the very front of the profession, where vast interests are involved, and the most commanding ability is required.

"The practice of law has changed materially from what it was in the last generation. Then very few private law libraries exceeded 200 volumes. The office rent was merely nominal. The average lawyer had no clerk. All his pleadings were written by his own hand. He made his fires and swept out his office. Now, any well-equipped office away from public libraries must have a large collection of books, a clerk, a stenographer and typewriter, and many other expensive appointments. Then the lawyer presented his case to the court without the aid of long lines of decisions on the questions at issue. His argument was based upon the analogies of the law, and by logical reasoning and analytical processes of thought he deduced the principles which he claimed controlled the case at bar. New books have been so multiplied that many arguments are mainly founded upon precedent rather than upon any independent reasoning. With the long lines of decisions of State and Federal courts, and the innumerable text-books, it is a contest between authorities, rather than the reasoning of the trained lawyer,

which is thought to be decisive of disputed questions. This has become so general that courts of last resort are frequently cited with great confidence to the latest opinions of *nisi prius* courts as absolutely decisive of the questions involved. The result is that much of what was once known as the science of the law is now reduced to a scramble as to which side of the controversy can present the greater number of decisions. It may be said, however, in this connection, that in the array of authorities presented, it frequently requires no small degree of legal learning for a lawyer to properly discriminate and determine whether a cited case is really in point and favors his contention. In a recent case in the Supreme Court, counsel for appellant relied upon the identical line of cases which counsel for appellee insisted were decisive in his favor.

"A trial is a legal conflict or battle between two opposing forces and the judge should be patient to study and understand the whole situation. No judge can properly preside at a trial by jury unless he gives close attention to the evidence as it is introduced. Without such attention he cannot intelligently decide questions arising on the introduction of the evidence. Most of these questions are easily determined if the judge understands the issues and the evidence already introduced. Thus equipped, he can in most instances decide at once, without argument by counsel, and arguments should be allowed only in case of doubt. No counsel should be allowed to argue a question on the admissibility of evidence unless invited to do so by the court. A rigid observance of this rule of practice saves much time, and when once understood by the bar is certain to meet with approval. One side to the battle is doomed to defeat and the other 'to go down to the tavern,' and, if wicked, indulge in profanity. But this is not usual because of serious reflection on the judge. There are but few lawyers so narrow-minded as to have a personal grudge against an honest and upright judge because of his last decision. They know they can appeal, and the lasting criticism, if any, is usually against the court of last resort. From that there is no appeal, and the contest is at an end with the exception of the somewhat uncertain right to a rehearing. No judge can, by any decision he may make, satisfy both sides. And this fact

is the foundation and only cause of the criticism to which courts are constantly subjected. But unless the case involves a matter of public concern in which the people are worked up to a frenzy of excitement, the just judge is usually not at all affected in his standing in any decision he may make.

"Judicial scandals are rare in this country. A late writer has said that such a thing occurs 'but once or twice in a generation.' It may safely be said that a judge who is upright in his private life is rarely ever approached with improper or mercenary offers or proposals. The aim and object of every honest man in that position is to do justice within the rules of the law, and there is no incentive or temptation to do otherwise than follow the dictates of conscience. In other words, a jurist has no motive to do wrong. It is justice, and nothing but justice, which his natural inclination induces him to seek and dispense. That there are just criticisms and fault found with the judiciary no one will deny. The law is not an exact science, and those who administer it sometimes make grievous mistakes. It is a common saying that 'It is human to err,' and the courts, from the lowest to the highest, are no more than human. Courts of last resort are given to too much elaboration. The opinions are much more extended than necessary. The iteration and reiteration of the plainest fundamental principles and the citation of authorities in their support ought to be excluded as mere rubbish. The opinions of courts are not for the purpose of instruction in rudimentary law. If a new question arises, it should be properly treated, and the reasons given therefor. But the citation of scores of cases on the common question should be omitted.

"And it has become the practice, and in some States the law requires, that no case is decided until an opinion in writing is filed with the clerk. Such has been the practice in this State for more than thirty years, and it appears to be required under our law. It is questionable whether this provision of the statute is an absolute requirement. It was held by the Supreme Court in the year 1862, that it was not. The first Constitution of this State was adopted in 1846, and up to the present time, ninety volumes of Supreme Court reports have been published, and four volumes are now in the

hands of the publisher. The State of Ohio was admitted into the Union in 1802, and all of the opinions of the Supreme Court of that State are contained in seventy or seventy-two volumes. "The reason of this great disparity in the numbers of reports in the two States is, that in Ohio many of the cases are decided without either writing or filing opinions. The recent Evangelical Church controversy was pending at the same time in the courts of several States, all of the cases involving the same questions. The Supreme Court of Ohio decided the case by a mere order of affirmance. No other record was made.

"There has been a steady increase in the importance of the litigation in this State. It is safe to say that the amounts of money or property involved are now greater by fifty per cent, in any given number of cases, than those of ten years ago. This arises from the increased value of real property and the accumulation of large estates, the settlement of partnerships, and the litigation arising over corporate rights. Courts and lawyers are conservative in matters of practice and procedure, and a suggestion of any change in methods is invariably met with opposition. The life work of the lawyer consists largely of controversy, contention and debate. One reason for the failure of some lawyers of large experience in the profession to make acceptable judges is that they are partisans by education and practice, and cannot divest themselves of that trait of character however they may strive to do so.

"It is important that the law pertaining to the rights of property be settled and firmly established. Mere practice and procedure ought to be brought up in line with the enlightened and advanced civilization of the present age."

In *U. S. v. E. C. Knight Co., Spreckles' Sugar Refining Co. et al.*, Chief Justice Fuller, in writing the opinion of the court, thus speaks of the definition of the word "monopoly": "In commenting upon the statute, 21 James I, ch. 3, at the commencement of chapter 85 of the third institute, entitled 'Against Monopolists, Propounders and Projectors,' Lord Coke, in language often quoted, said: 'It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamental laws of

this kingdome. And therefore it is necessary to define what a monopoly is. A monopoly is an institution, or allowance by the King, by his grant, commission, or otherwise, to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politique or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawful trade.' Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which 'one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure,' whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress, is not confined to the common law sense of the term as implying an exclusive control by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all or some considerable portion of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life."

We print in this number of the *LAW JOURNAL* the argument presented to the judiciary committee of the Senate by the committee on law reform of the New York State Bar Association in regard to the continuance of the Miscellaneous State Reports of the Official Series. This is the first time that any mention of this subject has been made in these columns, and is a most delicate question to handle, involving, as it does, the proposition as to whether certain reports shall be preferred to others. The interest of the lawyers demands that the great number of reports which are now published should be

modified in some way, either by a general recognition by the courts of the fact that the opinions should be shortened, or by the judges lessening the number of opinions which are handed down and deciding more cases without written opinions. The theory of the Official Series has been that not only that the reports were edited by persons who are recognized by the State, but also that all decisions of the courts of the State of New York should be included in the three sets of reports. However much or little the profession has recognized the value of these reports, the continuance of all as a symmetrical whole is demanded by the bench and bar and certainly by those people who have started with almost the assurance of the State that the books which they have purchased will be made of value and practical interest by the addition of all the later volumes of each report.

The Court of Appeals, on Tuesday, February 26, 1895, handed down a most important decision in the case of *People v. Robert W. Buchanan*. It will be remembered that the defendant was indicted by the grand jury of the city and county of New York for the crime of murder in the first degree in killing Anna Buchanan, his wife, with poison administered to her. On the trial of the indictment he was found guilty as charged. Judge Gray writes a most clear and well-expressed opinion, reviewing the facts and stating with great accuracy and interest the testimony of the experts who, it will be recalled, examined the body of the victim forty-two days after it had been interred, and who advanced many theories as to the cause of death in the analysis of the partly decomposed body of the woman. Aside from the literary quality of the opinion, perhaps the most important and most interesting point involved is in regard to the illness of a juror, which, it seems, took place after the jury had determined upon their verdict. The facts are so plainly stated by Judge Gray that we simply print his opinion on that point. He says:

"After the jury had retired, an incident occurred, which has been made much of and which constituted the basis, in part, of a motion for a new trial. The jury retired in the afternoon of April 25. In the evening of the day following, they were taken over to a hotel for their dinner. Paradise, one of their number, was taken suddenly ill and fainted. A physician was called in, who found him first unconscious and then delirious. He had him removed to another room, where he treated him professionally. A report of the occurrence

was made to the recorder; who sent for and examined the attending physician, in the presence of the district-attorney and of the defendants' counsel. He gave a description of what had taken place and of what he had done. He gave his opinion that the attack had been caused by the mental strain, and he thought the juror might be able to come to the court after a while. Later in the evening, the juror having improved, was brought over and took his seat, with his associates, in the jury box. It appeared that they had agreed upon a verdict before the illness; but the recorder thought it inadvisable, under the circumstances, to then receive their verdict; advising them to again retire and confer. They did so, and shortly returned with their verdict. Upon the facts, as they were made to appear, there was nothing to warrant the trial-judge in refusing to receive the verdict. Subsequently, however, upon the hearing of the motion for a new trial, certain other facts were made to appear, which we have considered carefully, with the view of ascertaining whether they furnish any sufficient reason for believing that the verdict of the jury was not properly or fairly reached. One branch of the motion was based on the ground that there had been an illegal separation of the jurors. Affidavits were read, showing that upon the removal of the sick juror from the room, in which he and his fellow jurors were dining together, the other jurors separated; some running to and from the sick man's room and others going in other directions and alone. In opposition were read the affidavits of the jurors and of the court officers, to the effect that the jurors were always in charge of the officers; that none of them were ever alone, and that no communication was had with them by any person in reference to the case. Upon these proofs, it was discretionary with the trial court to order a new trial or not, and with the exercise of its discretion we will not interfere. (Code Crim. Proc., § 465, subd. 3.) It was a question of fact, and I think the judicial discretion of the learned recorder was well exercised, in having regarded the involuntary separation of the jurors as working no possible prejudice to the defendant. The second branch of the motion for a new trial was based on the ground that the attack, which the juror Paradise suffered from, was an expression of a generally deranged judgment, and that his mind could not have been clear and sound, or capable of judgment, for some hours before and after. In support of that ground, the affidavits of several distinguished physicians and alienists were produced and read. It was their opinion, upon the

statement of the physician who attended the said juror, of the juror's son and of others, detailing what had occurred, that the attack was epileptic in character. They, in substance, thought it evidenced a confirmed epileptic condition, and indicated a mental disturbance, which must have existed for several hours and must have rendered his mental action unreliable and valueless. In opposition to these opinions, were read affidavits by several other physicians, expert in mental diseases, who had made a personal examination of the juror, and who gave it as their opinion that there was no perceptible indication of epilepsy, or of paresis, and that he was in full possession of his faculties. Upon Paradise's statements as to his past life, they were of the opinion that he had never suffered from epilepsy or insanity. They thought the symptoms of his attack were those of nervous exhaustion and of hysteria, induced by the close confinement and the long-continued strain upon him in the performance of his duties of a juror. His own affidavit was read, denying ever having suffered from epileptic attacks. He narrated the occurrences in the jury room and stated that after the first ballot, when he had voted "not guilty," he had upon each subsequent ballot voted "guilty" and that the jury had agreed upon their verdict before they went to the hotel for their meal. He stated that he felt well when he came back to court and was able to deliberate. He gave the facts about his past life and he showed that the day after the conclusion of the trial he had gone away on business and remained away till June, being in the full possession of his health and faculties. The affidavits of physicians, who had known and attended him in the past, stated that he had never manifested any epileptic symptoms, or any form of nervous disease. Other affidavits by his employer and by his fellow-jurors were read, to show his mental competency. The recorder, in denying a new trial, had before him the conflicting opinions of the experts, the facts stated in the affidavits and those within his own observation. It cannot be said that the defendant made out a case of mental incompetency in the juror. While the opinions of the physicians, secured by him, seemed to give support to his theory of a mental or nervous disease in the juror, which incapacitated him to deliberate or confer upon his case, they were not based on any personal examination, but were premised upon the statements given them. In view of the evidence as to his physical and mental condition upon actual examination; as to the facts of his past life and of his condition for weeks

after the trial, the learned recorder could not well have decided otherwise than he did and I think we must agree with him that the opinions of the experts for the People were warranted by the evidence; while those of the defendant's experts were not."

Among the, shall we say, "reform measures," introduced in the Assembly is one by Mr. Vacheron to amend section 1756 of the Code of Civil Procedure in relation to divorces. There seems to be no practical, valid reason for such a measure since divorce in some places is so easy and the only difficult parts of it are the journey to and from the State where marital infelicities are quickly cured and the wherewithal to pay the freight. One of the few clear parts of our code is the substantive law and procedure of divorce, the former of which was placed there, presumably because any stray bit of law is put in the Civil Code so that it cannot be readily found in its proper place when wanted. The general waste rubbish style of the code may have induced the author of the bill to believe that such substantive law would be pleasing to the people of the State if put in the code, and this happy disposition of such a statute is its only beneficial feature. The bill is as follows:

"Section 1756 of article 2 of title 1 of chapter 15 of the Code of Civil Procedure is hereby amended by adding thereto the following: Where husband and wife have been alienated and estranged so as to willfully refuse and decline to have sexual intercourse with each other for a continuous period of over fifteen years, during potency, an action for divorce may, upon that ground, be maintained, and a divorce granted in case the husband and wife each voluntarily ask therefor, provided there be no minor children living from their wedlock. The husband and wife shall be competent witnesses to such estrangement, but corroboratory evidence thereof shall be also required."

It can be easily and readily seen what the bill if passed would lead to, as it would only be necessary later to shorten the time during which the husband and wife had not lived together, and insert a little joker in some act striking out the provision as to minor children. If society regards matrimony and divorce as a condition or release from a condition which can be entered into at the will or pleasure of the parties concerned, then an even more broad statute should be passed than the one under discussion, but until such a degree of depraved intellectual morality arises in the State there is no place, even in the code, for such a piece of legislation.

## SOME CURIOUS INCIDENTS IN THE WORK OF A PUBLIC ADMINISTRATOR.

A Paper read before the New York State Bar Association, by  
WILLIAM B. DAVENPORT, of Brooklyn, N. Y.

THERE exist in the State of New York two public administrators. The office in the city of New York was created in 1815; that in the county of Kings in 1871. In the remaining counties of the State the county treasurer is an acting public administrator. Among the multitude of foreigners who drift into the great seaport of the New World, more tarry in its vicinity than elsewhere, and leave there the greatest number of persons liable to die without next of kin who can administer upon their estates. The public administrator is charged with the care of the estates of those who, dying, leave of those who are entitled to share in such estates no one competent, able or willing to administer thereon.

The character of the estates include everything conceivable in the way of personal property — from cows and canaries to the cremated ashes, in one case, of a Rhode Island lady.

The circumstances under which death loosens the earthly hold upon wealth, and the neglect of prudent preparation for that event, forces the estates into the hands of the public administrator, are various.

One of the trim and tidy vessels of the New York fleet of pilot boats sailing out of New York harbor, pushing her way eastward through storm and darkness, was struck by an ocean liner and the boat-keeper of the *Commodore Bateman* sank with her, without a will. In another instance the wife of a Brooklyn baker, refusing to transfer her property to the possession of her liege lord, he killed her, and in turn immediately committed suicide, and thus the property in question came into my hands to be administered.

Another instance was as follows: A thrifty Irishman for years had filled the position of principal truckman for a large importing house in New York, and had gained a reputation for some wealth. Immediately after his death relatives flocked from adjoining States to his residence, and hardly was the funeral over than they carefully commenced a search for what they hoped to find. Time passed, and brought with it only disappointment, but by accident, within an old-fashioned, brass-bound trunk, in the attic, the savings of years stood revealed, and in the presence of government bonds, bank books, currency and gold galore, each distrusting the other, they came in solemn procession, bearing this trunk as they had found it, to turn over the property and await a distribution. An examination of the bank books revealed the fact that he had possessed a phonetic idea of the spelling of his name, and to each bank clerk, as he announced

his desire to open an account, he readily subscribed to the form of spelling which the bank official suggested, thus making eight different ways of spelling his name, equally his own.

But then, again, cases present themselves where the hope of untold wealth leads to naught. A circumstantial story of a large amount of personal securities belonging to one Charles Edward John Baptise Vonostrock, that in the dead of night had been conveyed to the cellar of an unoccupied house in the suburbs of Brooklyn, proved after the most careful examination to have doubtless existed only in the fancy of a lunatic. At least it was never possible for me to secure the possession of them.

Then, again, in another instance, twenty-two large and heavy trunks and packing cases gave substantial evidence of something in the way of assets, but when opened, the miscellaneous collection of rags, bread crumbs, empty bottles and nondescript valueless articles that they contained caused the fear of some contagious disease on the part of the appraisers. Prospects of valuable silks, rare old laces and gems without number failed to materialize.

On the other hand, however, the search for hidden treasure sometimes yield a far more favorable return. There lived alone in a comfortable dwelling in the upper part of Brooklyn an elderly German woman, without an occupation, but with an apparent source of income. Alone, unfriended, death found her, and after the occupation of the premises by the police, a casual search failed to reveal anything of value except the furniture and an exceedingly trifling sum of money. Satisfied that there must be something undiscovered, a second and a third search were made, and upon the last effort, in a teakettle on the upper shelf of a kitchen closet were found two paper bags obtained from a corner grocery store, and in each of these bags nine savings bank books, representing an aggregate of \$18,000.

There lived and died in that portion of Brooklyn known as Williamsburgh a German, who had often declared that his sister had cheated him in the division of his father's estate, and that her boy should never share in anything which he possessed; but his surroundings and his mode of life gave no evidence of the possession of wealth. Clearing up his room after his death, a small key, apparently belonging to a safe-deposit box, was found. A tracer was sent to every safe-deposit company in the cities of New York and Brooklyn, and it was ultimately discovered that in the Central Safe-Deposit Company vaults, in Fourteenth street, near Fifth avenue, in New York, he rented a box which contained, upon examination, six savings bank books, representing over \$10,000. Now, in this case, after

the bank books were discovered, there came into the office a variety of claims, which revealed the confidence and discernment of the creditors of the deceased. An undertaker alleged that he had furnished a funeral, which included a magnificent casket worth \$1,000, and which, with a few extras, made his bill \$1,450. A physician had carefully attended him for years, performed one or two serious operations, but had never troubled to send in his bill, which had grown to be \$2,600. A nurse was so devoted to the care of her patient that she had taken no thought for the morrow, and had left her charge to amount to \$1,700, while one of our profession detailed the exact dates upon which he had been consulted professionally upon important hypothetical questions, which left the deceased owing him a balance of \$295 upon an aggregate charge of \$300. All these people substantiated their claims under oath, but suffice it to say have not yet collected their accounts.

An old lady living in what might literally be denominated a hovel, complained some years since to the police that she had been robbed of a considerable amount of money. A careful examination on the part of the police afterward led them to believe from the apparent poverty of the woman that there could be no possible foundation for the claim. She absolutely failed to inform them of the possession on her part of any savings which might have been the subject of such a theft, but after death, within this building was found more than \$1,200 in gold and bills and nine savings bank books, some of which showed deposits made more than twenty years before, and upon which books there was entered neither any credit of interest nor any draft, showing that the pass-books had never been within the bank during that period of time.

In the midst of the preparations for burial which a charitable church society proposed to give to one who had for many years been living upon their alms, they accidentally found between the mattresses of the bed on which she died a savings bank book in which deposits of very trifling amounts, saved out of the pittance of charity she had received, had made an aggregate of over \$1,300.

The number of those estates wherein no next of kin are ultimately found are comparatively few, and in my experience have not averaged five per cent of the cases which have been administered in this department. An elderly Frenchman, who had lost his wife many years before, had occupied a single room in a building for more than ten consecutive years, and daily passing in and out, had left no knowledge of who might be interested in him by ties of blood or affection. Stricken down one morning in one of our business thoroughfares, he was carried into a store, an ambulance was sent for, and he was

conveyed to a hospital. Death came without the return of consciousness upon his part, and in his pocket was found a bond and mortgage and several bank books aggregating an estate of more than \$15,000. Among the few trifling papers in his room was a letter bearing the subscription, "Your loving sister, Julie," dated in the city of Marseilles, France. Careful inquiry and advertisement there failed to elicit evidence of the existence of this sister, but after the money had been paid into the hands of the treasurer of the State of New York, a niece appeared, proved her relationship and obtained the money.

Not always is the claim of relationship so well sustained. A man who passed under the name of Wilson, and who had for years served a newspaper route, taken down with disease, caused himself to be carried to one of our hospitals as a paid patient. The physicians advised him of the imminence of death, and urged him to make such preparation in his affairs as might be needed. He scorned their advice, and one morning he passed away, leaving under his pillow bank books and ready money representing over \$5,000. The story of this incident passed into the daily papers, but by an accident his name was given as Nilson. Inside of six weeks eight letters from different portions of the United States reached me, telling the pathetic story of the death of "a dear old uncle," "a brother," or some other relative of the name of Nilson in Brooklyn, whose property they were entitled to share, or anxiously asking me for information of the whereabouts of a dear old gentleman of that name, who had been long lost sight of. Sufficient to say that none of these shared in the distribution of his estate.

Sometimes the flood of relatives, however veritable, seems never likely to stop. A thrifty old gentleman who had presided over a ferry gate and carefully saved his earnings, had accumulated a considerable amount of money (perish the thought that any of it had been taken from the corporation improperly), and died without any known relatives. Some months passed away, when an elderly lady, a young woman and a baby presented themselves at the office. They anxiously inquired whether the estate of "A" was in the hands of the public administrator. Assured that it was, the old lady claimed to be his only sister and sole surviving relative, and desired an immediate accounting. Told that the harsh provisions of the law compelled that time should elapse to afford any creditors an opportunity to present their claims and to enable her to establish more fully her relationship, she finally returned to Cincinnati, Ohio. Some more months elapsed, and another elderly female came in, interested in the same estate. She, too, declared that she was the sole sister and only next of kin of the



deceased; asked if she had ever heard of one claiming to be a sister, and whose residence was in Cincinnati, she promptly declared that she had died years before. When told that a person claiming to be such a sister had been in the office but a few months before, she unhesitatingly pronounced her an imposter. Within two weeks the two sisters returned in company, mutually acknowledging their relationship, but still vigorously denying the existence of any other next of kin. Time rolled along, and the day upon which the advertisement for creditors expired an attorney in the city of Brooklyn presented himself at the office, and announced that he had in his possession powers of attorney from the children of a deceased brother of the ticket-taker, who had died in Tasmania. Examination revealed the fact that all the claimants were really entitled to share in the estate.

There is woven through the thread of many a story in the office humor, romance or pathos. An elderly Scotch woman died, possessed alike of many names and considerable money. Great uncertainty hung around the question of who was really entitled to an interest in her estate as a husband. A canny old Scotchman presented himself with a marriage certificate, signed by a prominent clergyman of a Protestant Episcopal church in Brooklyn, setting forth the celebration of a marriage ceremony, which seemed to ante-date all other claims. Questioned why he had so long remained in obscurity, and had never disputed the claims of subsequent alleged husbands, he said: "A, weel, I knew she couldna live always, and when she deed she would leave a pretty penny." But, unfortunately for his rights, an earlier marriage record showed that a forgotten Scotch husband was still alive when his marriage was celebrated.

A curious case passed under my notice recently of a little girl who, in a heroic effort to save the life of her companion in crossing a street railroad track, some years since, did so at the expense of both of her legs. A large verdict was recovered for the child from the railroad company and deposited in a trust company as guardian for the child. Thereafter, the mother of the child obtained an absolute divorce from the father. Then the girl, grown to young womanhood, died without a will; that father, living far away, became the next of kin of his child. Meanwhile the mother had remarried and the father executed an absolute release of his interest in that child's money, without pecuniary consideration, to his former wife, and thus enabled me a few weeks since to pay over to her some \$16,000.

Within a day or two of one another a father and mother died, leaving a little girl in the personal care of a sister of the mother. There was some considerable estate and a question of who should be ap-

pointed guardian of the property and person of the child arose at once. Upon the return day before the surrogate, it appearing that the aunt was not a citizen, her claims to the child were necessarily disregarded, and an order appointing the uncle as guardian issued. When he went the next day to find the child he discovered that the aunt had fled with the child and taken passage upon a Cunarder to return to her Irish home, and if possible retain the child, whom I believe she sincerely loved. Hurred instructions passed over the cable to detain the child when they landed at Queenstown; but fate seemed to favor the aunt, for stormy seas compelled the Umbria to pass Queenstown without landing her mails, and before news could be transmitted to Liverpool the aunt and child had been lost sight of.

Aside from stocks and bonds and money, many a curious trinket, many a souvenir, valuable only in the associations that surround it, are gathered up in the estates of the dead, and some of the most particular instructions received from relatives abroad, in the matter of the disposition of property, often relate to the returning of these keepsakes. These trifles serve to tell, perhaps, of a mother's love for some wanderer in the New World, the full fruition of whose hopes death has prevented, and oftentimes go back to carry some bit of comfort to the bereaved.

From among the many hundred of cases which have passed under my observation, in the years in which I have been public administrator, I have selected these. They but serve to illustrate the proverb that "truth is stranger than fiction," and doubtless will continue to recur until Time hangs up his scythe.

#### IT DIDN'T WORK.

JUDGE LILLIBRIDGE'S court room in Detroit, Mich., was recently opened with prayer. John D. McLaulin, who sued John J. and William Davis for an alleged assault, was the first witness called to the stand. With his Bible under his arm he impressively went into the witness box and, to the astonishment of the court, attorneys, jury and spectators, at once assumed a religious attitude, and began to pray. James H. Pound, attorney for the defendant, was so nonplussed that he neglected to make an objection. Despite the exertions of the court to preserve the established decorum of the court-room, the witness persisted in his supplications. When the "amen" was reached McLaulin took his seat in the witness box and the court-room resumed its customary appearance. Half a dozen witnesses testified that McLaulin's reputation for truth and veracity was bad. The trial was concluded in the afternoon, when the jury brought in a verdict against McLaulin, finding no cause for action.—*Ohio Legal News*.

## CONTINUANCE OF THE MISCELLANEOUS REPORTS OF THE OFFICIAL SERIES.

*To the Committee on the Judiciary of the Senate:*

The committee on law reform of the New York State Bar Association desire to submit to your committee some considerations relative to the proposed discontinuance of the Miscellaneous Reports after April 1, 1896.

It is, of course, well known and understood that at the expiration of the current year the Superior City Courts, so called, except the City Court of New York city, will cease to exist, being consolidated, under the new Constitution, with the Supreme Court. By reason of such consolidation very much — indeed the greater part — of the work now devolving upon the miscellaneous reporter will necessarily be performed by the reporter of the Supreme Court. There will remain, however, three important sets of decisions, which seem to require the continuance in some form of official reports for the purpose of bringing them within the reach of the profession without delay or duplication.

The present system, which has been in operation a little less than two years, has been so eminently satisfactory that attention may be called very briefly to the situation of affairs previous to the act by which the Miscellaneous Reports were provided for.

In 1891 the situation had become such that there were nine sets of reports in existence in this State, aside from the official reports of the Court of Appeals and the Supreme Court, the expense of which, together with the Session Laws, to each lawyer, was, in round numbers, \$100 per year. It was desirable, in fact necessary, that some action should be taken by which this number of reports should be decreased and the duplication of decisions be prevented, since in some instances the same case was reported two, three, four and five times in the same court. The agitation on this subject resulted in the drafting of a bill providing for three official series of reports, together with a digest, to be published in connection with the Session Laws. While the plan in this form failed, it resulted in the passage of an act providing for a miscellaneous reporter, whose duty it should be to report the decisions of the Supreme Court, at Special Term, Surrogate's Courts, County Courts, whenever desirable, and the Superior City Courts. Thereafter the publishers and reporters by voluntary agreement established the plan upon which the present combined official series has been carried on. It is not too much to say that this has been eminently satisfactory to the lawyers and judges, and has resulted in their obtaining for thirty dollars per year all the opinions in all the courts of the State, making a net saving of seventy dollars a year to each lawyer and judge. Moreover, putting

the decisions of all the courts in official form, so that as a matter of convenience it has been possible to refer to the opinions of any court whose decisions are reported in the Miscellaneous Reports much more readily and conveniently than theretofore, when they were scattered through nine sets of reports without any certainty of their being found in any specific one of the nine.

Not only has the series met with the approval of the lawyers of this State, but the manner in which it has been conducted has attracted the attention of lawyers and judges throughout the country to such an extent that at the late session of the American Bar Association at Saratoga steps were taken to the appointment of a committee to obtain a report with reference to the feasibility of the adoption of a like plan throughout the country. It would, therefore, be exceedingly unfortunate if we were thrown back to the condition of affairs which existed before the passage of the act in question, so far as the report of the decisions at Special Term, in the County Courts, Surrogate's Courts and the reports of the decisions of the City Court of New York are concerned.

However opinions may differ with regard to the value of the reports of decisions of these different tribunals, the fact exists that lawyers are desirous of obtaining these decisions, and that unless provision is made by law for official reports, they will be reported in an unofficial way so as to add very much to the expense and annoyance connected with it. Five of the nine series of the reports, other than the official reports, which were in existence in 1891, when this agitation commenced, have ceased to exist. As to two others, it may be said that they are issued at irregular intervals, in such a manner as to indicate that they are unable to compete with the official series, and are not likely to remain much longer in competition with them.

The result of entirely abolishing the Miscellaneous Reports would be to invite this competition and again bring forward the irregular and unofficial series, so as to a very great extent undo the good which has been done by reason of this enactment.

It is not intended to be urged that the present Miscellaneous Reports should be continued in precisely the same manner in which they exist by law. It is and must be recognized that the very great change in the amount of work done must necessarily fairly decrease the expense of reports and the compensation to the reporter. With this question we do not in any way agree to take part, nor have we any suggestions to make as to ways and means which may be adopted in the interest of economy. We only insist that provision should be made by law for the continuance of the series, either by continuing a reasonable compensation to a reporter of

the Miscellaneous series or by authorizing him to issue reports in the same manner as the Supreme Court reports are now issued, looking for his compensation to a sale of the volumes. These are matters of detail and questions of expediency, in which the association and its committee are in nowise interested, except so far as relates to the efficiency of the work and character of the reports. It may be fairly said in passing that the character of the work done has been entirely satisfactory, and that any change by authorizing an increased price per volume must necessarily increase the subscription price of the combined series by so much as the cost of the labor of the reporter now paid by the State, but no suggestion is made beyond the very urgent one, that the series should be continued in some form as an official series, recognized by law, in order that its continuance may be rendered certain, and that by its continuance the irregular and unofficial reports may be discouraged.

It would seem that no argument is necessary after the experience of two years, certainly to lawyers members of this committee, in favor of the plan upon which the combined Official Series has been conducted, both for its economy and efficiency.

All of which is respectfully submitted for the committee on law reform.

J. NEWTON FIERO.

*Chairman.*

### THE LAW OF CONTRACTS.

By ERNEST A. JELF, Barrister-at-Law.

THE Law of Contracts is more than half of our whole law. It tells us in what cases a man who has sworn to his neighbor will not be permitted to disappoint him, however much it be to his own hindrance. When parties have once agreed and are *ad idem*, the law will allow no backsliding, unless some special reason can be pleaded in defense. Hardly any man in the land can be sure that he will not be obliged to go to law at some time or another upon some matter of contract, however averse to litigiousness his character may be. Crimes, and even torts, we think we can avoid by circumspection as regards the committing of them; and we may well hope that we shall never be the victims of them in a serious case which would compel us to take proceedings. But we are, most of us, making contracts great or small nearly every day of our lives. We may at any moment through some oversight find ourselves unable to fulfil our part, or we may be unable to afford to allow our neighbor to withdraw from his. The simplest accounts are riddled through and through with contracts. They ramify into a thousand affairs of importance in our lives. And when one is concluded it is only in order that another one may be begun. Millions upon millions are carried through without difficulty

for every one which is made a matter of dispute. Yet the chances are in favor of a fight sometimes.

Hence the department of the law, which we intend to examine to-day, is unusually voluminous. Where, then, shall we best find our law?

Firstly, we will refer once more to Bullen and Leake's "Precedents of Pleadings in the Superior Courts of Common Law," of which the third edition was published by Stevens & Sons in 1868. That is the best edition to possess. See Chap II, "Counts in Actions on Contracts," pages 35-272, and Chap. V., "Pleas and Subsequent Pleadings in Actions on Contracts," and the notes on these chapters. As we have said in the case of torts, so we say here — the common law of contracts is stated nowhere more correctly and conveniently than in Bullen and Leake's chapters concerning it, as regards the date from which they speak.

The leading cases on contracts in the common law must be carefully studied. We refer again to Smith's Leading Cases (9th ed., Maxwell & Son, 1887), and the learned notes thereon. Each of these leading cases is made a focus, round which the whole law upon the particular point is gathered in every instance. With respect to contracts we emphasize the importance of the following cases, and the commentaries of the editors upon them. *Lampleigh v. Brathwait* (i, 153), relating to the doctrine of consideration, especially as to a "courtesy moved by previous request;" *Chandelor v. Lopus* (i, 186), explaining the nature of warranty and how, where a stone was sold as a Bezoar stone, which was really no such thing, it gave the purchaser no right of action in the absence of warranty and of fraud; *Birkmyr v. Darnell* (i, 384,) showing the distinction between a man's promising as surety and undertaking as for himself; *Peter v. Compton* (i, 359), about contracts not performable within a year; *Cumber v. Wane* (i, 366), as to accord and satisfaction; *Collins v. Blantern* (i, 398), making the illegality of the contract a good plea of defense; *Carter v. Boehm* (i, 522), showing what concealments vitiate a policy of insurance; *Wigglesworth v. Dallison*, about the construction of written contracts by reference to usages; *Lickbarrow v. Mason* (i, 737), as to stoppage *in transitu*; *Cutter v. Powell* (ii, 1), the well known case about the uncompleted contract and the failure of a condition precedent; *George v. Clagett* (ii, 130), as to a set-off against a factor who had sold another's goods as his own; *Smith v. Hodson* (ii, 138), where a contract was tainted by fraud, but was held to have been affirmed by the defrauded party; *Godsall v. Boldero* (ii, 236), as to the extent to which a creditor may insure the life of his debtor; *Patterson v. Gandasequi* (ii, 379), *Addison v. Gandasequi* (ii, 389), on the law of principal and agent; *Thomson v. Davenport* (ii, 395),

on the same subject, where there is an undiscovered principle; and *Roe v. Tramarr* (ii, 553), as to a covenant to "stand seised." See also Finch's "Selection of Cases on the English Law of Contracts" (Clay & Son and Cambridge University Press, 1886).

Of course, equity must not be left out of account in considering this department. Equity has her own leading cases, and possesses a collection of them hardly less renowned than Smith. This is, of course, White & Tudor's "Selection of Leading Cases in Equity, with Notes" (6th ed., Maxwell & Son, 1886). Like Smith, it is contained in two large fat volumes, and it is arranged on the same principle as Smith, by which work it was first suggested. As instances of the important bearing of this work upon the department at present under consideration, see *Lester v. Foxcroft* (i, 881), as to part performance of a parol contract respecting land; *Cuddee v. Rutter* (i, 907), as to specific performance of agreements relating to personal property; *Blandy v. Widmere* (ii, 1), showing that a covenant to leave so much money to anybody is performed by a partial intestacy which gives that person as much money; *Seton v. Slade* (ii, 542), as to specific performance with compensation; *Ryall v. Rowles* (ii, 799), as to an assignment of debts without notice to the debtor; *Rees v. Berrington* (ii, 1106), which establishes the release of the surety by the creditor giving time to the principal debtor, and the notes thereon. For specific performance generally—the chief equitable doctrine affecting the law of contracts—the reader must, of course, refer to Sir Edward Fry's treatise thereon (3d ed., Stevens & Sons, Limited, 1892).

Equity, as a whole, will be considered in a later chapter, and in the meantime we will refer our reader to certain text-books, where he may hope to find his law, and his equity as well, for the purposes of this department.

Before, however, passing to our general survey of the text-books, we must draw attention to the importance which attaches in this department to the countless acts of Parliament affecting the subject, and to which all the case law is subservient. Almost the first element requiring attention in the study of the law of contracts is the famous Statute of Frauds (29 Car. 2, ch. 3), upon which innumerable arguments have been based and innumerable decisions given. From this time forward there is a long catalogue of statutes affecting our subject, ending with the Sale of Goods Act, 1898 (56 and 57 Vict., ch. 71), which codifies the law of the sale of goods, or attempts to do so. This statute has been edited, with notes, by its draughtsman, his honor Judge Chalmers, and published by Stevens & Sons, Limited, 1894.

Coming now, at last, to the text-books, it will be seen that two are of pre eminent excellence. "A Digest of Principles of the Law of Contracts," by S. M. Leake (3d ed., Stevens & Sons, 1892), and "Principles of Contract: a treatise on the general principles concerning the validity of agreements in the law of England," by Sir F. Pollock, Bart. (6th ed., same publishers, 1894). Which of these are we to prefer? We quote Sir William Anson's opinion: "The modes of treatment adopted by those two writers," he says, "are based on two totally different principles. Leake treats the contract as a subject of litigation from the point of view of a pleader's chambers. He seems to ask, 'What are the kinds of contract of which this may be one?' Then, 'What have I got to prove?' 'By what defenses may I be met?' Pollock regards the subject *ab extra*; he inquires what is the nature of that legal relation which we term contract, and how it is brought about. He watches the parties coming to terms, tells us how the contract may be made and by what flaws in its structure it may be invalidated. Leake treats the subject from every point of view in which it can interest the litigant. Pollock wrote a treatise on the information of contract; only in the last edition has he introduced a chapter on performance. Perhaps I obtained the most complete information on this subject from Leake; but Pollock started me on my way." Note that Pollock has, at present, the advantage of being up to date; the new edition having been published so lately as August of last year.

But, though these are the two leading treatises on the subject, they are by no means without rivals of considerable note. The learned Mr. Smith, to whose Leading Cases we have already so often referred, himself wrote a treatise also upon Contracts; based upon lectures which he had delivered. The eighth edition was published in 1885, under the editorship of V. T. Thompson, by Sweet, and Maxwell & Son, and Stevens & Sons.

Then there is Addison on Contracts (9th ed., by Horace Smith, Stevens & Sons, Limited, 1892). This does perhaps not hold quite the place held by Addison on Torts, to which it is a companion; but this is chiefly because it is passed by more numerous and more formidable competitors. Nor can we forget Chitty's "Treatise on the law of Contracts and upon the defenses to actions thereon," which has been a recognized authority from its first publication in 1826 until to-day. The twelfth edition, newly arranged with much added matter and facilities for reference by Lely and Geary, was published by Sweet & Maxwell, Limited, in 1890.

For an introduction to the whole subject, students should refer to "Principles of the English Law of Contract and of Agency in its relation to contract,"

by Sir William Anson, Bart., D. C. L., Warden of All Souls' College, Oxford (7th ed., Oxford, Clarendon Press, Frowde, and Stevens & Sons, Limited, 1893.)

Contracts affecting special lines of business have been treated by those who have specialized in connection with such lines of business. Take, for instance, building contracts. There are Emden's "Law Relating to Building" (2d ed., Stevens & Haynes, 1885), Hudson's "Law of Building" (same publishers, and Waterlow & Sons, Limited, 1891), and Woolrych's "Metropolitan Buildings Acts, with Notes and Forms" (3d ed., Sweet, and Stevens & Sons, 1882). Or, again, "the Law relating to Civil Engineers" is especially dealt with by Macassey & Strahan (Stevens & Sons, Limited, 1890); and "Electric Lighting" by Cunynghame (same publishers, 1883).

As we have said before, more than half the law of the land is contract law; and several of the subjects, which we shall hereafter have to consider, such as the law of principal and agent, landlord and tenant, husband and wife, or master and servant, are but sub-departments of this department. "To find your law" on any of these subjects, special treatises must often be consulted, to which, for want of space, we are unable on the present occasion to allude.

The commonest form of contract is the contract of sale, and this has been made the subject of many separate treatises. As regards real property, see especially Dart's "Vendors and Purchasers of Real Estate" (6th ed., by Barber, Q. C., Haldane, and Sheldon. Stevens & Sons, 1888). Also turn back to "The Law of Vendors and Purchasers of Estates," by Edward Sugden, better known by his subsequent title of Lord St. Leonards. As regards personal property, there are Benjamin on the "Sale of Personal Property" (4th ed., Sweet, 1888), Lord Blackburn's "Contract of Sale" (2d ed., Stevens & Sons, 1885), and Campbell's "Sale of Goods and Commercial Agency" (2d ed., Stevens & Haynes, 1891). We would refer also to the short "Digest of the Law of Sale," by Ker (Reeves & Turner, 1888). But the whole law on this subject is now revised and codified by the Sale of Goods Act, 1893, above referred to. But this code does not for one moment dispose of the necessity for consulting the earlier cases and statutes, of which in the main it is merely declaratory.—*Law Times*.

Where a roadmaster of a railroad company, whose duty is to impart orders to the foremen under him, intrusts the delivery of an order to a locomotive fireman, who, by his negligence, injures the foreman, the roadmaster becomes a vice-principal *ad hac vice*, and the defendant railway company is liable. (Card v. Eddy [Mo.], 28 S. W. Rep. 753.)

#### CONVICT MADE GOODS IN OHIO.

JUDGE NOBLE has handed down a decision in the Court of Common Pleas, at Cleveland, which impeaches the constitutionality of a law passed by the Ohio General Assembly, making it unlawful to sell convict-made goods manufactured in the prisons of other States without first obtaining a license from the secretary of state of Ohio. The law was passed May 19, 1894, and went into effect January 1, of the present year. Under this law Frank P. Yanders was arrested on a warrant issued by Justice of the Peace George R. McKay, charging him with selling brushes made in a New York penitentiary. Judge Noble, in delivering his opinion, said that the law was unconstitutional in that it discriminated between goods manufactured in this State and those manufactured outside the State. The clause which it is claimed was violated is a section of the Constitution of the United States, which provides that Congress should have power to regulate commerce with foreign nations and among the several States. The decision maintains that the doctrine is well settled that power is vested in Congress alone to regulate commerce among the States, and that the non-exercise of its power is saying that commerce shall be unrestricted, and that it is not unrestricted when discriminating burdens are placed upon goods of foreign manufacture. A State has not the authority to impose a burden upon foreign manufactured goods which is not imposed on goods manufactured within the State, even though it might be justified under the claim of police power. No State could levy or tax on interstate commerce in any form either by way of duties levied on transportation or on the receipts derived from transportation or on the occupation or business of carrying it on.—*Ohio Legal News*.

#### HUMORS OF THE LAW.

A CERTAIN justice of the peace having arrived, previous to a trial, at a conclusion upon a question of law highly satisfactory to himself, refused to entertain an argument by the opposing counsel. "If your honor pleases," the counsel replied, "I should like to cite a few authorities upon the point." Here he was sharply interrupted by the justice, who stated: "The court knows the law, and is thoroughly advised in the premises, and has given its opinion, and that settles it." "It was not," continued the counsel, "with an idea of convincing your honor that you are wrong, but I should like to show you what a fool Blackstone was."—*Central Law Journal*.

## Abstracts of Recent Decisions.

**ACCIDENT INSURANCE.**—In an action on a policy of accident insurance, where the company set up a contract to accept a weekly payment for a certain number of weeks in discharge of the claim, parol evidence is admissible to show that plaintiff could not read or write, and placed his mark on the proofs of loss without knowledge that they contained such contract, and that he afterwards refused to sign a receipt in full when the sum of such weekly payments was paid to him. (*Lord v. American Mut. Acc. Ass'n.* [Wis.], 61 N. W. Rep. 298.)

**ASSUMPSIT — PLEADING.**—In an action of *assumpsit* to recover damages for defective machinery which plaintiff had purchased, paid for, and returned as useless, the plaintiff must charge the promise that the machinery would perform the work for which it was intended, positively, and not by way of recital. (*Wolf v. Spence* [W. Va.], 20 S. E. Rep. 610.)

**ATTORNEY AND CLIENT — ACTION.**—An agreement to pay an attorney for his services an amount equal to that paid another attorney connected with the same action, is valid. (*Lungerhausen v. Crittenden* [Mich.], 61 N. W. Rep. 270.)

**CARRIERS OF PASSENGERS — SLEEPING CARS — CONTRACT FOR BERTH.**—It is no excuse for a sleeping car company's breach of contract to reserve a certain berth for plaintiff that another person demanded it before plaintiff presented herself to pay for and occupy it, and that there was no other unoccupied. (*Pullman Palace Car Co. v. Booth* [Tex.], 28 S. W. Rep. 719.)

**CONTRACT FOR PERSONAL SERVICES.**—Contracts for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable by his incapacity from illness to perform. (*Powell v. Newell* [Minn.], 61 N. W. Rep. 335.)

**COUNTY — DEFECTIVE BRIDGE — NOTICE OF DEFECTS.**—In an action against a county for injuries caused by a defect in a county bridge, evidence that a member of the board of county supervisors was informed of the defect prior to a regular meeting of the board held before the time of the accident is competent, as it is the duty of each member of the board to report defects in bridges. (*Morgan v. Fremont County* [Iowa], 61 N. W. Rep. 281.)

**CRIMINAL LAW — ARGUMENTS OF COUNSEL.**—Where the evidence against a defendant on trial for assault is positive, a remark of the county attorney that, if the jury make a mistake, defendant can appeal called forth by a line of argument opened by defendant's attorney, is not ground for reversal. (*Moore v. State* [Tex.], 28 S. W. Rep. 686.)

**DEEDS — ACKNOWLEDGMENT.**—Certificates of acknowledgment to deeds, made in July, 1839, in foreign States, are not insufficient because they do not state that the deeds were executed according to the laws of such States, since the registry law then in force only required certificates to state that "the officer taking the acknowledgment is such officer as by his certificate of acknowledgment he purports to be, and that he is duly commissioned and qualified." (*McCammon v. Detroit, L. & N. R. Co.* [Mich.], 61 N. W. Rep. 273.)

**TRUST IN FAVOR OF WIFE.**—Where a wife's father, with her consent, for the purpose of making an equal distribution of his property among his children, causes land to be conveyed to her husband by a deed of general warranty, the land is not charged with any trust in favor of the wife. (*Acker v. Priest* [Iowa], 61 N. W. Rep. 285.)

**ESTOPPEL IN FAIS.**—A contract for the sale and construction of a creamery was signed by the purchasers at the solicitation of the seller's agent. The purchasers failing to provide land on which to construct the creamery, the seller, as permitted by the contract, procured land and erected the creamery in compliance with such contract, in the view of such purchasers. Soon after the contract was executed, and at various times afterwards, the latter sought to be released from, and refused to comply with, the contract for various reasons, which did not include any claimed alteration of it: *Held*, that the purchasers could not, in an equitable action by the seller to enforce such contract, set up an unauthorized alteration, of which the seller was ignorant, made by the agent after part of them signed it. (*Davis & Rankin Building and Manufacturing Co. v. Dix* U. S. C. C. [Mo.], 64 Fed. Rep. 407.)

**FEDERAL COURTS — JURISDICTION.**—The organization by the individual stockholders and officers of a corporation existing under the laws of one State of a corporation under the laws of another State for the express purpose of bringing a suit in a Federal Court to try the title to a tract of land claimed by the former corporation, and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court. (*Lehigh Min. & Manufacturing Co. v. Kelly* [U. S. C. C., Va.], 64 Fed. Rep. 401.)

**GARNISHMENT — DEBTS SUBJECT TO.**—Where, in garnishment the evidence shows that the garnishees owe defendant directly, or as heir of his deceased wife, plaintiff is entitled to judgment. (*Simmons v. Carmichael*, [Tex.], 28 S. W. Rep. 690.)

**INSURANCE — CONTRACT OF RENEWAL.**—An oral agreement between plaintiff and defendant's agent in regard to renewing a policy of fire insurance, in

which the amount of the policy to be taken is not fixed, does not constitute a binding contract. (*Sater v. Henry County Farmers' Mut. Fire Ins. Co.* [Iowa], 61 N. W. Rep. 209.)

**INSURANCE—POLICY—MODIFICATION.**—Where an insurance company modifies a life policy by an agreement "that all restrictions of travel, occupation, or residence expressed in the original policy" shall be waived, and further agrees that from that time the policy shall be "incontestable," and that when the policy became a claim "the amount of insurance" shall be paid on approval of the proof of loss, the provision in the original policy that in case of death by suicide the company shall be liable only for the "net value of the policy" no longer remains in force. (*Simpson v. Life Ins. Co. of Virginia* [N. Car.], 20 S. E. Rep. 517.)

**JUDGMENT—COLLATERAL ATTACK.**—The validity of a judgment of a court of competent jurisdiction will not be considered on a motion to quash a writ of *feri facias* issued thereunder. (*Jones v. George* [Md.], 30 Atl. Rep. 635.)

**MUNICIPAL CORPORATION—PAVING CONTRACT—INVALID ASSESSMENTS.**—Where a city having authority to pave its streets and pay therefor from its treasury, and supposing that it had authority also to assess the cost on abutting property and transfer the assessment in payment for work, contracts with a person, who also supposed it had such authority in regard to assessments, to do such paving, and to pay him by assigning the assessments to him, the city, not having in fact any authority to make the assessments, will be liable on the contract for the work, though it stipulated that the assessments shall be accepted in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectable or not. (*Barber Asphalt Paving Co. v. City of Harrisburg* [U. S. C. C. of App.], 64 Fed. Rep. 283.)

**NEGLIGENCE—LIABILITY OF HUSBAND.**—Where recovery is sought against a husband and wife on the ground that plaintiff's injuries, caused by the discharge of a rifle in the hands of the wife, were due to the negligence of both husband and wife, no presumption that the husband is liable arises from their relationship and the fact that he was present. (*Bethel v. Otis* [Iowa], 61 N. W. Rep. 200.)

**PARTNERSHIP—DEATH OF PARTNER.**—Where one partner advanced money for the purchase of materials for repairing the firm property, and in his will gave the other partners the privilege of buying his share in such property at a fixed price, manifestly considering the amount so advanced as a demand against the firm, the survivors, who were also executors of his estate, may repay the amount so advanced with assets of the firm. (*Ashbrook v. Ashbrook* [Ky.], 28 S. W. Rep. 660.)

**PROHIBITION—MANDAMUS TO JUDGE.**—Prohibition will not lie to prevent a circuit judge from proceeding on the petition of receivers of a railway company asking authority to enter into an agreement for the partial readjustment of the affairs of the company, and from carrying out the decree rendered. (*In re Rice* [U. S. S. C.], 15 S. C. Rep. 149.)

**RAILROAD COMPANY—ILLEGAL LEASE.**—Where the officers, directors and shareholders of a railroad company designedly enter into an illegal and void lease of their railroad to another company, the court will not relieve them therefrom, they being *in pari delicto*. (*Olcott v. International & G. W. R. Co.* [Tex.], 28 St. Rep. 728.)

**REMOVAL OF CAUSE—DIVERSE CITIZENSHIP.**—An administrator with the will annexed, a citizen of Connecticut, filed a bill in the State Court for the construction of the will against two beneficiaries, citizens, respectively, of Connecticut and New York—the former claiming that certain personal property, bequeathed to her for life, with power of sale and appropriation of proceeds, should be delivered to her as her own; and the latter claiming that such life beneficiary should give bonds under a statute of Connecticut, for the safe-keeping of such property: *Held*, that the cause was not removable, the administrator being, under the law of Connecticut, not a nominal, but a real party in interest, and one of the defendants being a citizen of the same State. (*Security Co. v. Pratt*, U. S. C. C. [Conn.], 64 Fed. Rep. 405.)

**SALE—PAROL EVIDENCE.**—Where a contract of sale provides that title shall remain in the seller until the price, including notes given therefor, is paid, the fact that two of the notes were signed by only two of the buyers, and one by only the other one, does not render the contract ambiguous, so as to permit the administration of parol evidence to show that the contract was in fact several. (*Pettyplace v. Groton Bridge & Manuf'g Co.* [Mich.], 61 N. W. Rep. 266.)

**TENANTS IN COMMON—ADVERSE POSSESSION.**—When a tenant in common is in possession and exercises acts of ownership of an unequivocal character, and of such a nature as, by their own import, to give notice to the other co-tenants that an adverse possession and a disseisin are intended to be asserted against them, then the possession of such tenant in common is adverse. (*Feliz v. Feliz* [Cal.], 38 Pac. Rep. 521.)

**WATERS—TIDE LANDS—DISPOSITION BY STATE.**—A State, if its laws permit, may dispose of its tide lands free from any easement of the upland owner. (*Pacific Gas Imp. Co. v. Ellert*, U. S. C. C. [Col.], 64 Fed. Rep. 421.)

# The Albany Law Journal.

ALBANY, MARCH 9, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ANY criticism which may appear in this paper on any action of the Legislature of the State of New York, is not intended as a partisan effort to disparage the accomplishments and enactments of a political party, but are written only for the purpose of calling attention to what appear to us to be either needless or bad legislation on the part of a body in which, from our standpoint of view, we recognize no distinction of political faith. So long as no political bias or prejudice can be attributed to a criticism which is intended to be fair and reasonable and wholly in relation to the merits, so much greater is the effect of suggestions advocated by any journal on the minds of reasonable men. The newspapers of recent date have been attempting to disparage the propriety of passing several bills which are now before the Senate for its consideration, and which have reference to the admission of certain persons to practice as attorneys and counselors in the courts of record of this State. The two bills to which our attention has been called simply authorize the State Board of Law Examiners to examine certain individuals in the same manner as other applicants, and with the same force and effect, and giving the General Term the same power to admit such persons as if they were citizens of the United States and this State; provided, however, that the persons who are thus exempted from the general rule shall declare their intention of becoming citizens of the United States. There seems to be no reason why such a bill should not pass, as the persons seeking admission to practice are to be subjected to the same mode of examination. As can be seen, the idea is simply to allow them to undertake this examination as though they were citizens of the United States and of this State, and under the rules of the Court of Appeals. In case these persons sought to enter any other business or occupation, no such unfortunate state of affairs

would confront them, and there should be no valid reason why a person should be debarred from entering the profession of law until a time when he could become a citizen of this country. Some, probably, would be so foolish as to start the cry of "foreign labor," but in the legal profession, at least, it is hoped that there will rise up no person or class of persons who will fear an active and vigorous mental conflict with one who, though born in another country, desires to obtain the benefits and privileges of a citizen of the United States and a member of the legal profession.

A reprint of the toast "How to Explain to Your Client Why You Lost His Case" is printed in the *Law-Book Record*, and is not only amusing, but abounds in historical and clever sayings, which were compiled and well arranged by the author. He jests with the subject very attractively; but the well-known facts in relation to the findings, which are, unhappily, too well known to the legal profession in their active practice of law in the courts of this and other States, reveals the fact that the mind of a jurymen works in a way which is most peculiar to the genus of jurymen, and puzzling to the mind of an attorney. The writer has of late observed several cases in which verdicts have been rendered where one or more of the jury have given as a reason for their action facts which were absolutely extraneous to the issues involved, and which had no pertinency to the merits of the case. Sectional and class feeling are well known to enter into the determination of many cases, while other causes are as varied as the temperaments and characteristics of men. The judges themselves many times influence the formation of an opinion as to the merits of a case. In relation to this, it has been a pet theory of the writer, which he has started many times to explain, that in the charge to the jury the judge should be most brief, or should be absolutely prohibited from attempting to sum up the facts which are presented by the issues, and should charge the jury in the simplest manner, almost in the words of the law which are applicable to the circumstances which may be brought out by the evidence. Not only would this be an excellent arrangement for the lawyers and their clients, but the judges would be free from many harsh criticisms of partiality and favoritism



which are so frequently heard after the case has ended and the verdict rendered. The attempt to remedy the prejudices of jurymen would be as foolhardy as to try to angelize human nature, or for Edison to invent an electrical mind to replace the shattered intellects of some of the gentlemen in the box. But we suggest that the word to the wise, when it reaches the ears of the judge, will be sufficient, and that an effort may be made generally and successfully by judicial officers to leave the facts alone when addressing the jury. The toast "How to Explain to Your Client Why You Lost 'His Case'" is as follows:

"The question, as framed, is not unlike that with which Charles II long puzzled the Royal Society. He demanded the cause of certain phenomena, the existence of which he falsely assumed. The answer was simply the denial of the existence of the phenomena. What lawyer ever attempted to explain the loss of the case upon the hypothesis that he had lost it? That a lawyer cannot lose a case is as well established a maxim as that 'the king can do no wrong,' or, that 'the tenant cannot deny his landlord's title.' Eliminate this error and our question is of easy solution. Coke tells us that law is the 'perfection of human reason;' Burke, that it is 'the pride of the human intellect;' 'the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns;' 'the most excellent, yea, the exactness of the sciences;' and the eloquent Hooker, that 'her seat is the bosom of God, her voice the harmony of the spheres; all things in heaven and on earth do her homage — the least as feeling in her care, the greatest as not exempt from her power.' But we know that, if it be the purest of reason, the exactness of the sciences, its administration is not always intrusted to the severest of logicians or the exactest of scientists. We know that the great, the crowning glory of 'our noble English common law' is its uncertainty, and therein lies the emolument and pleasurable excitement of its practice. If, oblivious of this, you shall have assured your client of success in the simplest case, the hour of disappointment will be that of your tribulation, and professional experience can extend to you no solace or aid. But your client's cause has resulted unfavorably. You,

of course, are never to blame; the fault is that of the judge, the jury or your client himself, and it may be of all three. It becomes your duty to divert the tide of his wrath into those channels where it can do the least possible harm. If he be a crank and shoots the judge or cripples a juror, they fall as blessed martyrs, and their places and their mantles are easily filled; but not so readily your place or your mantle. As one of America's sweetest poets, Mr. G—— M. D——, has expressed it in a touching tribute to our professional and social worth, unequaled for delicacy of sentiment, boldness of imagery, and beauty of diction in the whole range of English poetry:

'Judges and juries may flourish or may fade,  
A vote can make them as a vote has made;  
But the bold barrister, a country's pride,  
When once destroyed can never be supplied;'

The selection then of a target for your client (I use the word 'target' metaphorically) must rest upon the peculiar facts and circumstances of the case and the 'sound discretion' as the venerated Story has it, of the counsel. But avoid, if possible, imputing the blame to your client, for although this has been attended with very happy results, yet his mood at such times is apt to be homicidal, and, moreover, you should bear in mind there your aim is to conciliate. 'Who wrote that note?' demanded an Indiana lawyer who, under the old system of procedure, had declared in covenant as on a writing obligatory, and gone out of court on a variance. 'I got Squire Brown to write it,' answered this sorely perplexed and discomfited client. 'I thought so,' sneered the learned counsel. 'Didn't you know that no d—— magistrate could write a promissory note that would fit a declaration?' First as to the jury. Upon this head I need not enlarge, only remind you that you are not held by the profession as committed or estopped by any eulogium, however glowing, which you may have pronounced during the progress at the trial on their intelligence or integrity. It is only in the capacity of a scapegoat that the American juror attains the full measure of his utility, and as such he will ever be regarded by our profession with gratitude not unmingled with affection. But it is to the judge that we turn in this extremity with unwavering confidence. The serenity and grandmotherly benignity enthroned upon his visage is to the layman that placidity of surface

which indicates fathomless depths of legal lore; to the lawyer it bespeaks the phlegmatic temperament of one whose mission is to bear unmurmuringly the burdens of others. It comes upon you like a revelation, that your weeks of study, your elaborate preparation, your voluminous brief, are all for naught; that the impetuous torrent of your eloquence has dashed itself against his skull, only to envelop it in fog and mist, and more 'in sorrow than in anger' you confess that the presumption that every man knows the law cannot be indulged in his favor. Even your luminous exposition has failed to enlighten him. You need not spare him. He thrives on abuse. Year in and year out he bears the anathemas of disappointed lawyers and litigants with the stolid indifference of Sancho Panza's ass in the valley of the packstaves, or beneath the missiles of the galley-slaves, and society comes finally to regard him pretty much as did Sancho his ass. It berates him, overtasks him, half starves him, and loves him. But, seriously considered, our question is only a long-standing and harmless jest of the bar, meaningless in actual practice. The lawyer is untiring in his client's behalf, and the client knows, be the result what it may, that he has had the full measure of his lawyer's industry, zeal and ability, and requires no explanation. Lord Erskine said that in his maiden speech 'he felt his children tugging at his gown and heard them cry, 'Now, father, is the time for bread.''' The British bar applauded the sentiment. The American lawyer throughout the case feels his client tugging at his gown, and if unsuccessful is sustained by the consciousness that he has done his whole duty as God has given him to see and perform it; and, should he want further consolation, he can open that eldest of all the books of the law and there read these words, which may soothe his wounded spirit, and possibly best answer the question of to-night: 'I returned and saw under the sun that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill, but time and chance happeneth to them all.'"

The hearing before the joint judicial committees of the Senate and Assembly on behalf of the third, fourth and sixth judicial districts rela-

tive to the division of the State into judicial departments, took place in the Assembly Chamber, on Tuesday, March 6, 1895, at three o'clock and was very largely attended by lawyers from not only those districts, but from all over the State, and it is not unreasonable to say that here were present over one hundred lawyers who were interested in the division of the new departments, and who had come from all parts of the State to favor the O'Connor bill. There seems to be some plan on foot, instituted by lawyers who either live in or are interested in Syracuse, to join the second and third judicial districts into one department, which would make a department with over 2,100,000 inhabitants, or nearly twice as large as any of the proposed departments, except, the first department. The discussion was opened by ex-Assemblyman Teft, of Whitehall, representing the fourth district, who said that the lawyers of the fourth district were opposed to the Syracuse plan, and were in favor of the O'Connor bill. Mr. Brackett, of Saratoga, also spoke in favor of the O'Connor bill. Marcus T. Hun, Esq., official reporter of the Supreme Court, spoke against a migratory court, saying, that, in his opinion, any dissatisfaction which might exist in regard to the present General Terms was owing to the fact that one of the judges simply wrote the opinion and that little or no consultation was held between the members of the court, so that practically the result was that one judge reviewed the determination of the trial court. It might well have been added, that any desire to relieve the Court of Appeals must really come by strengthening the Appellate Divisions of the Supreme Court so that appeals will not be taken from them to the higher court, and that the very idea of increasing the number of judges on the Appellate Division was that they should remain in one place and should have frequent consultations, somewhat similar to those of the Court of Appeals. It is obvious that the recognition by the bar that such a status existed in the new Appellate Division would give greater confidence that the determinations of the Appellate Division were correct and were likely to be upheld by the court of last resort should an appeal be taken from them. In fact the only hope of improving the present General Terms is by fixing the court in one place and by the

judges agreeing to remain there, making it their judicial home, if not their actual residence. John G. Milburn, Esq., of Buffalo, spoke against the O'Connor bill, and desired that the seventh and eighth districts should be made the fourth department, while Judge McLennan, of Syracuse, spoke against putting the fifth, seventh and eighth districts into the fourth department, and favored putting the second and third together. The judge, however, failed to mention the fact that the governor could designate justices to do the work in other departments. Several lawyers from Brooklyn spoke against putting the third district with the second. Mr. J. Stuart Ross, of Brooklyn, delivered an argument against the O'Connor bill, on the theory that they have too few judges. It must be remembered, however, that during the Constitutional Convention the delegates from Brooklyn on the judiciary committee claimed that the number of judges apportioned to them under the present scheme was sufficient—in fact more than they needed—to cope with the work of the second department. It is only reasonable to say here that the second department could have had more judges apportioned to them by the Judiciary Article if the Brooklyn members on the judiciary committee of the Constitutional Convention had not repeatedly asserted that they had plenty under the existing law. William Vanamee, Esq., of the second department, also spoke against the jointure of the second and third districts on the ground that it would be unconstitutional, as the population of the two districts combined would not be uniform with the others. L. E. Carr, Esq., of Albany, said that under the O'Connor bill the business of the third, fourth and fifth districts would equalize the work of the sixth, seventh and eighth, and that each would have about 600 cases a year to determine, which was an additional reason why the O'Connor bill was fair and proper. Elbridge L. Adams, Esq., of Rochester, who was sent by the Rochester Bar Association, also spoke in favor of the O'Connor bill, and in opposition to the idea of putting the second and third districts together. David Hayes, Esq., of Rochester, also spoke against the juncture of the second and third districts, and in favor of the O'Connor bill. There seems to be no doubt, even in the minds of the committee, but that the departments should be

constructed as provided by the O'Connor bill; and, as the chairman stated, the only point on which there seems to be a hesitation is as to establishing the seat of the Appellate Division. There seems to be no reason why two committees, composed of lawyers who have been engaged more or less in active practice, should entertain any doubt as to the permanent location of the Appellate Divisions in one place for the *entire year* and *for all time*. Any intelligent lawyer who has ever given any attention to this subject knows that the least chance of making a migratory court out of the new Appellate Division will absolutely rob it of any benefit which it was intended should accrue to this new court by the Constitution.

The English Court of Appeal, in the case of *Foster v. London, Chatham & Dover Railway Co.*, have decided another case of the mode of user by a railway company of land acquired by them. The plaintiff sought an injunction restraining defendants from using certain lands, acquired for a pathway, for the purpose of tenants who had leased part of the adjacent property to the company and who held as such tenants from year to year. It was maintained that the company had no right to let their arches adjoining this strip of land for business purposes. The question was whether the use of the arches and the strip of land behind each, held by tenancy from year to year, was incompatible with any of the purposes for which powers had been conferred upon the company. Judge Matthews, in writing the opinion of the trial court, holds that there was no evidence that what done by the company was *ultra vires*. He says: "It is in the power of the railway company to assume possession of the railway arches and the lands behind on giving notice at any time that they think necessary, and on the giving of such notice they would have possession of the lands for the purposes of their railway; that the strip of land is not superfluous \* \* \* it was obviously the piece of land which was desired by the company for the purpose of repairs, if repairs were desired, and for the purpose of extending their railway, if hereafter it should appear to them desirable that that should be done. \* \* \* No evidence was gone into before me to establish that what was done by the defendants was such an

interference with the rights of the plaintiff as to amount to a nuisance, nor in the acts set up on the pleadings." Lord Holsbury, in writing the opinion affirming the judgment of the lower court, says: "There is no proposition of law established by authority which prevents the railway company from using the land in question and their arches which they do not actually require for the purpose of sending an engine backward and forward on the line or for some other purpose that may afford profit to them." Smith, L. J., in his opinion affirming the judgment of the trial court, says: "It has been urged on the plaintiff's behalf that inasmuch as the defendants purchased this land for the purpose of their railway, the letting of these arches for profit is not a purpose of carrying on the railway and that it is *ultra vires*, and that, therefore, the plaintiff has a *locus standi* in a court of law to prevent this being done by the company. \* \* \* I am satisfied from the authorities which have been cited by the learned counsel on both sides that the plaintiff's counsel are not right in their proposition that the railway company, when it purchased the land for the purposes of the railway, was only authorized to run their trains backward and forward and to have stations, etc., for the purpose of carrying goods and passengers upon the railway." The principle decided seems to be that where a company can regain the possession of land within a reasonable time, as from year-to-year tenant, there is no reason why it should not lease a certain part of the property for the purpose of gain, and that such a use of the land is not *ultra vires*.

In the case of *U. S. v. E. C. Knight Co., Spreckles Sugar Refining Co. et al.*, Judge Harlan, in writing a dissenting opinion, discusses most fully the question as to "What is Commerce among the States?" In it he says: "What is Commerce among the states? The decisions of this court fully answer the question. 'Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.' It does not embrace the completely interior traffic of the respective States—that which is 'carried on between man and man in a State, or between different parts of the same State and which does not extend to or affect other States'—but

it does embrace 'every species of commercial intercourse' between the United States and foreign nations and among the States, and therefore, it includes such traffic or trade, buying, selling and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States. 'Commerce, as the word is used in the Constitution, is a unit,' and 'cannot stop at the external boundary line of each State, but may be introduced into the interior.' 'The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally.' These principles were announced in *Gibbons v. Ogden*, and have often been approved. It is the settled doctrine of this court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected. In *County of Mobile v. Kimball*, 102 U. S. 691, 702, it was said that commerce with foreign countries and among the States, strictly considered, consists 'in intercourse and traffic, including, in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, the language of the court was: 'Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions.' In *Kidd v. Pearson*, 128 U. S. 1, 20, it was said that 'buying and selling and the transportation incidental thereto constitute commerce.' Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations."

The *Law Journal* publishes an interesting article which was published in the *Pall Mall Gazette*, and which was an interview of one of its correspondents with M. Bertillon, who has reduced to a science the measurements of criminals and the classifications of their weights, sizes, heads, and the other parts of their body so that they may the more easily be identified years after their measurements have been taken. The manner of detecting a criminal who has once been measured are so clearly explained that it is only necessary to give the article: "On entering with him the measuring room, I saw gathered together at one end, under the charge of a warder, a batch of accused persons awaiting their turn. M. Bertillon ordered one of them to stand forward. He had been arrested the night before on a charge of begging, and on being asked his name gave it at once. To the question whether he had ever been arrested before he replied in the negative. M. Bertillon ordered him to submit to measurements being taken, and when the card was complete in all its details, M. Bertillon handed it to me and asked me to myself verify the man's statement. I went to the rows of pigeon-holes, or shelves, covering one side of the room. I took first the category of heads, and by looking at my card I saw that in length of head my man was marked 18.7. Length of head has three divisions, and the figures outside the pigeon-holes enable me to determine whether this particular case belongs to the large, medium, or small division. As I saw that the figures 18.5 to 19.0 denote a medium length head, I could class 18.7 in this category. Henceforth I knew that my man was to be found, (if at all) in the grand division of medium-length heads. Next as to breadth of head: 15.4 to 15.8 is a head of medium width, and on my card the figure marked was 15.5. As far as heads were concerned, I could now ignore all sections except those of medium length and breadth. The next category was that of length of little finger, and here again I could determine to what class my friend belonged. Each classification, by reducing the number of pigeon-holes in which the fatal card may be ultimately found, brought me one step nearer to the accomplishment of my task, and the vindication or condemnation of the man beside me. The fourth subdivision is that of length of foot, and having ascertained

by the same process of comparison this item, I am brought to the very drawer in which there may be a duplicate of the card I held in my hand. I pulled out the drawer, which I found to contain some 300 or 400 cards. These are once more subdivided into large, medium, and small forearms. My man belonged to the small forearm class, so I devoted my attention to about 100 cards under this heading. It would only need now to look through this 100 in order to learn the truth, but M. Bertillon saves us the trouble by classifying this last lot according to color of eyes. The card I seek must be marked like mine, Cl: I in eyes. There are three marked so. The last is the same, point for point, as the one I hold in my hand. On the back is the photograph, taken four years ago, of the man at my side, who pales a little at the sight of it. I compare the two cards. The only difference is in the name of the accused, who, under a false one was condemned four years ago to two years' imprisonment for theft. '*C'est vrai*' was all he said as he turned sullenly away."

We publish in this issue of THE JOURNAL an article on "The Method of Code Revision" by George A Benham, Esq., of the Troy bar, who has been engaged for a considerable time in writing articles and making a study of the procedure law of this State. There seems to be a unanimity of feeling among lawyers who venture to express their feelings in the same vein as Mr Benham, that the code needs a revision which will simplify it and eradicate many of the complicated rules and regulations which exist in the present voluminous work which is called a code. After a thorough discussion and elaboration of the ideas of lawyers on this subject it may be possible to prevail upon the Legislature to give the legal profession a code simplified by one or two persons of practical experience and who have no "pet hobbies" to pass off as practical methods of procedure.

In *Lichtenberg v. McGlynn* (Cal ), 38 Pac. Rep. 541, it was decided that the holder of a claim against a decedent's estate can recover only the amount for which the claim was presented, and rejected by the executors or by the judge of the Superior Court.

## GOVERNMENT REGULATION OF RAILROAD RATES.

(A paper read before the New York State Bar Association, by  
MARTIN A. KNAPP, Interstate Commerce Commissioner.)

NO problem in law-making is more important or perplexing than the nature and extent of appropriate legislation affecting the charges of railway carriers. It is a subject upon which many volumes have been written and which many more will not exhaust, for it touches the welfare of every person and taxes the resources of public authority. Transportation by rail is of such recent advent and has developed with such amazing rapidity that neither its rights nor its obligations are yet adequately defined. The railroad of to-day is not only the chief agency by which the internal commerce of the country is carried on, but its influence upon other pursuits is so powerful, and its relation to every form of industry so intimate and vital, that its proper place within the sphere of government control presents an inquiry of the gravest import.

The principal purpose of this paper is to point out the distinctive and peculiar function of public transportation as indicating the range and character of the restraints to which railroad charges should be subjected. Upon this point there exists much confusion of thought and a surprising want of correct understanding. The exactions and intolerance, the partiality and injustice which give rise to such frequent complaints against railway carriers may be attributed in great measure to a common misconception of the nature of their services and the office which they perform. The inherent difference between transportation and the various industrial vocations which depend upon it is often ignored or wholly overlooked. Both the managers and the patrons of railroads are slow to perceive that the business of public carriage is essentially unlike all private occupations. The agencies by which intercommunication is effected, and by which all the products of labor acquire exchangeable value, are not always regarded as the instruments of a public service, at once unique, incomparable and indispensable, but rather as mere private possessions to be dealt with as interest or caprice may determine. Even the opinions of learned judges and the language of legislative enactments not unfrequently disclose ignorance or indifference respecting this distinction. The laws by which railway corporations are created are framed in close analogy to the statutes under which corporate bodies are formed for other purposes, the legal regulations applied to their operation and management are substantially the same for both classes, and in a variety of ways the public function of the former is confounded with the private character of the latter. Now it cannot be too strongly insisted that the "right" of

a corporation to construct and operate a railroad is radically different from the "right" of the public to use its facilities. It is one thing to own a railway; it is quite another thing to be entitled to its services. One is a property right, the other a personal right; one is a possession, the other a privilege; one is an acquisition, the other an endowment; one may be bartered away, the other is "inalienable." In the very nature of organized society, transportation is a constant and universal necessity. It stands in the catalogue of primary wants. It is as essential to industrial life as the atmosphere is to animal life. It is the bond of union whereby mankind are held together, the medium of all associated effort and achievement. There is no place where its agencies are not indispensable, no time when its services are not imperatively demanded. It is the ever-present and unyielding condition upon which personal welfare and social progress continually depend. It follows, therefore, from the fundamental and necessary office of public transportation that to provide the highways of travel and the agencies of commercial exchange is a function of government in every sense legitimate and in every respect essential. To regard these agencies as a species of property, subject to the same rules which govern the accumulation and management of other possessions, is a mistaken and mischievous conception. Transportation is not a commodity, but a service. Its physical appliances, its fixtures and franchises are property, they are acquired; not so the right to its facilities that is enjoyed. The ownership of the carrier is the privilege of the public. The business of providing this public privilege differs from every form of private enterprise for it is afforded solely by virtue of authority proceeding from the State. There is no natural right in the individual to engage in the business of railway transportation, because that business can be carried on only by taking private property against the will of the owner, and that high prerogative belongs to the government alone. To furnish the means of public carriage, the railroad must exercise extraordinary powers which are secured from and delegated by the State. Through these delegated powers, by the aid of this unusual and supreme authority, it participates in the duties of civil administration and discharges obligations which are founded in the constitution of society. The railroad, therefore, can rightfully do nothing which the State itself might not do if it performed this public service by its own agents instead of entrusting it to the corporations which it has created.

Upon this foundation, laid in the nature and necessities of social order, rests the inherent right of every person to just and equal treatment in all that pertains to railway transportation. The railroads are engaged in a public service, and that service

should be impartially performed. They are not vendors of merchandise, free to make secret and varying bargains with their customers, but the purveyors of a public privilege which all are entitled to enjoy on the same terms. They should not be permitted to make differences between individuals on account of their position, their influence or the magnitude of their business. Neither official station, personal prominence nor patronage of unusual volume furnishes any just or defensible ground for giving one man cheaper conveyance than another. The right to use the facilities which the carrier affords is a fundamental and inalienable right, the very essence of which is equality, and some invasion of that right is found in every deviation from charges commonly imposed. It the State should itself undertake to supply the public need in this direction, no sort of partiality would be tolerated or attempted. Every function which government performs, every power which it directly exerts, and every activity which it exclusively controls, must of right be exercised for the equal benefit of every citizen. Any discrimination in favor of persons or places, any difference between wholesale and retail charges for the privileges and immunities which public authority is bound to provide is offensive and intolerable. For the government to make distinctions in its modes of operation by reason of the amount of service which it may render, or on account of the differing industries and occupations of its subjects, is to depart from its legitimate sphere and violate the principle upon which it is founded. The farmer who sends but one letter a year is entitled to the same rate of postage as the merchant who sends hundreds a day. The measure of import duties is the same whether the entry be a case or a cargo. The amount of service never affects the relative price. Much or little, it is all in the same proportion.

This is the rule which should govern the charges for railroad transportation. Impartiality, strict and unvarying, is the requirement to be rigidly imposed, and from that standard no deviation should be permitted. The large shipper is entitled to no advantage over his smaller competitor, either as to rates or facilities, for both should be served on the same basis. If concessions to particular persons because of their greater influence or patronage would not be possible under government ownership, they should not be permitted under private ownership. If in one case the rule of equality would be observed, in the other it should be enforced. As I view the matter, the State has as much right to farm out the business of collecting its revenues or preserving the peace, and allow the parties performing those offices to vary the rate of taxation according to their own interest, or sell personal protection to the highest

bidder, as it has to permit the great function of public carriage to be the subject of special bargain and secret dicker, to be made unequal by favoritism or oppressive by extortion. No service which government undertakes can be more useful, and no duty which rests upon it is more imperative, than to secure to the public — always and everywhere — just and equal treatment by every railroad carrier.

In the nature of the case this duty can be fitly and adequately discharged only by the national government. For obvious reasons, State legislation in respect of rates must be limited in scope and variable in operation. It is influenced by the circumstances and prejudices of locality, and is therefore liable to be feeble and inefficient in its action, or it may be so vexatious and burdensome as to be clearly oppressive. Both results find illustration in statutes quite recently enacted. But the business of railroad transportation cannot be separated into parts as the country is divided into States. It is mainly interstate. It cannot be segregated without fatal impairment. Each railway has become an inseparable portion of an immense and intricate organism. There are many members, yet but one body. Between the different parts there is such intimate relationship, such mutual dependence, that whatever affects one must in greater or less degree affect the others also. This vast and complex system is the nerve-power of the nation, sensitive to its further extremities; to divide it is to destroy it. While the laws which regulate property in different States may be variable and conflicting without serious injury, the laws which regulate commerce should be uniform and harmonious in all the territory which submits to one jurisdiction. Rights which are acquired may be varying and dissimilar as between one State and another, but rights which are inalienable, which are a privilege and not a possession, must have common and equal recognition in every part of the Union.

To assert the right of every person to just and equal treatment, to secure its actual enjoyment, to insure fairness and impartiality in the charges and conduct of railway carriers, is the paramount purpose of government regulation. Whatever plan is adopted for accomplishing this purpose necessarily includes the fixing of a standard of compensation, binding alike on those who furnish and those who use the agencies of transportation. The idea of legislative control over rates presumes a definite and uniform rule for ascertaining the terms upon which the carrier's services can be obtained whenever or wherever those services may be required. Whether established by the carrier in the first instance, as is the usual custom, or prescribed by the superior authority of the State, a rule must exist on the basis and subject matter of useful regulation. In other words, there must be a common and public rate, *prima facie* just and reasonable, which measures, so

long as it remains in force, the lawful and uniform charges to every passenger and shipper. The rate, therefore, being the principal object to which legislation of this character is directed, two classes of questions are involved in its consideration. These two classes are wholly distinct in their nature, and widely different in their appropriate treatment. One class embraces the methods by which the justice and reasonableness of a rate is to be determined; the other relates to the measures by which the observance of that rate is to be enforced. It is one thing to fix the standard of compensation; it is an entirely different thing to compel adherence to that standard by the carrier and the public. The offenses committed by departure from the established tariff, the rate-cutting, rebates, false weighing, false classification, and endless other devices by which favored persons secure cheaper conveyance than their neighbors or business rivals, are practices at variance with the rudest conception of justice. Their prevention is an obvious public duty. But injustice of the gravest character may also result from the observance and enforcement of the established schedule. This injustice arises not so much from rates which are excessive in themselves—for these are comparatively few—as from the relative rates applied to competing localities and kindred articles of traffic. Every community and every pursuit is so dependent upon the facilities of railway carriers, so directly affected by the cost of this necessary service, that an inequitable adjustment of rates between competing towns or commodities may produce the most serious disaster. It is as much the duty of the State to restrict these charges within reasonable limits, and to enforce relative equality in the standard of rates, as it is to prevent unjust discriminations between individuals who are entitled to the same treatment.

The distinction between these two classes of grievances—one caused by deviation from the public rate, the other by its enforcement—appears as plain as it is important; yet it is a distinction which often fails to be appreciated, and is frequently quite overlooked. Upon this point there is much misunderstanding both as to the provisions of the federal statute and the power of Congress to legislate upon the subject. Yet it must be evident upon reflection that the only effective mode of dealing with the discriminations between persons which are effected by departure from the common standard is to place them in the category of criminal misdemeanors. Redress by means of a civil action for damages is practically unavailing and manifestly inadequate. No argument is needed to show the insufficiency of private suits to protect dependent shippers from wrongs of this description; they can only be corrected by

treating them as crimes. Such offenses are not mere evasion of a contract obligation; they are infringements of a public right and violations of a public duty. They are delinquencies to be restrained by punishment, not broken agreements to be made good by compensation. But when transgressions of this nature are made amenable to the criminal law, when the mandate of the statute has given them this penal character, they must be dealt with in the same manner as other punishable offenses. How to check discriminations of this kind is a most difficult inquiry. Unlawful agreements between shipper and carrier are consummated in secrecy, and are all the more harmful on that account. The means for their concealment are practically unlimited; the mutual interest of the parties compels each to screen and protect the other; detection is almost impossible. The volume of traffic between competitive points is often far below the aggregate capacity of rival roads by which those points are connected. The opportunity of the shipper combined with the carrier's necessity is a constant temptation to bargain for preferential rates. The fact that rate-cutting and every species of favoritism between individuals are criminal misdemeanors is undoubtedly a great restraint, for conscientious men are unwilling to transgress the law and the dishonest hesitate to incur its penalties; but the scruples of the former are sometimes overcome and the latter will frequently run the risk of discovery. Moreover, the average public sentiment recognizes little moral turpitude in compacts to secure special favors from railroad corporations, and the general refusal to play the role of informer covers the illegal transaction with comparative immunity. Agreements between rival lines to maintain schedule charges are usually short lived, for they rest wholly on a pledge of good faith and do not long survive when interest inclines either party to break them. In addition to this the amount of property to be transported is extremely variable from time to time, while the carrying capacity of the roads is nearly a constant quantity. Hence at certain seasons of the year or in periods of commercial depression, when the volume of shipments is greatly reduced, the strife to get business is exceedingly fierce. There are occasions where competition is so sharp, where the freights of some large shippers or combination of shippers is so needful to a particular road, that when reduced rates are demanded as the alternative of losing the tonnage, the carrier can hardly refuse. Yet the offense of rate-cutting—however induced or committed—cannot be distinguished, as respects its detection and the mode of bringing it to punishment, from other misdemeanors. The ordinary machinery of the criminal law must be employed in enforcing penal statutes



against this offense, and there is no other way by which it can be corrected. The law-making power in this direction is practically exhausted in creating the crime. When that is done, when certain acts are declared misdemeanors, the subsequent perpetrators of those acts become liable to criminal prosecution in like manner and by the same agencies as other offenders. Nor can Congress provide any summary or exceptional methods for preventing and punishing this class of transgressions. The importance of uniform procedure in all criminal cases, and the constitutional right of indictment and trial by jury, preclude the creation of special tribunals having criminal jurisdiction of a particular class of offenses, unless such tribunals afford all the safeguards by which personal liberty is now surrounded. Theoretically, therefore, the existing system of criminal laws is ample and sufficient for redressing the wrongs now referred to. It is not lacking in strength or certainty. If these offenses escape detection and punishment, it is not because of any structural defect or weakness in the criminal machinery already provided, but because those charged with the administration of the criminal law are unable or unwilling to enforce it against this class of transgressors.

But as respects those transportation abuses which arise from conformity and adherence to an established schedule, the situation and the remedy are entirely different. How to correct the evils which result from *making* and *enforcing* unjust rates is a wide-reaching inquiry, the importance of which can scarcely be exaggerated. It involves the investigation by government authority of existing standards of compensation and the power to require their alteration when found excessive or unequal. Under the prevailing usage in this country the schedule of charges for the conveyance of passengers and the carriage of various commodities is made in the first instance by the carriers themselves. In a few cases the maximum rates which they are permitted to exact are fixed in the charters by which railway corporation are created; generally, however, no such limitations are imposed and other considerations are heeded in prescribing the terms upon which their services are offered. It is no part of my purpose to review the history of rate-making or to discuss the theories upon which rate-sheets are constructed; it is sufficient to observe that when the "Act to Regulate Commerce" was enacted there had long been tariffs in general use which furnished, nominally, at least, the basis for computing the carrier's charges. These standards are still devised by the railroads themselves, and represent their notions of proper remuneration. The great body of producers and consumers, whose interests are so vitally affected by the cost of transportation, and who are in such ut-

ter dependence upon railway facilities, have no voice in fixing the scale of charges, and little power to prevent extortion or inequality, save as they may command the intervention of public authority. To investigate these tariffs, established as they are, by the action of the carriers, and in their own interest, to require their correction when ascertained to be unfair or oppressive, to determine, in short, *what are just and reasonable rates* for railroad transportation, is a government function of the highest utility. This is the central idea of "regulation" and the special field of its usefulness. Some authority there must be superior to and independent of the carrying corporations, to supervise their schedules, prevent unfair exactions, and equalize as far as may be the burdens of transportation. More and more, as population increases and industries multiply, will these burdens demand impartial scrutiny and equitable readjustment. To give each community the rightful benefit of location; to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe a standard of charges which shall be relatively just to both shipper and carrier, is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of government regulation.

One or two inferences from these views may be briefly stated. No just theory of rate regulation will proceed on the assumption that the public alone are in need of protection and that the railroads can take care of themselves. I have little sympathy with such an unfair and illogical contention. Between the railways and the public there is reciprocal dependence rather than mutuality of interest. Neither can exist alone, neither is independent. The bonds which hold them together are indissoluble, yet are they so conjoined that one of them cannot gain advantage without injury to the other. The shipper is entitled to have his property transported at a reasonable price; the carrier is equally entitled to reasonable compensation for performing the service. The collision of pecuniary motives by which both parties are influenced gives rise to the controversy over rates and charges. This conflict is incessant and sometimes extremely severe. But the shipper is not always the under dog in the fight. It happens upon occasion that he gets much the best of the bargain. The situation of the railroad not unfrequently furnishes an opportunity which the shipper does not scruple to turn to his own profit. Odious extortions have been practiced by railway carriers, but the public is also sometimes unreasonable and unjust. The service in which the carrier engages is undertaken for private gain. The shipper avails himself of this service, likewise for private gain. The selfishness of human nature is on both sides of the

transaction. Now, the object of government regulation is to hold these opposing forces in stable equilibrium, to reduce contests and complaints to a minimum, and to bring the dealings between shipper and carrier under the control of mutual justice. The sufficient scheme of legislation, therefore, will recognize the possibility of wrong-doing on one side as well as the other; it will be judicial rather than partisan in its aims and requirements, and while equipping the shipper with ample protection will also furnish the carrier with all needful defenses.

It follows also that the principle of competition, which governs the relation of industrial forces, has but limited application to the business of railroad transportation, and that public welfare would be conserved by authorizing rival lines to make enforceable agreements with each other respecting the movement of competitive traffic. The doctrine that railway carriers are public agents, to whose services all persons have a common and equal right, is inconsistent with the idea of actual competition in the performance of their public duties. The abridgement of this common and equal right by secret concessions and unlawful rebates, the discriminating practices which are still so prevalent and so demoralizing, find inducement and excuse in competitive conditions which are imposed by mischievous legislation and mistaken views of public policy. The situation of many railroads at the present time is not unlike that of the great powers of Europe. Each in a state of armed neutrality watches the other with jealous suspicion, and an approximate peace is maintained only by lavish preparations for war. The process is expensive, the result unsatisfactory.

CONTRACT OF SALE — ACCEPTANCE OF OFFER. — Plaintiff sent to defendants an order for certain cotton warp, at prices named, on board cars at N. Defendants accepted the order, conditioned that the colored warp be accepted on board cars at L. Defendants declined to give any better terms or ship otherwise than as proposed by them; but stated that they thought they could secure a certain rebate if the goods were shipped via Erie Despatch. Plaintiff directed them to send a specified amount of a certain kind of warp by Erie Despatch, and also to ship a certain quantity of Eureka warps, saying: "If it suits your convenience better, ship the Eureka warps by Erie Despatch, and can make a fair rate, we would be perfectly willing to have you ship the goods that way." *Held*, that plaintiff's last letter was not a positive acceptance of defendants' offer in their last letter, and that no contract was consummated. (*Hargadine-McKittrick Dry Goods Co. v. Reynolds*, U. S. C. C. [Mo.], 64 Fed. Rep. 560.)

## THE METHOD OF CODE REVISION.

BY GEORGE A. BENHAM.

THE revision of the Code of Civil Procedure cannot be safely entrusted to the Legislature alone. Experience has taught us this. The Legislature should have the aid and advice of competent counsel who can and will give their undivided attention to this subject. The good results attained by the committee of statutory revision suggest that the revision of the code be delegated to a similar commission. But the revision of the code in accordance with the dictates of sound judgment will be a radically different task from the revision and consolidation of the general laws. The work of the committee of statutory revision was, as I understand it, simply to codify and digest the existing laws with such changes in arrangement or phraseology as seemed proper. Indeed, the express construction of their work as embodied in the consolidated acts, seems to indicate that their work was simply that of the codifier. We have the work of mere codifiers in a ponderous volume (in proportions truly worthy of the name of code!) about the size of Webster's Unabridged—and sad experience has taught us that we should shun codifiers, as such, with reference to a system of procedure, as we would perdition. Our State ranks first in the Union in everything—but especially in its judicial institutions, and we are supposed to have the most enlightened and rational system of procedure extant; yet after a score of years of laudable efforts we are obliged, very reluctantly it is true, to confess that while our mode of procedure in actual practice is perhaps the best and most perfect that could be desired, yet we have no intelligible written exposition of it, and that which we call a *Code of Procedure* is a veritable labyrinth of legal perplexities—a Pandora's box of woes. Over this so-called code our practitioners have "erred in vision and stumbled in judgment," as though traveling the rocky road to Jordan. But our judges, endowed with profound learning and rare discriminating judgment, holding the invariable scales of justice, have by patient and zealous efforts, evolved a great unwritten code, found in many thousand carefully prepared opinions, which is an honor to the State and its institutions, and should be handed down as a priceless legacy to posterity.

Now it is very clear that what we need—in fact what we must have, is a rational, uniform, and true exposition of this unwritten code in the shape of a concise, terse, and methodically constructed written code, which will be in harmony with the correct and admirable principles laid down by our courts. Just as the judges are, by virtue of their office, arbiters of law and fact, so they should be the arbiters of the method of determining law and fact—or of the mode of procedure. The judges have

performed their labors thoroughly and well, and it behooves us to conserve the results of their labors, and to apply them intelligently in practice in the administration of justice and equity.

We should have then, not a number of irresponsible codifiers to huggermugger the Legislature and foist upon an innocent and long suffering people a great mass of unwieldy and inconsistent rules, amplified and dexterously "padded," but a commission composed of competent and experienced practitioners, fully acquainted with existing conditions, and the limitations and imperfections of the present system, and impressed with the imperative needs of the hour. The work which such a commission would be called upon to perform would be analogous to that which confronts a text book writer *that is, the intelligent comprehension of the true import or meaning of the decisions of our courts, construing the present codes and the formulation from such decisions of a clear and concise system of rules of procedure* which will expedite the administration of justice, and avoid the vexatious and unseemly contests over mere technical forms which are so often interposed to delay or defeat the rights of litigants. Consequently, we should employ the services of at least one experienced and successful author of approved treatises upon legal topics—for every intelligent lawyer well understands the peculiar skill required by a legal writer, which may not be essential to a successful codifier—an able and liberal minded practitioner, having much experience in trial practice, and it might be judicious to secure an ex-judge familiar with the rules of reformed procedure as applied in the trial of causes.

In order to obviate the pernicious influence of local bias or prejudice, or theoretic views regarding our system of procedure, I suggest that we entrust the important work of code revision to a commission composed of three persons—one to be a good trial lawyer of this State, and two to be selected from other States—one of the latter being from a non-code State. If we could associate with an able trial lawyer of this State an expert treatise-writer from a distant State—far enough removed to be uninfluenced by our system of procedure—and a retired judge of successful experience in a code State—also at some distance from the State of New York—we should doubtless attain the best results.

The work of such a commission would, I apprehend, if supplemented by the hearty and disinterested co-operation of the bench and bar of his State, prove highly satisfactory and of permanent value. We should in such event acquire and develop an admirable system of procedure, which would be uniform, consistent and stable. But such a commission should, in the exercise of its functions, be circumscribed by certain well-defined limitations. It

should be invested with ample discretionary powers, but at the same time charged with the execution of a specific work. *We do not want the views of theorists exploded in our code; we do not want a code constructed in accordance with the individual views of any body of men, however learned or eminent in their profession; we do not want the law as it was, or ought to be, BUT AS IT IS TO-DAY—as enunciated in the decisions of our courts.* The profession, acting through the Legislature, has proved, after repeated trials, that it is incompetent to frame a proper code of procedure, and it has been obliged to impose that important duty upon the courts. The courts have performed that duty most admirably, and the only rational and sensible thing for the profession to do is to reduce the judge-made code to a compact and definite system, and put it into actual practice.

And when the new code is adopted, provision should be made for limiting appeals, purely upon questions of practice, to the General Term, except in cases involving grave constitutional questions which the General Term adjudge should be passed upon by the Court of Appeals. Our practice ought to be reasonably well settled by this time, and if we embrace within the new code a correct interpretation of the decisions already made upon this subject, we shall have a well defined and intelligible system. We have no moral or legal right to impose upon the Court of Appeals the determination of questions of procedure. That onerous duty has been borne by our highest court with great fortitude and dignity for many years, but we have reached that point where patience has ceased to be a virtue. It is to be hoped that we shall never again be called upon to create a Second Division of the Court of Appeals—because our judicial mill is choked up with procedure cases, due to an abortive Code of Procedure and an asinine fashion of carrying such cases to the highest court. The virtue and usefulness of our courts consist not in power to dispose of a large number of cases rapidly, but inability to decide a reasonable number of cases *right*, and thus secure for us the inestimable value of an unbroken line of uniform and just decisions which are the greatest safe guards of free institutions.

TROY, N. Y., March 2, 1895.

**MALICIOUS PROSECUTION—STATING FACTS TO INSPECTOR.**—Where defendant furnished an inspector with facts on which he filed an information against plaintiff charging a distinct offense, defendant cannot escape liability for malicious prosecution on the ground that the prosecution was instituted through mistaken judgment on the part of the inspector. (Holden v. Merritt [Ia.], 61 N. W. Rep. 890.)

## DIVISION OF STATE INTO JUDICIAL DEPARTMENTS.

Memorandum presented to the joint judiciary committees of the Senate and Assembly, on behalf of the lawyers of the third, fourth and sixth judicial districts, relative to division of the State into judicial departments at a hearing in the Assembly Chamber, Tuesday March 5, 1885.

**U**NDER the provisions of the Judiciary Article of the new Constitution, the number of departments in the State is reduced from five to four, so that instead of five General Terms heretofore sitting, there will be four bodies of that character to be termed Appellate Divisions of the Supreme Court. This change necessitates a new arrangement of the departments.

As the departments now stand, the first consists of the city of New York, the second of the second judicial district, the third of the third and fourth judicial districts, the fourth of the fifth and sixth judicial districts and the fifth of the seventh and eighth judicial districts.

The new Constitution provides that the city of New York shall constitute a department, and that "the others shall be bounded by county lines and be compact and equal in population, as nearly as may be." The four departments, outside of New York city, as now constituted, must, therefore, be rearranged so as to constitute three departments under the new system. Several plans have been proposed.

It seems to be agreed upon all hands that it is impracticable to divide districts in forming the judicial departments, and no voice has been raised in the discussion of this question favoring such action. This proposition may, therefore, be considered as abandoned, even by its most ardent advocates. If any question existed with regard to it, it would certainly be put at rest by the provision of the Constitution to the effect that "the justices of the Appellate Division, in each department, shall have power to fix the times and places for holding the Special and Trial Terms therein, and to assign the justices in the department to hold such terms or to make rules therefor." In case of the division of the districts, it will be noted at once that it would be impossible for the justices of the Appellate Division to fix times and places for holding Trial and Special Terms of the court in that part of the district falling in their Appellate Division, for the reason that they would have no authority or jurisdiction over all the judges of the district, since the Appellate Division, in the department to which the remaining portion of the district belonged, would have like power and authority. It would, therefore, be impossible to carry out this provision of the Constitution if districts were divided. There is the further objection to this plan that, under the provision that appeals from orders cannot be taken to the Court of

Appeals, it is more than probable that a condition of affairs will result where different rules, as to practice at least, will be in force in different judicial departments, each Appellate Division being a law unto itself, under the new Constitution, with regard to these matters, hence a justice of the Supreme Court, holding Trial or Special Terms in different counties in a district, part of which lies in two departments, would be likely to find himself bound by different rules of practice, if not by substantially opposite holdings as to the substantive law.

Senator O'Connor's bill, No. 263, provides for the arrangement of the departments so that the second district shall constitute a department as at present; that the third, fourth, and sixth shall constitute a department, and the fifth, seventh and eighth shall constitute a department. This was the arrangement up to 1882, and is apparently satisfactory to all interested throughout the State except the fifth district, where a movement is being made for the purpose of so dividing the districts as that the second and third shall constitute a department, the fourth, fifth and sixth, a department, and the seventh and eighth a department. The effect of this is to throw together the second and third districts, which have nothing in common, whose business centers are at different points, namely Brooklyn and Albany, and which are territorily so situated as to make it impossible that they be thrown together without great inconvenience to the bar. Whether General Terms were held at Brooklyn or Albany, it must necessarily result in lawyers in attendance passing through the first department, New York city, in order to reach the place for argument. This is true as to all lawyers from the third district, and as to all lawyers in the second district residing upon Long Island, Staten Island and in Westchester, and is manifestly an arrangement to be avoided if possible.

The proposition to join the second and third districts is unsatisfactory to both those districts, as well as to the fourth and sixth, is not favored by the seventh, while it does not seem to have any support from the eighth district. Aside from other considerations, such a division is open to very serious objection upon the ground that it is not in accordance with the provision of the Constitution that "the departments shall be compact and equal in population as nearly as may be."

An examination of the figures, upon this question, shows the following population:

Second district	1,623,000
Third, fourth and sixth districts	1,370,000
Fifth, seventh and eighth districts	1,709,000

This seems to be a division "equal in population as nearly as may be." It has been urged that the Court of Appeals, having sustained apportionments

heretofore, which it was claimed were not entirely just and equitable, thereby a precedent is established for action contrary to the spirit of the Constitution in this regard. Such an argument scarcely needs refutation or even consideration. The proposed division, as urged on behalf of the fifth judicial district, gives the following result:

Population second and third districts .....	2,143,000
Population fourth, fifth and sixth districts .....	1,343,000
Population seventh and eighth districts .....	1,216,000

Instead of the population being "as nearly equal as may be" in this case, the population of the department consisting of the second and third districts would be 800,000 in excess of that department consisting of the fourth, fifth and sixth districts, and 917,000 in excess of that constituted by the seventh and eighth districts. This result is so manifestly a violation of both the letter and spirit of the Constitution that it would seem it should put an end to controversy upon the subject.

The only other possible division would be as follows:

Population second district .....	1,623,000
Population third, fourth, fifth and sixth districts ..	1,863,000
Population seventh and eighth districts .....	1,216,000

But this would be manifestly unjust, giving to the department consisting of the four districts 200,000 larger population than the second department, and 647,000 more population than the department consisting of the seventh and eighth districts, and would place almost the entire territory of the State in a single department consisting of four districts, while the other three districts would constitute the remaining three departments. There is nothing to argue in favor of such a combination. No more just and equitable division can be made, therefore, upon the basis of population than that in the O'Connor bill.

Nor is there force in the argument made before the committee that the city of New York has a population substantially as large as the second and third districts, since the county of New York is made a separate department by the Constitution from the very necessities of the case, it being impossible to divide that city for judicial purposes, and is given seven appellate justices, while the other departments have but five; moreover, as we shall see, the overflow from New York must go to the second department.

But aside from the question of population, the matter of business is to be taken into consideration in determining what shall be the boundaries of the judicial districts. Upon this point we have the statement, said to have been made by Presiding Justice Van Brunt, of the first district, that in all probability there will be 1,100 cases upon the calendar of the Appellate Division in the first department, composed of the city of New York, when the

calendar shall be made up on the 1st of January, 1897. This result is owing, to some considerable extent, to the fact that two appellate tribunals in the city of New York have been abolished, namely, the General Terms of the Common Pleas and the Superior Court, and this appellate business must go to the General Term. The design of the plan for the new Appellate Divisions, as indicated in the arguments in the Constitutional Commission of 1890, where this plan originated, was that the appellate tribunal in the second district should aid in carrying on and disposing of the accumulation of the business in the first department, and taking into consideration the fact that the business in the second department, thus composed of the second district, might possibly not be so large, in proportion to the population, as that in some of the other departments, still the aggregate of the business of the two departments would be very much more than one-half of the aggregate of the business throughout the entire State. This view is fully justified by the figures which have been presented to this committee by Mr. Carr, indicating that much more than one-half of the business in the Court of Appeals comes from the first and second districts, showing very clearly that the appellate tribunals in those districts must pass upon a larger number of cases than the appellate tribunals in the rest of the State. This view is borne out by the statistics as to the number of cases decided by the General Terms of the different departments from carefully compiled figures, which are as follows:

	1892.	1893.	1894.
First department .....	612	613	624
Second department .....	314	330	269
Third department .....	230	267	272
Fourth department .....	247	234	227
Fifth department .....	350	349	491

It thus appears that, in 1892, the General Terms of the Supreme Court in the first and second departments disposed of 926 cases, while the General Terms of the Supreme Court in the other departments of the State disposed of 827. In 1893 the General Terms of the Supreme Court in the first and second departments disposed of 943 cases, while the General Terms of the Supreme Court in the other three departments of the State disposed of 850 cases. In 1894 the General Terms of the Supreme Court in the first and second departments disposed of 988 cases, while the General Terms in the other three departments of the State disposed of 990 cases, clearly indicating that much more business was transacted, on the average of the three years, in these two departments, than in the other three, and showing that a fair division into departments would be such as to make two departments of those now constituting the first and second departments, leaving less than one-half of the appellate work to the

rest of the State, now constituting three departments, and which should, therefore, fairly constitute the other two judicial departments. If to this statement should be added the cases disposed of in the third department, which are to be fairly estimated at 212, according to figures hereafter given, we have 1,195 causes decided in the first, second and third districts proposed as two departments, and 778 in the balance of the State to form the other two departments. These figures need no comment. This is still clearer when we consider that the General Terms of the Superior Court and Court of Common Pleas of New York city and of the City Court of Brooklyn are to be abolished. It is true that the City Court of Buffalo is also to be abolished, but it is fair to assume that the City Court of Buffalo and Brooklyn each have substantially the same amount of appellate work, and that this will be added to the work of the respective Appellate Divisions, leaving to be added to the labor in the first department, aided by the causes to be sent to the second department, cases heretofore heard in the General Terms of the Superior Court and Court of Common Pleas.

Nor is this question as to the disposition of the business left to conjecture, since the Constitution provides clearly with a view to just such an adjustment, "Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments, at a meeting called by the presiding justice in arrears, may transfer any pending appeals from such department to any other department for hearing and determination." It would be manifestly unjust to transfer business from the city of New York to the central or western part of the State, and the natural and just arrangement with reference to this matter would be to constitute a tribunal in the second district, to sit in the city of Brooklyn, convenient for the bar of the city of New York, to which the surplus business may be transferred.

Again, if we take the business transacted during 1894 by the General Terms, we shall find that the General Terms of the second department decided 859 causes, that the third department decided 272, of which probably one-fourth came from the fourth district, which would leave 214 cases on appeal from the third district; this, added to the 359 disposed of in the second department, makes 563 causes disposed of by the General Terms in the second and third departments now proposed to be consolidated, as against 786 causes decided in the districts out of which it is proposed to form the other two departments, an average of 393 causes each for the new third and fourth departments as proposed, as against 563 causes for the new second department, as pro-

posed by those who desire to consolidate the second and third districts in a department.

Upon the question of area, it may be said that taking the O'Connor bill, the area of the departments consisting of the third, fourth and sixth, as there proposed, is greater by some 5,000 square miles than the department composed of the fifth, seventh and eighth. It is urged, on the part of the seventh and eighth districts, that a larger amount of business is there transacted, and that under the system in vogue previous to 1882, the three judges holding General Term were unable to keep up with the accumulation of business. This argument entirely overlooks the fact that two judges are to be added to each Appellate Division for the express purpose of enabling additional business to be transacted, and that the reduction of the number of General Terms was made upon the distinct ground that the General Terms should be increased by two judges each, so as to enable the three General Terms outside the city of New York to carry on the business theretofore conducted by four appellate tribunals. Nor is there force in the argument that the number of judges of the Appellate Division in the second district is disproportionate to the number of trial judges, in view of the fact that it is expressly provided by the Constitution that only three of the justices of the Appellate Division need be taken from the department to which they are assigned. The evident purpose and intent of this was, as has been acted upon in the appointment by the governor of the judges to the General Term in New York city, in taking of two justices from other districts, to enable the New York and Brooklyn districts to have the benefit of any surplus of judges outside those cities, and unquestionably the same course will be taken with regard to the second district, with the view of aiding the work not only of the second district, but of New York city, by the selection of two justices from districts outside the first and second. It will thus be seen that no good reason, whatever, exists for the division proposed by those representing the fifth judicial district, in consolidating the second and third districts in a single department, but that all the arguments as to territorial extent, proximity of territory, uniformity of business interests, population and extent of legal business, point to the division in the O'Connor bill, by which the second district shall be made an independent department, the third, fourth and sixth districts shall constitute a department, and the fifth, seventh and eighth constitute the fourth department. This must necessarily result, and very properly so, in locating the place for holding the courts in the second district at Brooklyn, in the third department at Albany, and in the fourth department at such point as may be selected by

those interested in the fifth, seventh and eighth districts. There is certainly no lack of cities admirably located for that purpose, and we have no desire to interfere with the location of the appellate tribunal in that district. On the other hand, we insist that there should be no attempt to fix the location, by arrangement of districts or otherwise, for the place of holding the Appellate Division in the third department, other than such as may be selected by those who are residents of the department.

J. NEWTON FIERO,  
*Chairman of Committee.*

### Abstracts of Recent Decisions.

**ATTORNEY AND CLIENT — DISCONTINUANCE OF ACTION.**—A discontinuance of an action for personal injuries will not be set aside because the stipulation is filed without the knowledge or consent of plaintiff's attorney. (*Voigt Brewery Co. v. Donovan* [Mich.], 61 N. W. Rep. 343.)

**CARRIERS—DELAY IN FURNISHING CARS.**—A railroad company which does not own refrigerator cars, but has an arrangement with the owners of such cars whereby it can furnish the same to its shippers, is liable for injuries to shippers caused by delay in furnishing cars when promised. (*International & G. N. R. Co. v. Young* [Tex.], 28 S. W. Rep. 819.)

**CHATTEL MORTGAGE.**—A mortgage on a stock of merchandise, conditioned on the payment of certain debts "when due," provided that the mortgagor was to remain in possession until the condition was broken. The debts at the time of the execution of the mortgage were past due, and the mortgagee took possession the day after the mortgage was executed. *Held*, that the mortgage was valid as against creditors of the mortgagor. (*Kub v. Garvin* [Mo.], 28 S. W. Rep. 847.)

**CORPORATION — UNLAWFUL PREFERENCE.**—The president of an insolvent corporation, whose tangible property was in the custody of the law, gave a bank the company's note, payable on demand, for a debt not due. Suit was commenced on it the next day. The company filed its appearance, pleaded the general issue, waived a jury, and consented to an immediate hearing. Execution was issued, and returned *nulla bona*, and on the same day the bank filed a creditor's bill. A director of the company was individually liable, as guarantor and otherwise, for the debt due such bank. *Held*, an unlawful attempt to give the bank a preference over other creditors of such company. (*Wisconsin Marine & Fire Ins. Co.'s Bank v. Lehigh & F. Coal Co.*, U. S. C. C. [Ill.], 64 Fed. Rep. 497.)

**CORPORATION—TRANSFER OF CORPORATE STOCK.**—Where a corporation recognizes a transfer of its stock, and treats the transferee as a debtor for the subscription, he is substituted for the transferor as owner thereof, though no entry of the transfer is made on the books. (*Kruger v. Hanover Nat. Bank* [Miss.], 16 South. Rep. 353.)

**CRIMINAL EVIDENCE — CHARACTER OF DECEASED.**—The overt act, as hostile demonstration of the deceased against the accused, must be proved before the introduction of evidence as to the dangerous character of the deceased. (*State v. Green* [La.], 16 South. Rep. 367.)

**CRIMINAL LAW—HOMICIDE—INTOXICATION.**—The fact that defendant was intoxicated at the time the crime was committed is no justification therefor, if his mind was still sufficiently clear to plan a formed design to kill in consequence of which he deliberated and premeditated upon the killing. (*State v. McDaniel* [N. C.], 20 S. E. Rep. 622.)

**DEED TO MORTGAGEE.**—In order to sustain a deed by a mortgagor to the mortgagee of the mortgaged premises in satisfaction of the debt, a new consideration, passing from the mortgagee to the mortgagor, need not be shown. (*Watson V. Edwards* [Cal.], 38 Pac. Rep. 527.)

**ESTOPPEL — VOID FORECLOSURE SALE.**—Where a mortgagee who purchased the land at a void foreclosure sale remains in possession, with the acquiescence of the mortgagor, for nearly ten years, the mortgagor is estopped to claim that, because the mortgage debt is barred by limitation, the mortgagee is not entitled to satisfaction of the debt out of the land. (*Lucas v. American Freehold Land Mortg. Co. of London* [Miss.], 16 South. Rep. 358.)

**FRAUDULENT CONVEYANCES — CANCELLATION.**—Where by fraud or questionable contrivance or irregularity the title to land is wrested from the owner, and converted to the use of another, the owner, though not in possession, may sue to cancel the conveyance and quiet title. (*Packard v. Beaver Valley Land & Min. Co.* [Ky.], 28 S. W. Rep. 779.)

**PROHIBITION—WRIT—WHEN GRANTED.**—Where, in a libel against a ship for injury to cargo, the time charterer is cited in by the owner of the vessel, claiming that the charterer was liable, as between the owner and charterer, for the negligence, if any, which caused the injury, the court, having jurisdiction of the subject-matter and the parties, will not be prohibited from entertaining the owner's contention against the charterer in the same suit with the libel against the ship, as the error, if any, in so doing, may be corrected on appeal. (*In re New York & P. R. Steamship Co.* [U. S. S. C.], 15 S. C. Rep. 182.)

# The Albany Law Journal.

ALBANY, MARCH 16, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE argument before the United States Supreme Court in regard to the constitutionality of the Income Tax has been engrossing the attention of that tribunal for several days and will doubtless receive from the members of the court the profound consideration and judgment which its importance necessitates. As we have pointed out and as has been stated by others so well, the mere levying of the tax is not what is objectionable so much as the arbitrary powers granted to United States officers over citizens of the country, and the socialistic tendencies of the bill which exempts one class from any payment of revenues to the support of the government. Ex-Senator Edmunds, of Vermont, on Monday, before the Supreme Court, delivered more than the argument of a great constitutional lawyer. In his words there was the thrill of the love of country; they were the utterances of a patriot and those phrases were coined not to try to defeat a measure to bring revenue to the government, but to guide it from the unfortunate consequences of having such a law, as has already darkened the statute books, declared constitutional by the highest court of this republic. As is most strongly and ably put by the *New York Sun*, "Standing on the same intellectual level as that of the judges whom he addressed, Mr. Edmunds reminded them that it is a question of national destiny which they have to decide; that they are the people's bulwark against revolution and anarchy." It is the same feeling which exists in the minds of those who may or may not be subject to the tax, which reminds them that the rights of citizenship are to be preserved against the tyranny of unjust legislation, the theories of agitators and the forerunners of socialism and that the historical guarantee of no taxation without representation shall be forever kept sacred from the attacks of fanatics, anarchists and the scum which has

overflowed from Europe. We realize that many may not agree with us, but it is probable that any favorable decision by the Supreme Court of the United States upholding the constitutionality of the existing law will cause another influx of foreigners who will willingly accept their support and, in time, demand it at the hands of those who have honestly accumulated their property, for some will think that the country has placed its favorable seal on socialism. Naturally the law was attacked in two different ways, first on the theory that it was a direct tax and was not laid according to the rule of apportionment and was unconstitutional; and, secondly, on the ground that it was an indirect tax and was not laid according to the rule of uniformity and hence was unconstitutional. The first contention was ably made by Clarence A. Seward, Esq., of New York city, whose brief we will comment upon at length and which contained a most elaborate, exhaustive and learned discussion of the history of taxes prior to the time of the adoption of the Constitution, with many abstracts from Elliott's debates and decisions of the United States courts in regard to taxes laid by different statutes. William D. Guthrie, Esq., also argued against the unconstitutionality of the Income Tax and in conclusion said:

"We recognize that the power of taxation must be exercised without restraint, except constitutional limitations. Let Congress amend this act, apportioning direct taxes among the States and equalizing their application, and none will more willingly contribute to the national welfare than our clients, even if it takes all of their property. We ask you to impose no limitation upon the right of Congress to tax up to the full measure of the requirements of the nation. Recognizing that authority to tax in its nature must be without limitations, except equality of burden, and that it involves the power to destroy, we are here to plead that the destruction must result from some necessity or peril of the Union, and that however the occasion may arise, the destruction must be equal and uniform and not of selected individuals or classes. Did not the Constitution of the United States spring into life as the product of a longing, of a hope, of a determination to establish a government of equality? The fundamental principle of the American system is



equality — equality of rights, equality of duties, equality of burdens. Every clause of the Constitution was supposed to have been conceived in the light and spirit of that rule. The Constitution will never perish as long as equality is the guiding star, illumining the path and piloting the way of the lawmaking power. Let that star ever keep the compass true. The observance of the principle of equality in the past has built up a great nation, and, whatever may be temporary interest or prejudice or blindness, the masses will inevitably realize, if they have not already done so, that the disregard of that principle is in conflict with their own vital and permanent welfare, and cannot be tolerated if we are to remain a free people. We Americans have sacred rights which we hope shall never be erased or obscured by mortal power, and the most sacred, the one of all that should remain inviolate, is equality. Half a century ago Allison uttered his famous prophecy that class legislation and attempts of the majority to spoli private property would ultimately wreck the American republic. Bryce, who saw but the surface, and whose mind was hospitable to every favorable symptom, wrote that the perpetual strife of rich and poor, the oldest disease of civilized States, did not yet exist with us. It is only five years since one of the leading members of this bar, on the occasion of the celebration of the centenary of the court, pointed to the attacks upon individual rights and private property in many forms and under many pretexts, which were then beginning to be heard and might be looked for to an increasing extent, and earnestly said that the accursed warfare of classes was the danger that appeared to threaten our future. But anxiety was soon dispelled. We still hear the acclamations that greeted his proud and confident boast that, whatever might come, the Supreme Court of the United States would meet the emergency, maintain the Constitution, and protect the people. In words that might well be blazoned upon the walls of this historic chamber, he eloquently said of your great tribunal: 'Having its origin in the sovereignty of the people, it is the bulwark of the people against their own unadvised action, their own uninstructed will. It saves them not merely from their enemies, it saves them from themselves.' "

Mr. Seward, among other things, in comparing the law of Massachusetts and the present act said: "The only difference between the income tax of Massachusetts which has been imposed for 200 years and the present law, is that one was collected by State officials and the other by federal officials." E. B. Whitney, Esq., assistant attorney-general, argued in favor of the constitutionality of the act. In speaking of the Moore case, he said, "The case of Moore v. Miller was a more direct assault upon the traditions and practices of the treasury department than any other statute. This suit is in violation of a section of the Revised Statutes, which expressly stated that no suit to prevent the collection of any tax shall be maintained by any court. No tax could be found in the books where an injunction had been issued in such case, and but one injunction against a federal official had ever been sustained by the Supreme Court of the United States." The argument used by the other appellants we shall give more fully hereafter. Attorney-General Olney devoted his argument on the part of the United States to the Constitutional questions which the several plaintiffs alleged to be involved in the cases presented. Many of the objections raised seemed to him to be simply perfunctory, taken *pro forma* and by way of precaution. Speaking of the inquisitorial features he said, "Suppose it to be true that the income tax undertook to ascertain the incomes of citizens by methods which were not only disagreeable but were infringements of personal rights, the consequence would be, not that the law was void but that the hotly denounced inquisitorial methods could not be resorted to. Similar considerations would apply to the objection that the law was to be pronounced void because taxing the agencies and instrumentalities of the governments of the several States." Continuing, Mr. Olney said:

"The power to tax was for practical use, and was necessarily to be adapted to the practical conditions of human life. These were never the same for any two persons, and as applied to any community, however small, were infinitely diversified. Nothing was more evident, or had been oftener declared by courts and jurists, than that absolute equality of taxation was impossible. No system had been or

could be devised that would produce any such result. No country or State of this Union had ever adopted a plan of taxation that did not exempt some portions of the community from a burden that was imposed upon others. The power to do so was unquestioned, and was universally exercised. It was quite beside the issue to argue in this or any other case that Congress had mistaken what public policy required. On that point Congress was the sole and final authority, and its decision, once made, controlled every other department of the government. No exemption was made by the statute in favor of a class that was not based on some obvious line of public policy — and, that class being established, one uniform rule was applicable to its members. It is manifest that in this distinction between persons with incomes over \$4,000 and those with incomes under that amount, Congress was proceeding upon definite views of public policy and was aiming at accomplishing a great public object. It was seeking to adjust the load of taxation to the shoulders of the community in the manner that would make it most easily borne and most lightly felt. So with business corporations. Their net incomes were taxed at the standard rate of two per cent, but undiminished by the standard deduction of \$4,000. The result might be that a man in business as a member of a corporation was taxable at a little higher rate than a man in the same business by himself or as a co-partner. It was common knowledge that corporations are so successful an agency for the conduct of business and the accumulation of wealth that a large section of the community viewed them with intense disfavor. When, therefore, this income tax law made a special class of business corporations and taxed their incomes at a higher rate than that applied to the incomes of persons not incorporated, it but recognized existing social facts and conditions which it would be folly to ignore." In conclusion, Mr. Olney said, "It would certainly be a mistake to infer that this great array of counsel, this elaborate argumentation, and these numerous and voluminous treatises, miscalled by the name of briefs, have any tendency to indicate anything extraordinary or unique either in the facts before the court or in the rules of law which are appli-

cable to them. I venture to suggest that all this laborious and erudite and formidable demonstration is bound to be without effect on one distinct ground. In its essence and in its last analysis it is nothing but a call upon the judicial department of the government to supplant the political in the exercise of the taxing power; to substitute its discretion for that of Congress in respect to the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of those who have it to bear. Such an effect, however weightily supported, can, I believe, have but one result. It is inevitably predestined to failure unless this court shall for the first time in its history overlook and overstep the limits which separate the judicial from the legislative power, and the scrupulous observance of which is absolutely essential to the integrity of our constitutional system."

James C. Carter, Esq., of New York, also argued for the law in behalf of the Farmers' Loan and Trust Company. Joseph H. Choate, Esq., of New York city, argued against the constitutionality of the law and opened in his usual humorous vein, rather throwing fun at the arguments which had been made by Mr. Carter in behalf of the bill. His remarks in part were as follows:

"If the court please, after Jupiter had thundered all around the sky and had leveled everything and everybody by his prodigious bolts, Mercury came out from his hiding place and looked around to see how much damage had been done. He was quite familiar with the weapons of his Olympian friend. He had often felt their force, but he knew that it was largely stage thunder, manufactured for the particular occasion, and he went his round among the inhabitants of Olympus, restoring the consciousness and dispelling the fears of both gods and men that had been prostrated by the crash. It is in that spirit that I follow my distinguished friend; and I shall not undertake to cope with him by means of the same weapons, because I am not master of them. It never would have occurred to me to present either as an opening or closing argument to this great and learned court, that if in their wisdom they found it necessary to protect a

suitor who sought here to cling to the Ark of the Covenant and invoke the protection of the Constitution, which was created for us all, against your furnishing that relief and protection, that possibly the popular wrath might sweep the court away. It is the first time I ever heard that argument presented to this or any other court, and I trust it will be the last. Now, I have had some surprises this morning. I thought until to-day that there was a Constitution of the United States, and that the business of the executive arm (turning to the attorney-general) was to uphold that Constitution. I thought that this court was created for the purpose of maintaining the Constitution as against unlawful conduct on the part of Congress. It is news to me that Congress is the sole judge of the measure of the powers confided to it by the Constitution, and it is also news to me that that great fundamental principle that underlies the Constitution, namely, the equality of all men before the law, has ceased to exist. On the day of Gen. Sherman's funeral, Rutherford B. Hayes said to me that I would probably live to see the day when, in the case of the death of any man of large wealth, the State would take for itself all above a prescribed limit to his fortune, and divide it or apply it to the equal use of all the people, so as to punish the rich man for his wealth. I looked upon it as the wanderings of a dreamer, and yet in less than five short years I find myself in the Supreme Court of the United States contesting the validity of an alleged act of Congress, which is defended by the authorized legal representative of the government upon the plea that it was only a tax levied upon extremely rich men. It was defended upon principles as communistic, socialistic, populist as has ever been addressed to any political assembly in the world. Now, if you approve this law with this iniquitous exemption of \$4,000, and this communistic march goes on, and five years hence they come to you with an exemption of \$20,000 and a tax of twenty per cent, how can you meet it in view of the decision they ask you to render? There is protection now or never under this law. You cannot reserve the limit, and my learned friend says you cannot apply any limit. He says that no matter what Congress does in the matter of a limit, if in their so-called—what did he call it?

—sociology? political economy?—they say a limit of a minimum of \$20,000 or a minimum of \$100,000, this court will have nothing to say about it. I agree that it will have nothing to say if it lets go its hold upon this law—upon a law passed for such a purpose, accomplishing such a result by such means. I thought that the fundamental object of all civilized government was the preservation of the right of private property. That is what Mr. Webster said at Plymouth Rock in 1820, and I supposed that all educated, civilized men believed it. According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the winds. Washington and Franklin were alive to that sacred principle, and if they could have foreseen that in a short time—for what are 115 years in the life of the republic?—it would be claimed in the Supreme Court of the United States that, not despite that Constitution, but by means of it, they had helped create a combination of States that could pass a law for breaking into the strong boxes of the citizens of other States and giving out the wealth of everybody worth more than \$100,000 for general distribution throughout the country, they would both have been keen to erase their signatures from an instrument that would result in such consequences. The spirit that invaded the halls of Congress was seeking to throw up its entrenchments in the Supreme Court of the United States. If this law is upheld the first parallel would be carried, and then it would be easy to overcome the whole fortress on which the rights of the people depend."

It was commendable that the members of Assembly did not lose sight of the true object of punishment in contemplating the evils which the Hon. Elbridge T. Gerry had so vividly pictured to exist, and for which he sought to have a bill passed establishing the whipping post as an additional method of punishing certain unfortunate individuals whose depravity is only exceeded by their injury to the community. The so-called "Gerry bill" proposed to amend section 14 of the Penal Code, by providing that "whenever any male person should be convicted of rape, or of sodomy, or of incest, or other felony, consisting in, or accompanied by, the

infliction of pain, injury or suffering upon the person of a female or of a child of either sex, actually or apparently under the age of sixteen years, the court wherein such conviction is had may, in its discretion, in addition to the punishment now prescribed by law for such penalty, direct the infliction of corporal punishment on such individual. The sentence will specify the number of strokes or lashes, which shall not exceed forty in number, to be laid upon the bare back of the person convicted, within a time specified, by means of a whip or lash of suitable proportions and strength for that purpose. Such corporal punishment shall be inflicted by the keeper or other officer of the prison, to be designated by the warden or superintendent, within the prison enclosure, and in the presence of said warden or superintendent and of a duly authorized physician or surgeon, but in the presence of no other person; and the warden or superintendent and physician or surgeon, within thirty days thereafter, shall certify in writing the fact of the infliction to the court imposing the sentence." It is not with an indistinct idea of the heinousness of the crimes which are committed upon young children and women by brutes that we approach the subject, for the perpetration as well as the result of these depraved and lustful acts are only too well known and have been most graphically described by the distinguished philanthropist whose name the bill bears. The writer cannot assert, with these facts in view and with the evidence of such past cases ringing in his ears, that he would feel inclined to favor this or even a more painful form of punishment; but cool judgment and calm deliberation which should exist in such a case, demand that prejudice and passion should be mollified by the kindlier and more enlightened ideas which accompany the development and refinement of civilization. The ancient idea of punishment was the deprivation of life or the infliction of pain and suffering, while civilization conceives of it as a removal of the offender from society for the protection of all for a long or short time. It has become expedient and it is deemed proper to deprive a man of his life when he willfully takes that of another, but there is no analogy in law between such a form of punishment and that advocated by the author of this bill. Electrocuting does not

tend to satiate the public desire for retaliation, but has descended with the essence of Christian teaching, while the tortures of the whipping post would defeat the justice and the majesty of the law, and would not assist to right a wrong. By degrees the cruelty of punishment has become a ghost of the past. The Assembly, by defeating the bill, prevented the darkening of the statute books by the enactment of a law of revenge?

Several weeks ago we commented on the first English decision which had been recently rendered and which held the American doctrine that a restraint of trade is proper and legal when it is reasonable for the parties concerned and not in conflict with the interests of the country. The Court of Appeals of the District of Columbia has recently decided one of these contracts in the case of *Godfrey v. Roessel*. In this case the plaintiff agreed "not to engage under any circumstances in or by any other way associate with the management, either in his own name or that of any one else, in any laundry or laundry business in the District of Columbia." The court, in its opinion, cites the case of *Nev. Co. v. Wisor*, 20 Wall. 64, which says: "Cases must be adjudged according to their circumstances and can only be rightly judged when the reasons and grounds of the rule are carefully considered." The court then says: "After a party has deliberately made his contract, and received a consideration therefor, it must clearly appear that it contravenes public policy before the courts will declare it void upon that ground. Substantial judgment and the application of contracts are entitled to superior consideration to the vague and indefinite influence of public policy urged to avoid a contract for which the party has received a valuable consideration. Such a defense always comes with bad grace from the party to the contract who has received full consideration and enjoyed the fruits of the contract that he urges should have been in contravention of law or opposed to public policy."

In *Detroit Citizens' St. Ry. Co. v. City of Detroit* (U. S. Cir. Ct. of App.) it was held that a street railway is not incapable of taking a grant of a right to use the streets of a city for its railway for a term extending beyond its corporate franchise, the interest being assignable.

## THE MISSION OF STATE BAR ASSOCIATIONS

BY RALPH STONE, GRAND RAPIDS, MICHIGAN.

IT would seem at first thought, if you will pardon the use of a time-worn phrase, like "carrying coals to Newcastle" to bring to the New York State Bar Association anyone's conception of the proper mission of State bar associations. Your association stands easily at the head of such organizations, in the character of its membership, in its service to the law, and in its utility to the profession. I have no apology to make as a young man, and perforce of somewhat limited experience in the practice of the law, for undertaking to discuss this broad question, in the presence, constructively at least, of the cream of the lawyers of this powerful Commonwealth, and I have no apology to make simply because I intend neither to trespass upon the domain of those learned in the science of the law itself, nor to make any statement that as coming from a young man may savor of presumption. I would rather speak as a non-professional, and at times as though living in the atmosphere and looking through the glasses of the client.

Your association, more often than any other in the country, has listened to addresses of the same character as this. In 1880, Samuel Hand addressed you upon "Bar Association and the Profession." Elliott F. Shepard, in 1885, spoke upon "The Duty of the Profession to Bar Associations." In 1888, Martin W. Cooke read a paper upon "Bar Associations, What They May Undertake." I regret that in the preparation of this paper I have not had the opportunity to consult these addresses carefully, in order to ascertain how the subject has been heretofore presented to you. It has been treated to some extent in other States, notably by Melville W. Fuller before the Illinois State Bar Association, by William L. Gross, the earnest secretary of that association, and by Walter B. Hill, president of the Georgia State Bar Association. The opportunities of bar associations as agencies for the promotion of all movements having for their object the improvement of the law and the profession, have also been touched upon and dwelt upon at length by the presidents of the various associations in their annual addresses. It is a fair criticism upon all of these utterances, however, that they consist chiefly in "glittering generalities," or are beautifully constructed ideals of what bar associations ought to be. The field of practical suggestion has rarely been trodden, and it is the purpose of this paper to tread upon that field in a modest sort of a way, and stimulate, if possible, a little interest in the *practical* work of bar associations.

Lawyers are busy men, and those whose ability and influence are most needed in furthering such

work are the most occupied with their business, and the least inclined to render assistance. They are in hearty sympathy, perhaps, with the various projects for reform in the law and its administration, but, with nothing more than their naked countenance of such reforms, their membership is productive of no benefit to themselves or the profession, unless it is that the mere fact of their names being upon the rolls is a silent inducement to others to ally themselves with such associations. Occasionally one of the more capable members of the profession finds time, with the assistance of a stenographer, to prepare an address to be delivered before a gathering of lawyers, drawing from a rich vocabulary for sonorous phrases, and symmetrically rounded rhetorical periods, and from a well stored mind for quotations from the writings of noted and revered jurists of older times, topping off the literary structure perhaps with several paragraphs of beautiful and inspired sentiment.

It is hardly necessary to enlarge, in this general way, upon the inert condition of State bar associations. It is a fact so notorious that its truth is conceded. Some suggestions that may perhaps be dignified by the description of remedial measures will be considered later.

If not especially instructive, it is at least interesting to know something about the various State bar associations of the country and their relative activity. There are twenty-nine of these associations: Alabama, Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. It may be noted in passing, although not relevant to this part of the discussion, that in fifteen of these twenty-nine States a code in some form has been adopted. Without intending to make any invidious distinction, I would place the first six associations in point of activity and usefulness as follows: New York, Illinois, Ohio, Missouri, Alabama and Oregon.

The Alabama association was at one time very active, and is still quite influential in the State. It has a membership of about 200. A recent meeting of the association was held at a lake resort, and in lieu of the conventional banquet was served with a barbecued dinner. The association was organized in 1878. It has secured the enactment by the Legislature of several important measures, although in the majority of instances the Legislature has not looked kindly upon the association, and frequently measures suggested by it have been vigorously opposed and defeated by demagogues in the Legislature who were lawyers, but not members of the

association. The association is invested with the power to institute proceedings against attorneys. Some years ago a prominent attorney was prosecuted, and although he escaped conviction upon a technicality, the proceeding has had a healthy deterrent effect.

The Arkansas association is dead. It was organized in 1882 and died in 1890, with a membership of seventy-six.

The California association is not very active. The president died about two years ago, and the officials, I am informed, are too busy to call it together and reorganize it.

The State Bar Association of Connecticut has amply justified its existence by procuring the enactment of the "Practice Act," if for no other reason. It has also been useful in securing the passage of beneficial laws of minor importance, and in raising the standard of the profession. The meetings, however, are not well attended. The association was organized in 1875, and has a total membership of 125, probably two-thirds of the active lawyers of the State, according to the secretary.

The District of Columbia association is quite active, and has a membership of 175. The annual meetings are not well attended, but the interest has centered in the special meetings, when action looking to the formation of a Court of Appeals in the district has been under consideration. The association itself has no distinctive social gathering, but there is an annual "shad-bake," so-called, an excursion down the Potomac, open to all of the bar of the district, and usually attended by the justices of the Supreme Court and the Court of Claims. It is a very popular affair. The association has accumulated a library, the maintenance of which is the principal object of its existence. It was organized in 1874.

The Florida association is practically extinct, passing out of existence about four years ago. It printed no reports of its proceedings.

The Georgia association is one of the few active ones. It was organized in 1884, and has a membership of about 250, about 100 of these attending each annual meeting. The cities in which the meetings are held usually tender the association a banquet, fish dinner, boat ride or reception. The most valuable reforms accomplished by this association have been simplifications and modifications of the civil procedure, and just recently the Legislature passed a bill providing for the appointment of a commission of first-class lawyers in each judicial district to examine applicants for admission to the bar, the method of examination by committees in open court being abrogated. The latter reform is on the line of a paper read at one of the recent meetings of the Georgia association.

The Illinois association, next to New York, is the most active and influential in the country. It was organized in 1876 and has 850 paying members. Their meetings always close with a banquet "with the ladies and without wine," says the secretary. The Illinois system of intermediate courts of appeals is the direct result of the influence of the association, and the present agitation of the Torrens system of land titles was inaugurated by it. Some amendments to the criminal law of Illinois are also due to the influence of the association, notably an increase of penalty for crime on second and third convictions. The Illinois association takes an especial pride in the addresses and papers read before it, which have been of an exceptionally brilliant character.

The Kentucky association has few members living outside of the capital, Frankfort, and is not active.

The Louisiana association has not met for nearly seven years, and is practically defunct. It has never published reports of its proceedings.

The Maine association, reorganized in 1891, is fairly active, and has a membership of about 280. With the exception of one or two matters regulating practice, no legislation has as yet resulted from its influence.

The Minnesota association was formed in 1886, but has been inactive for the past three years. Its committees for the first two years attempted to exercise influence over legislation, but did not succeed in competing with the "third house," and gave it up. Some of its recommendations were acted upon, particularly a system of State examination for admission to the bar, which is a vast improvement over the old.

The association in my own State, Michigan, was organized in 1890, and has about 350 members. It has been working during the three years of its active existence to secure the passage of a bill regulating admission to the bar, and providing for a standing commission to examine applicants. It was instrumental in relieving the congestion of business before the State Supreme Court by bringing about the appointment of two additional justices, increasing their salary, and compelling them to reside at the State capital, Lansing. The association was reorganized last year, and has under way needed reforms. I regret that I cannot submit a better report than this from my own State, but we hope that the persistence and earnestness of a few of the leading attorneys of the State will result in a very substantial increase in interest in the work of the association.

The Missouri association is probably the fourth in strength and influence. It was organized in 1881, is very active, and has a membership of over 300. The annual meeting usually closes with a banquet,

and sometimes with a ball, which is attended by the wives and daughters of the members. It has had considerable influence in selecting appellate judges, in the enactment of legislation creating appellate courts and a Supreme Court commission to aid the Supreme Court, in adding two justices to the Supreme Court, and in causing the State to be redistricted judicially. It has not only succeeded in raising the standard for admission to the bar, by legislative enactment, but has also urged the strict enforcement of the statute by the courts. Altogether, the Missouri association has amply justified its existence.

The Montana association was organized in 1885, has about forty paid members, and the annual meetings average an attendance of ten. It has had no perceptible influence in the State, and its recommendations to the Legislature have been few and feeble. In fact, it is, as its secretary says, "comatose, if not really moribund."

The New Mexico association, organized in 1886, is also small, having but seventy-five members. It is quite active, however, and is able to boast that all of its recommendations have been acted upon by the Legislature. It has a code in preparation, which it fully anticipates will be enacted by the Legislature.

I now come to the New York State Bar Association, and will not presume to tell you that which you already know. I can only repeat, that you are known everywhere throughout the United States as the leading State Bar Association in the country, in every respect, and that the lawyers of other States look up to you as a pattern worthy of imitation. The reports of your own officials will give you the statistics of your organization; but in order that this history may be complete, I will add that the association is in its eighteenth year, and has a membership of over 1,000 of the best lawyers in your great State. The secretary of one of the most vigorous bar associations writes me, that "the profession in all the American commonwealths owes a debt of gratitude to the New York State Bar Association for the stand which it took in open opposition to the elevation to the bench of an unworthy and corrupt man, resulting in his ignominious defeat." Henry B. Brown, justice of the Supreme Court of the United States, chosen from my own State of Michigan, a teacher loved by all graduates of the University of Michigan Law School, has publicly spoken as follows concerning your association: "The Bar Association of the State of New York, if it had no other title to fame than the stand it has taken with regard to two or three questions of public interest, and with regard to the appointment of two or three men, at different times, would have vindicated its right to existence and

established its claim to recognition, and to the admiration of the community, by those very acts."

The Ohio association, organized fourteen years ago, ranks third in activity and usefulness. It has a membership of 450 lawyers, over 200 of whom attend each meeting. Its recommendations to the Legislature are usually acted upon. Its meetings are sometimes held at a lake resort. Through its influence, the only amendment to the State Constitution ever adopted, was secured, the old district court held annually by the judges of the *nisi prius* courts being superseded by the Circuit Courts, a system of intermediate courts. Other reforms accomplished by this association are as follows: Election contests of judicial offices are tried by the courts themselves, instead of by the Senate; the salaries of the Supreme Court judges have been increased, the term of office lengthened, and the number of judges added to, and provision made for two divisions of the court in order to facilitate business; an increase in the time of study for examination for admission to the bar, from two to three years, taking effect July 1, 1895; various changes in local practice; the creation of non-partisan election machinery; the adoption of an improved method of drawing grand and petit juries; the establishment of a law school at Columbus; and changes in the laws relating to the rights of married women. The association is contending for the abolition of the fee system of paying county officers, and for the substitution of salaries, and is discussing codification.

The Oregon association is quite active, has a membership of about 200, and is four years old. For so young an association, it has done admirable work. It has succeeded in obtaining legislation upon various matters of practice, and is now actively engaged in urging upon the people the creation of a code commission to re-draft the laws of the State. It is endeavoring to increase the number of justices of the State Supreme Court, in order to dispose of the accumulated business before that tribunal. At the last meeting of the association, more than twenty proposed amendments to the existing laws were considered and recommended, and bills are being drafted to present to the next session of the Legislature. Verily the Pacific brethren are absorbing some of the New York spirit.

The South Carolina association was organized eight years ago, and has a membership of about 250. It is active, but it is difficult to maintain the interest of its members. It has secured the enactment of some laws regulating practice.

The Tennessee association is thirteen years of age, has a membership of about 325, and is not very active. It has had no influence over legislation.

The Vermont association, organized in 1877, is one of the strongest, and embraces in its membership almost every lawyer of prominence in the State. It has been aiming, with some success, at uniformity of the laws of the State, and especially in the rules for the County Courts. It has also prepared bills to remedy defects in procedure, and will urge their enactment by the Legislature.

The Virginia association, organized in 1888, has a membership of about 450, and is fairly vigorous. Its influence has been chiefly ethical and social. The association has been unsuccessful in securing the passage of laws, although it has been urging a bill for certain reforms in practice and in the requirements for admission to the bar.

The Washington association, organized five years ago, is inactive, has a membership of only eighty, and might with profit absorb some of the spirit and energy of its neighbor in the State of Oregon.

The West Virginia association was organized in 1886, but its direct influence is very slight. It has legislative committees, but they exercise no practical influence upon legislation. Its recommendations, when made direct, have been disregarded.

The Wisconsin association has one vigorous member, the secretary. The organization itself evinces no vitality, except at its banquets. The hard work of a few, in the name of the association, has resulted in the appointment of a commission which passes upon all admissions to the bar by means of a strict examination. The association was organized in 1878, and has a membership of about 350.

I wish that the limits of this paper would admit of the drawing of general conclusions and comparisons from the histories and experiences of the different State bar associations, but I am compelled to abbreviate this part of the discussion in order to dwell more at length upon other and perhaps more important features. I will content myself with one deduction, namely: that almost all of the State organizations have exerted an influence for good in so far as they have brought lawyers together and cultivated in a greater or lesser degree, a brotherhood of the bar; but they have, generally speaking, proved an absolute failure in so far as any practical good has been accomplished to the body of the law itself, to its administration, and as a consequence, to the business and social interests of the people for which laws should primarily be made. This is not a flattering or complimentary statement perhaps, but I believe it to be an honest one, and it is time it should be made by someone.

Before considering what should be done to utilize the vast amount of intellectual strength and influence that is locked up in these twenty-nine State bar associations, let us take a brief and necessarily hasty glance at the live legal problems of the day,

the present status of each, and what the proper mission of State bar associations is with respect to them. In other words, what o'clock is it in law reform?

1. And first and foremost of legal education and admission to the bar I say "first and foremost" advisedly and deliberately, and with all the emphasis of which my personality is capable. There is no legal problem before the lawyers of this country to-day that should receive more attention than this. On its solution depends the future, first, of American jurisprudence, and second, in very great degree, of the social, and business and commercial interests of the people, since lawyers of necessity influence legislation more than any other class. We cannot bear in mind too vividly, on the one hand, that reforms of all kinds, and especially legal reforms, because of the traditional conservatism of our profession, come slowly, almost painfully so, and on the other hand, the fact that the span of human life is narrow. One generation inaugurates a reform and several succeeding generations develop it and finally effectuate it.

Jeremy Bentham listened to Blackstone's lectures and almost immediately after his graduation from Oxford in 1763 began his attacks upon the antiquities and excrescences of that English law so beautifully eulogized by his teacher. He became a radical advocate of codification, but in spite of his own able efforts, and the hard and conscientious work of his more moderate successors, the idea of codification has taken root so tardily that it has not manifested itself practically until our own day.

How important it is, therefore, that we of to-day go even to what is denominated extremes in prescribing the methods of training and educating those who immediately follow us, so that they may be equipped and qualified to grapple with these all-important problems of law reform.

The powerful press speaks glibly, and with too great a showing of truth, of the cunning and shrewd lawyer, and too rarely of the intellectual and skillful advocate. We are forced to face the disagreeable truth that the mass of the people look upon the profession very much as government is regarded by political economists — as a necessary evil. We ourselves, in our eulogistic references to the great jurists and talented leaders of the profession, are too prone to go back to the Eldons, Erskines, Cokes and Blackstones, and to neglect our own Marshalls, Websters, Dillons, Cooleys and Choates. Does this mean that the profession of the law nowadays is regarded by its own members as below the average of the bar of two or three generations ago? There are too many evidences of it. A depressing picture could be drawn of the condition of the American bar to-day, if we were to accept the public's idea of



it. But those having the true interests of the profession at heart, will deny that its character is retrograding or that its intellectual standard is depreciating. In order, however, to place the profession where it belongs in the public estimation, as well as for other reasons, the proper authorities must take up this problem of legal education and admission to the bar and solve it, and there are no organizations better equipped to undertake the work than the State bar associations of the country, acting perhaps in co-operation with the American Bar Association.

Next to life itself, the most valuable material thing to man is property. When illness racks his physical frame, or when he has reason to believe that, unless he takes proper precautions, his health will be impaired, he consults a doctor of medicine. So too, when his business interests have become seriously involved, or when he wishes to make a proper and wise disposition of his property, he consults a lawyer. To many, material prosperity is scarcely less important than physical well being, and, indeed, there are those, and too many of them, who value their fortunes more than their health. What a vigorous protest would arise all over this land, if a certificate merely of good moral character should entitle a person to practice the profession of medicine. And yet such a certificate, under the laws of one of our States, qualifies a person to practice law. This is an extreme case, to be sure, but it is cited in order to justify the statement that the requirements for admission to the bar in the several States are not only in a deplorable state of non-uniformity, but in a very great majority of the States they are woefully insufficient. There is no more reason in framing laws so that incompetent persons can invest themselves with the office and privileges of an attorney at law, and trifle and tamper with and damage the property interests of unsuspecting people, than there is in permitting any one, without study of or preparation in the science of medicine, to use the surgeon's knife, or to prescribe for dangerous diseases. The laws regulating admission to the bar in the several States, or in a vast majority of them, need revision, and it should be made the first aim of each State bar association in the country to see that the laws of its own State are brought up to the highest standard. If the New York law, for instance, is the best that can be conceived, it should be adopted in every State in the Union, so that the requirements for admission may be uniform throughout the country, and the term "The American Bar" mean something.

In order to illustrate the diversity of requirements in the several States, I have compiled from correspondence with the attorney-generals of all the States, a statement of the present status of the laws regulating admission to the bar. A similar investi-

gation was made in 1881 by a committee of the American Bar Association, but its published report embraced only twenty-three States, and in a number of those the laws have been changed for the better since that time, owing to the vigorous agitation of the matter by the lawyers. In my correspondence I have found the attorney-generals of the States uniformly courteous and obliging, and many of them have manifested interest enough to furnish not only an extended comment upon their laws, but extracts from the statutes and the rules of their courts governing the subject. I cannot embody the full results of this correspondence in this paper, but I have arranged it in such form that it may be preserved for reference, if it should prove to be sufficiently valuable. A few general observations, however, may serve to illustrate the importance of giving greater attention to the matter of uniformity of laws for legal education and admission to the bar.

In all of the States good moral character is required, and its possession by an applicant for admission is proven and certified to by various methods. It is absolutely necessary, of course, that lawyers should possess good moral character, and it is undoubtedly a wise provision to require its proof or certification before the privileges of an attorney at law are bestowed upon an applicant. But this requisite need give us very little concern, inasmuch as nearly all applicants for admission to the bar are young men whose morals have not been tainted. If the State authorities would only devise some method of *maintaining* the good moral character of members of the bar, their statutes regulating these matters would be vastly more serviceable. Practicing attorneys who have violated their oaths, and who have been guilty of unprofessional conduct; in other words, whose moral character will no longer stand the test which it endured when they were admitted to the bar, are suffered to continue the practice of the law, simply because their associates either have not the courage, or for other reasons, are not disposed to inaugurate disbarment proceedings. If the State, by its laws, is so careful to prescribe good moral character for admission to the bar, it is unquestionably its duty to see that this good moral character is maintained, and it should *itself* provide the machinery for disbarment, and attend to the execution of the laws in this respect as faithfully as it does in other respects.

Twenty-four of the States require a period of study previous to examination for admission, and in all the other States an applicant for admission can take his examination at any time, and the examinations are usually so informal, that practically he can be admitted at any time. Therefore, generally speaking, in about twenty of the States in this country, there are practically no requisites for

admission, or they are so loosely observed that their object is frustrated. In a number of the twenty-four States, where a period of study is required, the examinations themselves are mere formal matters; but although this should not be, yet we can, in a measure, condone it, in view of the fact that the applicant is at least required to study a certain number of years before being allowed to take his examination. These States, and the number of years study required in each, are as follows: North Carolina, one year; Washington, eighteen months; Colorado, Illinois, Iowa, Kansas, Maine, Maryland, Nebraska, North Dakota, Wisconsin and Wyoming, two years; Connecticut, Delaware, District of Columbia, Minnesota, New Hampshire, Ohio, Pennsylvania, and Vermont, three years; New Jersey, three, if the applicant possesses an A. B. or a B. S. degree, and four years if he does not; New York and Oregon, two years if a college graduate, three years if not; and Rhode Island two years, if the applicant possesses a classical education, three if he does not.

The favorite method of examining applicants is in open court by a temporary committee appointed by the court, or theoretically by the county or supreme judges themselves. Both of these methods, according to the testimony of the attorney-generals of the several States, are very unsatisfactory. They are the methods in vogue, however, astonishing as it may seem, in all but nine of the States. There are regularly constituted boards of examiners, whose examinations are real tests of competency, in Connecticut, Delaware, District of Columbia (elected by the Bar Association), Maryland, Massachusetts, Minnesota, New Jersey, New York and Wisconsin.

Diplomas from State law schools will admit without examination in fourteen States, viz.: Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, South Carolina, Tennessee, Texas, West Virginia and Wisconsin.

A standard of general education is necessary in only four States, viz.: Delaware, Minnesota, New York and Pennsylvania. In Delaware, Pennsylvania and Vermont, the student must register before beginning the study of the law.

In the State of Indiana there are no requisites for admission to the bar, except that the applicant must be a voter of good moral character.

This summary of laws regulating admission to the bar, and the machinery for executing them in the several States, is a more eloquent argument for uniformity of requisites for admission throughout the Union than pages and pages of earnest words. There is no reason in the world for a diversity of laws which will permit any voter, provided he be a good man morally, to practice law in one section of the country, while in another section good general

education, tested by examination before commencing the study of the law, three or four years' study of the law, and a rigorous examination in the law, are required before admission. The mission of State bar associations in this regard is obvious.

II. Bar associations should be the monitors of State legislation, in so far as it concerns or affects the body of the law or the administration of justice. Specifically and practically expressed, each association should have a committee whose especial duty it should be to frame the suggestions of the association into bills, see that they are introduced into the Legislature, and work hard for their enactment. The recommendations of a State bar association ought to command the attention of a Legislature and be almost equivalent to enactment, but the experience of nearly all the State bar associations is, that their propositions are received with suspicion and rejected without serious examination or consideration. The real reasons for this are: first, that bar associations are, generally speaking, not representative of the bar of the State, and, second, that legislators are educated in the belief that lawyers are natural lobbyists and all of their suggestions should be regarded with suspicion. It would seem, therefore, that if the usefulness of such organizations is to be materially increased, each association should add to its membership until it embraces not only the ablest lawyers in the State, but the major portion of them. A recommendation from such an association, through its accredited committee, will, as experience in a few of the States has demonstrated, carry weight and produce the desired result. How to allay the suspicion of jobbery which legislatures entertain with respect to measures proposed by lawyers, is a problem which is not so easily solved. Its solution means the entire reconstruction of public opinion, and can be accomplished only by the manifestation of a sincere and earnest desire on the part of lawyers to improve the laws of the State and to facilitate the administration of justice. It means hard work, and it means sacrifice of the lawyers' time. If the bar is unwilling to make the necessary sacrifices, in other words, if lawyers continue to neglect their responsibilities as semi-public men and officers of courts, bar associations are useless organizations, and this paper is waste ammunition.

This committee on legislation, which should be a constituent part of each bar association, should not only frame and urge the passage of bills, but, more important still, it should watch legislation, familiarize itself with every measure introduced into the Legislature, affecting the law or its administration, and use all the influence and strength with which it is clothed to prevent the enactment of vicious and hurtful laws. Several State associa-

tion have such committees, but they have been ineffectual because they have not been constituted of the proper men. And I might add, that they have been ineffectual in the large States, in New York, for instance, as I have learned since coming to Albany, because the number of bills introduced has been so great that it is practically impossible for practicing lawyers to properly examine all of them. In such cases commissions, such as urged by your president, should be enacted by the State, to do this work. Great care should be exercised in the selection of such bar association committees, their chairmen should be vigorous and enthusiastic in the work, and the committees should be held to strict accountability. In I think, nearly all of the States, a certain period at the beginning of the session of the Legislature is allotted for the introduction of bills. Immediately after the termination of that period, is the time when bar associations should convene at the State capital, and exert their influence in a practical way upon legislation. The judiciary of the State have it in their power to adjourn the County, Appellate and Supreme Courts on those days, and countenance and strengthen such meetings by their attendance. I am aware that the members of the Legislatures are likely to resent such meetings, as attempts to interfere with and reflect upon them, but it is fair and just to them to suppose, that when the sincerity of purpose of these associations is demonstrated, such feelings will die a natural death and the Legislatures and lawyers' organizations will work in harmony.

III. A third field in which State bar associations can work, and to the advantage of the people in particular, is in lending their influence to those who have undertaken to unify the laws of the States. I intended to dwell at some length upon this phase of the work of bar associations, but I find that it has been but lately presented to you, and I will simply allude briefly to the progress that has been made by the commissions on uniformity of laws in the several States, and suggest that bar associations should co operate with these commissions, and facilitate the accomplishment of the reforms fathored by them. It is pleasant to record the facts that this movement for uniform laws was inaugurated in 1889 by the State of New York, and that Michigan was one of the first of the States to follow and appoint a commission. Like all legal reforms, progress in this one has been slow. Twenty-two States have appointed commissions, as follows: Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Virginia, Wisconsin and Wyoming. Four conferences of the

commissions have been held; the first on August 24, 1892, at Saratoga Springs, N. Y.; the second on November 15, 1892, in New York city; the third in September, 1893, at Milwaukee, Wisconsin; and the fourth at Saratoga Springs in August, 1894. The work of the commissions thus far, embraces the subjects of: Acknowledgment of written instruments, bills and notes, execution of wills, marriage and divorce, weights and measures, discussed at the first meeting; the same subjects and the sealing of deeds, probate of foreign wills, and days of grace and presentment of bills and notes, at the second conference; at the third conference the work of the previous year was approved, and standing committees were appointed on the various subjects already mentioned, and upon commercial law, on descent and distribution of property, on certificates of depositions and forms of notarial certificates, and on appointment of presidential electors; and at the fourth conference the feasibility of preparing a commercial code was thoroughly discussed.

The practical result of the agitation for uniform State laws, as far as I have been able to ascertain, is the abolition of days of grace on notes in New York and several other States. It is not necessary to dwell upon the immeasurable benefits that must result from uniform laws. Of all legal reforms, it awakens the least opposition, if indeed it is antagonized at all, and it seems singular that, in the five years since the movement was inaugurated by New York, commissions have not been appointed in all of the States of the Union, and laws made uniform throughout the country in nearly all of the subjects taken up by the conferences of the commissioners, with the exception, possibly, of marriage and divorce. It is but another illustration of the conservatism of the profession, or what the younger and perhaps more impatient among us would denominate indifference.

IV. There are other legal problems to the solution of which bar associations are turning their forces. The more important of these is codification, and those of growing significance are: The alarming increase of law reports; the proper method of selecting judges; the congestion of business before the courts, especially those of last resort, and others of greater and lesser magnitude.

I am aware that this State of New York is the very heart of the codification movement, and that the life blood of the reform pulsates through its arteries and veins to nearly every section of the country. In not dwelling at length upon it, I wish it understood that I do not underestimate its importance or undervalue its influence for good upon the body of our jurisprudence. But I feel my inability to contribute anything new to the discussion of this question, and will not consume time in re-

peating the arguments for and against. It is really the only seriously debatable question which bar associations are called upon to consider, and we of the central States, and the profession to the west of us, seem to have indorsed it more enthusiastically and practically than the more staid and conservative brethren east of the Alleghanies. There is not an intelligent lawyer in the land who does not appreciate the necessity of a re-statement and a reconstruction, in some degree, of the law and its procedure. Call it a code and you arouse opposition at once, simply because the word to many signifies ultra-radicalism. The spirit of codification in some form pervades the entire American bar, although its practical manifestations are not as frequent as they should be, and it is in this direction that bar associations can perform valuable service. Codification has taken root in twenty-eight States and territories: New York, Missouri, Wisconsin, California, Kentucky, Ohio, Iowa, Kansas, Nevada, North Dakota, South Dakota, Oregon, Idaho, Montana, Minnesota, Nebraska, Arizona, Arkansas, North Carolina, South Carolina, Wyoming, Washington, Connecticut, Indiana, Colorado, Georgia, Utah and Maine. There are eighteen Codes of Criminal Procedure, five Penal Codes and five General Civil Codes, altogether an array of fifty-six codes in the United States.

Like the typical sermon of the satirist, this paper will have a number of "lastlys," or, in other words, the writer's conclusions concerning the mission of State bar associations. The present status of bar associations may be summed up in two sentences, always admitting, however, that there are exceptions. First, as agencies for reform, they have manifested a masterly inactivity, and have not exerted the minutest fraction of the influence of which they are capable, upon the law, upon legislation, and upon the profession itself. Second, and as a consequence of the first, State bar associations, conceded that there is a vast amount of dormant energy and influence locked up in their membership, have utterly failed to advance the development of a uniform and improved system of legal education and admission to the bar; have neglected to properly and effectively utilize their organizations as monitors of legislation affecting the law and its practice; have done absolutely nothing to assist in the accomplishment of uniformity of laws, and have not given the serious attention to the great problem of codification and the other less urgent reforms, which their importance demands. These statements are deduced from a correspondence with the secretaries of every existing State bar association, and are not one whit too severe. The whole thing may be summed up in one significant word, "*Indifference.*"

It naturally follows, therefore, that the first thing to be done is to eliminate this indifference. More of what are termed the "best men" in the profession, the leaders at the bar, those with the brains and ability to win their causes by honest and fair means, must take an active interest and participation in the work of bar associations. It is not meant by this that the leading spirits in the active associations are not lawyers of high standing and not above reproach; nor does it necessarily mean that our ablest lawyers are not members of bar associations. On the contrary, those upon whom the creative work of such associations falls, and to whom is largely due whatever beneficial reforms have been accomplished, are lawyers of unquestioned mental strength, and men of rigorous and exact ideas of professional ethics. The membership rolls of the most active State bar associations include the names of a number of the most capable attorneys, but, unfortunately, the contribution of those whose services such associations most need, ends there. When such men begin to appreciate the fact that they owe that oft-spoken of "duty to their profession," we may entertain hopes that bar associations will become really powerful agents for the promotion of legal reforms.

And now permit me to submit a few suggestions, which I make bold to say are intended to be practical remedies:

1. There should be an immediate organization of State bar associations in all of the States in which they are not already organized, notably, Pennsylvania, Massachusetts, New Jersey, Indiana, and Colorado.

2. Bar associations are too much organized. Their constitutions should be simplified, and the responsibility for the conduct of the work thrown upon a few. Confine the direction of affairs within well-defined banks, instead of permitting it to spread like an idle, stagnant marsh over a multitude of vice-presidents, local and general councils, and committees. This is not a criticism of the organization in New York, but is intended for the States in which the complaint is made that there seems to be no one responsible for the prosecution of the work of the association.

3. The American lawyer loves to talk, and resolve, and, after resolving, to talk some more on the resolution, and that is usually the end of it. Put a quietus on this. Let us have discussion, and plenty of it, provided it is directed to some practical end. Those especially interested in certain reforms, should prefer bills. Discuss them and amend them, but do not put them over until the next session. Do something with them. Model them to the satisfaction of a wise majority, and place them in the care of committees charged with

the duty of urging their enactment. Do not choose lawyers to serve on those committees who are noted and skilled lobbyists, because the suspicion of the average legislator is aroused at once, and the bills are bound to be hung up. Constitute the committees of earnest and vigorous men, well known if you please, but not tainted with the reputation of the "third house." If they are unfamiliar with legislative methods no matter. The counsel and advice of those who are acquainted with the law making machinery can always be secured. It is very often profitable, just as your association has repeatedly done, to take up a practical question for discussion with the idea of thoroughly ventilating it and eventually instructing a committee to prepare a bill or take certain action to put into effect the sentiment of the organization. But it too often happens, in the majority of bar associations, that the sentiment takes the form of a resolution, "That it is the sense of the association," which ever afterwards slumbers peacefully in the records of the organization, rather than the form of a motion *instructing* the committee to do something practical at once.

4. More of the leaders in the profession, the busiest of the lawyers, must be impressed into the active work of bar associations. The renowned jurists of the early English law, in beautiful, sonorous, well-rounded phrases, have told us that an attorney is an officer of the court, that he is the conservator of liberty, that his strong right arm should always be raised in defence of the rights of the people, that because of his training and superior intellectual attainments, the community looks to him to guide legislation and protect helpless interests from vicious laws. The young practitioner, just graduating from a law school, has these things repeated to him by his instructors, and in addition he is admonished to be conscientious, to lead a professional life of rectitude, and above all, to be faithful to his client and to the public weal. In periodicals, in addresses before bar associations, and in toasts at bar banquets, the subject of professional ethics is discussed in sentences of marvellous rhetorical beauty and strength. But it is a notorious fact that, barring exceptions of course, the strongest and ablest men of the profession stop short after their sermon and go back to their offices and plunge into their business again, until the next annual meeting or banquet. There is a practical method, I think, by which bar associations can utilize the services of such lawyers, to which I will allude at the end of this paper.

5. If we are to improve the character of the bar of the future, it is necessary that the standard of legal education be raised, and admission to the bar be guarded more strictly and faithfully. The

science of jurisprudence is just as much a science as medicine, and it is my personal opinion, which may not be shared by others perhaps, that if the science of medicine cannot be properly mastered by less than four years of study, neither can the science of the law. The science of medicine is being taught more and more by means of clinics, and I think that legal clinics, moot courts and practice courts can be multiplied with advantage to the study of the law. If four years study of the law should be made necessary in New York, for instance, four years should also be required in Texas and in every other State. If a State Board of Examiners is established in Maine to conduct all examinations for admission under certain prescribed rules, a State Board of Examiners, governed by the same or similar rules, should be created by every other State. The natural sponsors of legislation, having for its object the leveling up of requirements for legal education and admission to the bar, are the State bar associations. If such requirements could be made uniform throughout the country, there would be no *raison d'être* for those laws which regulate the admission of a practicing attorney of one State to the privileges of an attorney in another State. It would then be "a member of the American bar" and not a member of the Indiana bar — in which State there are no requirements for admission — or a member of the New York bar — in which State the requirements approach the nearest to the ideal.

6. State bar associations should attend at once to the enactment of a law creating commissions upon the uniformity of laws, in those States where they have not already been appointed, and co-operate with such commissions in securing the enactment of the bills for uniform laws prepared by the annual conferences. These bills cover only such reforms as the entire body of American lawyers heartily indorse, and the only stumbling block to the effectuating of these reforms is the indifference of lawyers.

7. As has already been observed, codification, in some form or under some other name, is an irresistible force, and its direction into proper channels is the legitimate work of State bar associations. The gold and the clay idol and human religious sacrifice, the dug-out and the stage-coach, the lance and the thumb-screw, the incantation and the magic cure, are passing and past, and in their places are a simple religion of honest living, a commerce with the ocean greyhound and the limited express, a government of arbitration and individual rights, and a science built upon reason and understanding. If there has been growth and development in everything else, is there any justification for clinging to the crudities, excrescences and hollow shells of the early English law? Does not the

boasted conservatism of our profession at times verge upon fossilism? Cannot we preserve our reverence for the good old things of feudal and baronial times, by embalming them in our memories? They have served their purpose. The clumsy machinery of the law of that period cannot stand the rack and the wear, the hustle and hurry of the present, and its continued use nowadays with the incessant breakdowns and repairs, is responsible for the clogging of the wheels of justice. In the manufacturing world, one man can do the work now of three or more, by the use of improved appliances. If the law is rehabilitated, renovated, and reconstructed, with wisdom and moderation, does it not reasonably follow that the administration of justice would be facilitated, and the number of judges of our courts of last resort be reduced instead of increased? Such reconstruction is nothing but codification or its equivalent, by whatever name you choose to describe it. It is an irresistible movement that is growing and developing, and it is the peculiar office of bar associations to facilitate and direct its growth wisely and practically.

I cannot help but feel, in spite of my efforts in this paper to submit something in the way of practical suggestion, that I have indulged too liberally in "should be's," that I have criticised the present tendency of bar associations and attempted to state methodically in what their true mission consists, but have suggested no plan under which they can be made to accomplish that mission. I do not propose to abandon the discussion without offering some plan, but I must confess that I do so with the feeling that even though I have made a special study of the matter, I am daring a great deal more than one of my experience and knowledge of the profession should attempt.

The history of State bar associations justifies the statement that, as now constituted and conducted, they are far from being as serviceable to the law, to the profession, and indirectly to the people, as they ought to be. This is chiefly and primarily because the lawyers of the country fail to appreciate their duty as semi-public officials, or, as I have already emphasized, the profession is saturated with indifference. The whole problem, therefore, is how to arouse them from this indifference, how to drag them from the absorbing pursuit of power and wealth, and enlist them in the cause of law reform? I trust you will suppress your astonishment, and pardon the apparent extreme commonplace of the remedy which I propose. I think you will all agree with me that the moving force, in undertakings, great or small, is invariably the personality and enthusiasm of one individual, whose whole time and mental strength and energy are given to the prosecution of the work. The State bar associations of

the country, collectively, compose a vast army of intelligent, intellectual and influential men. If their brains and influence could be concentrated upon any single good purpose, they would constitute a force which would be simply irresistible.

At present, State bar associations do not exist in all the States in the Union. Where they do exist, they are either absolutely inactive, or they work at cross purposes, or their activity is confined to fruitless annual meetings, or at the best their influence is weak and accomplishes reforms by a painfully tardy process. The need of the hour seems to be—I hardly know what to name him—a national organizer, or a national secretary, or a national official, no matter what his title, whose duty it shall be to organize State bar associations in every State and territory, to work incessantly, and by practical methods, to maintain among the profession in each State an interest and enthusiasm in the work of such associations, to have a central office, to place himself in communication with the executive officers of every State bar association, and if you will pardon the taint of slang, to keep things hot and moving all the time. Suppose, for instance, the National Conference of Commissioners for Uniformity of Laws should prepare a bill for a uniform law for the acknowledgment and execution of deeds (it has already been done), concerning the necessity for which the entire American bar is of one opinion. Let the draft of it be handed to this national organizer or secretary for reference to every State bar association. The duty of that official would be to keep track of the bill in every State, see that it is introduced by the bar associations into the several legislatures, and that proper and competent committees are appointed to urge its enactment. He should not rest, but should camp on the trail of every such bar association committee until the bill became a law in every State in the Union. Take another instance. Suppose that the American Bar Association should come to the conclusion and prepare a bill to the effect that, for the present at least, three years' study of the law should be required before admission to the bar, and that paid State boards of examiners should be appointed in each State. It would be the duty of this national secretary to submit the bill to each State bar association, urge its indorsement and introduction into the several legislatures by them, and if unable to accomplish the enactment of that particular bill, persistently advise with the committees of the several bar associations until they secure legislation which shall at least raise the standard for admission in all of the States, and hasten the time when the requisites will be identical throughout the country.

The expense of the prosecution of such work, if borne by all the State bar associations, would be in-

considerable. It would be difficult to select a lawyer qualified for the peculiar duties of such a position. It would demand one of experience, energetic, persistent, and above all, an earnest and enthusiastic advocate of law reform. There are very many ways in which a central office, devoted to the advancement of law reforms, could be utilized. The national secretary of whom I speak, could not only organize State bar associations, keep them alive and active, be instrumental in the passage of all kinds of bills, having for their object the raising of the standard of the bar and making laws uniform, but he could collect information bearing upon the practical workings of various codes in the States, point out defects in the laws, keep a watch generally upon State legislation, and collect a fund of information concerning statutory law which would be valuable to practicing lawyers who are members of State bar associations. I could consume pages in amplifying upon the practical uses to which an office of this description could be put, but it was my purpose simply to give expression to the idea.

It may be that this particular plan is impractical, and I am free to confess that I anticipate that it may be so considered. Nevertheless, my study of the history of State bar associations, with especial reference to their influence upon legislation, and their work in behalf of law reform has thoroughly convinced me that the alleged conservatism of the profession is really not so much conservatism as it is indifference, and that a proper appreciation of the necessity for such change and improvement as will keep the law and the profession abreast of the times, will not manifest itself unless some one, employed or self-appointed, devotes his entire time and energy to undermining and destroying this apathy among lawyers.

I cannot more appropriately terminate this paper than by quoting the graceful sentiment expressed by the Hon. John F. Dillon in the last of his admirable series of lectures to the students of the Yale Law school upon "The Law and Jurisprudence of England and America:"

"And, generally, the forecast may be ventured, that while the law will, in its development, undoubtedly keep pace with the changing wants of society, yet the work of jurists and legislators during the next century will be pre-eminently the work of systematic re-statement, probably in sections, of the body of our jurisprudence. Call it a code, or what you will, this work must be done. If not done from choice, the inexorable logic of necessity will compel its performance. It seems to me to be reasonably clear that in these and many other respects our laws and jurisprudence are likely to undergo essential changes. Scientific jurisprudence already a necessity, will play a more important part in the future of our law than it has in the past.

It is a mistake to suppose that the jurist, any more than the legislator, must look only to the past. He must also study the present and bring himself into actual contact with the existing conditions of society, its sentiments, its moral convictions and its actual needs. And the work must be done with all the aids that the learning and experience of the past affords, and under the inspiration of a higher ideal than the existing state of our law supplies.

"This work, as important, as noble as any that can engage the attention of men, will fall to the profession to do, since it cannot be done by others. It rests, therefore, upon the profession as a duty. It will not be performed by men whose sun, like mine, has passed the zenith, and whose faces are already turned to follow its setting. I address young men, men who are hailing the advance of their sun up the eastern sky, and who are full of the hopes, the aspirations, the generous illusions, the sublime audacity, which give to that interesting stage of life, when animated by high resolves, a present charm and a prophetic splendor all its own. No single laborer, unassisted, can do much in a work so vast. It is indeed a work which must be done more or less in compartments, and it is given to every earnest and devoted lawyer to do in his day and generation his utmost part, however humble."

### New Books and New Editions.

#### THE INCOME TAX LAW OF 1894.

This is the most complete work that has been published on this subject, containing as it does over 500 pages, and having been edited and prepared by Roger Foster, Esq., of the New York bar, and Everett V. Abbott, Esq., also of the New York bar, two of the most able writers of the present day. The completeness of the work can be estimated from the fact that the text of the statute law covers only a few pages, while the rest of the book is devoted to the explanation and annotations of the section. Chapter I deals with the history of the income tax, and is followed by a chapter on Constitutional Objections to the Statute, Incidence of the Tax, Incomes Subject to the Tax, Assessments, Payment, Collections, Remedies of Tax Payers. The second part is devoted to the annotations of the statute, and the Appendix gives the text of the various cases which have heretofore been passed on in regard to this subject. The work also contains the forms prepared by the treasury department. Mr. Foster, who is the author of "Foster's Federal Practice, contributed chapter II, which is devoted to "Constitutional Objections of the Statute." while Mr. Abbott, who is a lecturer in the Metropolitan Law School, contributes the chapter on "Incidence of the Tax." The opinion in full of Judge Hagner (*Moore v. Miller*) is also to be found in the work. Price, \$3.50. Published by the Boston Book Co., 15½ Beacon street, Boston, Mass.

# The Albany Law Journal.

ALBANY, MARCH 23, 1895.

## Current Topics.

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THE argument which has just been heard before the Supreme Court of the United States as to the constitutionality of the income tax has probably created more general interest than any other that has taken place before the highest tribunal of the United States for many years. The arguments against the constitutionality of the law are principally two — first that the act is a direct tax, is not laid according to the law of apportionment, and hence is unconstitutional; and, secondly, that the income tax of 1894 is an excise, and as it is not laid according to the rule of uniformity, is unconstitutional. The counsel for the first of these contentions has prepared one of the most brilliant and forceful briefs that has probably ever been presented to the Supreme Court of the United States. Certainly its historical features are most interesting and instructive. Basing our judgment, however, on the decisions which have been handed down by the Supreme Court of the United States, it does not seem possible that such a contention can prevail, and we still maintain that the law is unconstitutional, because it is not a uniform tax, as that court, through a long series of cases, intimate, though they do not absolutely hold, that the only direct taxes are a capitation tax and a tax on land. No more clear statement of these findings of the United States Supreme Court could be made than in the learned brief of the counsel who argued this point; yet it seems hardly possible the court will overrule its former holding on this subject. Mr. Clarence A. Seward presented the chief argument of the counsel on this point. He quoted, first, the two provisions of the constitution where the words "direct" and "direct taxes" are used, and then continues with a history of the early taxation in this country. In speaking of the New York convention, he [quotes

Mr. Williams, who said: "A capitation tax is an oppressive species of tax. This may be laid by the general government, but where a great disparity of fortune exists, I insist upon it that it is a most unequal, unjust and ruinous tax." (2 Ell. Deb. 340.) Mr. Wilson, in Pennsylvania, said: "The capitation tax is mentioned as one of those that are exceptionable. In some States that mode of taxation is used, but I believe with many it will be received with great reluctance." (2 Ell. Deb. 502.) In Virginia, Mr. Mason said: "For example they may lay a poll tax. This is simply and easily collected, but it is of all taxes the most grievous." Why the most grievous? Because it falls light on the rich and heavy on the poor. \* \* \* As to a poll tax, I have already spoken of its iniquitous operations. I need not say much of it, because it is so generally disliked in this State that we were obliged to abolish it." (3 Ell. Deb. 264-5.) The people therefore having felt the pressure of this capitation tax determined that it should not be laid by the Federal government, except upon the basis of population, that is, at so much per capita throughout the Union. To insure this result they nominated the tax in the Constitution. All other internal taxes the people left to the use of the words "direct tax" and "direct taxes." Whatever indefiniteness or ambiguity may be alleged to attach to this constitutional phrase, as one looks back at them through the mists and clouds of over a century, it cannot be said that any such doubt or ambiguity attaches to them now. The term "taxes" as used in the Constitution of the States and in the statutes of the present day, has, by universal consent, judicial as well as otherwise, been construed not to be limited to a tax on land only, but to include a tax on income. The Supreme Court of Missouri (43 Mo. 479) has so asserted. The Privy Council of England has also said: "An income tax is always spoken of as a direct tax, and is generally looked upon as a direct tax of the most obvious kind. To deny it that character would run counter to the common understanding of men on this subject, which is the one main clue to the meaning of the Legislature." This is high judicial authority for the position that in interpreting the words of a statute that interpretation is to be rejected which runs counter to the common



understanding of men. Both English and American lexicographers now agree that a direct tax includes a tax on income. The encyclopædists concur and the commonists assent.

In speaking of the authority of the courts to hold that an income tax is not a "direct tax" Mr. Seward said:

"This was first judicially voiced in the Springer case, decided in 1880. The conclusion was there reached that an income tax was not a direct tax, but was in the category of an excise or duty. The Springer case was founded upon the Carriage case (*Hylton v. United States*) decided in 1796. It was there held that a tax on carriages was not a direct tax, but was an indirect duty. In arriving at this conclusion, both the counsel for the government (Mr. Hamilton) and the court seemed to find it necessary to undertake to define the phrase 'direct taxes,' so as to justify the conclusion that a tax on carriages did not fall within the category of taxes intended by that phrase. Mr. Hamilton, arguing under his retainer, and advancing such positions as he thought might secure the favorable judgment of the court, said: 'The following are presumed to be the only direct taxes: Capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the whole property of individuals, or on their whole real or personal property. All else must of necessity be considered as indirect taxes.'

"Striking out of this presumption the words 'capitation or poll taxes,' which were particularly provided for in the Constitution, and laying out of view the 'general assessments,' which are not now relevant; and there remains as Mr. Hamilton's definition of the words 'direct taxes' only a tax on lands. This was but a theory and was advanced only as a presumption. The theory and presumption were not sustained by any evidence. The presumption was not stated by Mr. Hamilton as a delegate to the Philadelphia convention, but it was so stated nine years after the convention had adjourned, and was suggested as one of the reasons why a tax on carriages was not a direct tax. This is the origin of the alleged indefiniteness and ambiguity as to the meaning of the words 'direct taxes,' and of the interpretation that they were limited to a tax on land only. When the case passed into

the hands of the court, Mr. Justice Paterson said: 'Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land, is a questionable point.'

"Mr. Justice Chase said: 'I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two; to wit, a capitation or poll tax simply, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term 'direct tax.'"

"Mr. Justice Iredell said: 'Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. A land or poll tax may be considered of this description. In regard to other articles, there may possibly be considerable doubt.'

"There was no evidence adduced by Mr. Hamilton in support of his presumption. The question arose solely and wholly upon the statement by him that that was his presumption. The three judges who concurred in the limitation of 'direct taxes' to a tax on land, did so with doubt. Justice Patterson said it was a 'questionable point.' Justice Chase said, 'I am inclined to think, but of this I do not give a judicial opinion.' Justice Iredell said, 'Perhaps a direct tax can mean nothing but a tax on land.' It is upon this presumption of Mr. Hamilton and these three doubtful expressions of judicial opinion that the subsequent decisions of this court in *Insurance Co. v. Soule*, *Veazie Bank v. Fenno*, *Scholey v. Rew*, and *Springer v. United States*, were founded."

In speaking of the doctrine of *stare decisis*, Mr. Seward's argument was: "Tradition asserts that Mr. Lincoln, when a judicial decision was called to his attention as finally deciding a case, said: 'In this country nothing is ever finally decided until it is decided right.' If the conclusion reached in the *Hylton* case was unsupported by evidence—was in direct antagonism to the evidence as it exists, and which was not produced or passed upon—and if a time of peace is more favorable for an absolute disassociation from political atmosphere, then the rule of *stare decisis* ought not to constitute a bar to a new examination of the question in-

volved, upon grounds not before presented, nor the reaching of a different conclusion, if such a conclusion can be judicially justified. The rule which it is asked may now be applied is suggested by the court in *Leloup v. Port of Mobile*, decided in 1888 (127 U. S. 640)."

After citing *Martin v. Hunter's Lessee*, 1 Wheat. 326; *Gibbons v. Ogden*, 9 id. 188, and *Rhode Island v. Massachusetts*, 12 Pet. 721, in relation to the interpreting of the Constitution, Mr. Seward spoke thus in regard to "direct taxes:" "Is there any persuasive evidence that framers of the Constitution did not use the words 'direct taxes' in their 'natural and obvious sense?' Would there be any absurdity or injustice in holding that they did so use them, and that they intended precisely what they said? Is there any persuasive evidence that they intended to restrict the present meaning of the phrase to a more limited signification, and to reject therefrom the inclusion of a tax on income? It would seem, from a reference to such sources of judicial information as are resorted to by the courts in construing the Constitution, that these questions must be answered in the negative. They are to be found in the literature of the period, and in the debates of both Federal and State conventions. They had been used in Europe as meaning taxes which fell directly upon property and its owner, like a land tax or a tax on incomes, and as meaning taxes of which the ultimate incidence might fall upon another than the one who originally paid them, like taxes upon consumption. The inquiry, therefore, now is, whether when adopted in this country they carried with them the signification which universally obtained elsewhere, or whether they were accepted with a limited and restricted signification, which confined the meaning of the words to taxes on land and capitation taxes. There is no persuasive evidence that the American people, in using the words 'direct taxes,' intended that an income tax should not be included therein. The phrase 'income tax' is not to be found in the debates of the Philadelphia convention, nor, in that precise form, in the debates of the conventions of the several States which adopted the Federal Constitution. But that silence throws no light upon the inquiry whether at that time an in-

come tax was not included in the phrases 'direct tax' or 'direct taxes' by the American citizens who were then paying such taxes. A land tax is not mentioned in the Constitution, and, therefore, is not specified in that instrument as being a direct or an indirect tax. The phrase 'direct taxes,' to find its fulfillment, must of necessity include something more than a capitation or poll tax, which is otherwise provided for, and apply to something other than a single tax, that is, a tax on lands; otherwise the demand of the plural, 'taxes,' is not fulfilled. There is no persuasive evidence that in 1787 the species of tax then embraced within the phrase 'direct tax' in other countries and in the original States was intentionally excluded by the framers of the Federal Constitution, and by the citizens of the States which adopted it. History does not warrant the averment that such exclusion was made. What did the people of the ratifying States understand by the phrases 'direct tax' and 'direct taxes?' The Federal government had at that time no standard to which reference can be had for the definition of the phrases. The phrases must, therefore, be taken with their original and derivative meaning, as they came from Europe to this country, or else are to be taken as applying to the 'direct taxes' which the States were at that time imposing and collecting. Both the derivative definition and the practical definition afforded by the practice of the States included a tax on income. The inquiry invites a consideration of the pertinent literature of the period, and that shows that the then American citizens were quite familiar with the relevant English laws and with the writings of political economists, and that they borrowed the phrases 'direct tax' and 'direct taxes' from the language of the books of the period, and applied them to such taxes as they were then paying in their several States, both for the support of such States and for the support of the general government.

"It will be further noted that this apportionment of taxation was not limited to direct taxes or to indirect taxes; but that all the property and citizens of the several States which each of the States was then taxing was made liable for the proportion of that State, according to its population, as so computed, for the needs of the Federal government. It

will also be noted that the doctrine of representation was not referred to. There was no necessity at that time for such a reference. The States were represented in the Federal Congress by delegates — not less than two nor more than seven — and in determining questions in Congress each State had one vote, irrespective of the number of delegates. The idea of connecting representation with the same rule as was adopted for taxation, was necessarily an after thought, and did not arise until the question of the constitution of the House of Representatives came up for discussion.

"Therefore, there is this concurrent testimony that the words 'land, buildings and improvements thereon' were intelligently rejected by the Confederate Congress as not being either a just, an equal, or a convenient source of revenue for the Federal government, and if that was the opinion prior to the adoption of the Constitution, how comes it at a later day that the phrase 'direct taxes' is to be interpreted as relating only to a tax on 'land, buildings and improvements thereon,' and thus to place the tax back upon that which had been previously rejected as the only source of Federal taxation?"

Some of the references to the meaning of "direct taxes" cited by Mr. Seward were: "This brings the case to its historic features. The Constitution is to be interpreted by gathering the meaning and intention of the convention which framed and proposed it for the adoption and ratification of the conventions of the people of and in the several States. At the date of the Constitution (1787), the words 'direct taxes' and 'indirect taxes' were household words. They were borrowed from the literature and practice of Great Britain and the Continent of Europe."

In reference to current literature at the time of the adoption of the Constitution Mr. Seward said: "Adam Smith's 'Wealth of Nations' was published in 1776. It was referred to by the court in the Hylton case. It was spoken of by Judge Cooley as a book whose maxims had secured for them universal acceptance. It was a recognized authority on both sides of the Atlantic. Smith made it clear that by 'direct taxes' he meant taxes on persons assessed according to property or income, and as opposed to 'indirect taxes' on expenses or consumption.

Turgot, the French author, lived from 1727 to 1781. He published in 1764 a work on taxation. He says of its forms: 'There are only three possible: Direct upon the funds; direct upon the person, which becomes a tax upon labor; the indirect imposition, or that which is placed upon consumption.'

In conclusion the argument of Mr. Seward was: "It results, therefore: (1) That an income tax as a direct tax existed long before the Constitution; existed in some of the States after the Constitution, and in one of the States until the present day. It was as well recognized in the localities as any other tax. It was known and called a direct tax, as one of the taxes imposed by the States. (2) When the words were introduced into the Constitution, they were used, as Chief Justice Marshall said: 'In their natural sense,' and are to be taken, as he also said, 'in their natural and obvious sense.' It is not a 'natural sense' nor a 'natural and obvious sense' to reject from the taxes which the people were paying when the words were used, all of such taxes except a tax on land, and to limit and restrict the words which they did use to that individual tax. The people have never assented to that restriction in any Convention. (3) If an income tax be a direct tax, then, in order to be a constitutional tax, it must be apportioned and collected as such. (4) Such apportionment and collection do not involve any practical difficulty. If Congress should wish to raise the sum of \$100,000,000, it could apportion the quota of each State upon the basis of the census, and thus advise each State of the payment which it must make. It could request the States to collect and pay such proportions, as was done by section 53 of the Act of 1861. It could send the Federal assessors and collectors into each State, to assess the total amount of income and to specify and collect the rate per cent thereon which would produce the quota of the State, as was done under the land tax of 1815. It could reject from the population idiots, lunatics, paupers, prisoners, minors, and all persons whose annual incomes should not exceed \$1,000. If such rejection should amount to 60,000,000, out of the 65,000,000 supposed to be shown by the census, such 60,000,000 so rejected would be a given per cent of the entire population in

each State, and such percentage would show the distribution of the remaining 5,000,000 between the different States. The tax upon the income of each one of these 5,000,000 would then be \$20. If it should be said that such \$20 bore as hardly upon the smaller incomes as upon the larger ones, it is to be remarked, in the language of this court in State Railroad Tax Case (92 U. S. 575, 612): 'Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized.' Moreover, the criticism would not be of judicial cognizance. It would be properly addressed to Congress in an argument asking for a graduated income tax. In the Legal Tender cases (12 Wall. 633) Mr. Justice Clifford quotes with approbation the language of Judge Story. He said: 'Arguments drawn from impolicy or inconvenience, says Judge Story, ought here to be of no weight, as 'the only sound principle is to declare *ita lex scripta est*, to follow and to obey.'

"The conclusion now sought to be reached, that a tax on incomes is a direct tax, would not embarrass the government or be productive of inconvenience of any kind. The provisions of the income tax law have not yet been enforced. No vested rights of any kind have yet been created thereunder. No confusion can result if they be declared inoperative."

The *New York Tribune*, in speaking of the efforts which are being made by certain lawyers of the State to have the Miscellaneous Reports continued, has some most peculiar statements in it, which, so far as we can see, are not at all pertinent to the question under discussion. The article in question is as follows: "J. Newton Fiero, of the New York State Bar Association, who has frequently advocated useful legal reforms, is now urging a continuance of the publication of the Miscellaneous Reports of the Official Series. He will meet with less support in this matter than in some of the other suggestions which he has made. The Miscellaneous Reports contain the opinions delivered in the courts of jurisdiction inferior to the General Terms of the Supreme Court. When the judiciary article of the new Constitution goes into effect there will be little of value to be reported

in this series. Occasionally there is an opinion at Special Term which is of value, and some of the decisions in the County Courts, the Surrogate's Courts or City Court of New York may be worthy of preservation in some permanent form. The number of such cases, however, is small, and it is doubtful whether a sufficient number of cases worthy of official reporting can be found. The unofficial series published in a cheaper form may continue the work of printing a mass of opinions containing occasionally one which is valuable to the members of the bar."

There has been no contention so far as we can discover by any person interested in the continuance of these reports, that they would be as useful as formerly, since few opinions, except those delivered at Special Terms and the opinions of surrogates, will be published in this series. On the other hand the issue is not whether the reports will be as valuable, or how much or how little appreciation they may receive from the profession, but that the continuation of them will make the Official Series complete and give all the opinions handed down by any judge of a court of record in the State of New York in the series. The main argument in favor of the bill to continue these reports is, that there should be no stoppage in the publication of the opinions handed down in the courts of record of this State which are to be published in the Official Series, and no encouragement to outside unofficial reports, some of which have gone out of existence by reason of the creation of the series of Miscellaneous Reports.

A recent case, decided in Canada by Mr. Justice Bain will prove of more than passing interest to the profession as it involves several questions which have not been previously decided on the same state of facts. The Northern Pacific Express Company, the defendants in the case, were sued by Martin to recover a sum of money sent by the plaintiffs to their agents at Wawanesa in September last, which package mysteriously disappeared and no trace could be found of it after it was received from the place of destination by the agent of the defendant. It seems that the money was sent from Winnipeg and arrived at Wawanesa on the next day, at which time the plaintiff's agent called at the express office to pay some charges due and to get the money; he paid the charges but went

away without taking the package, and later when he called for it was told by the defendant's agent that the package had been put out on the counter when the receipt was signed by the plaintiff's agent. The question arose at once as to who was to bear the loss and the express company relied on the defense that their delivery book in which receipts were kept for all packages delivered, contained a receipt for the identical package in the handwriting of the plaintiff's agent. While the plaintiff relied on the custom that receipts were signed before delivery, and still held defendants liable. Mr. Justice Bain, in delivering the opinion, said that he saw no reason why the receipt should be conclusive evidence that the plaintiff had received the money, that there was not a physical transfer or delivery from hand to hand, and that if the plaintiff's agent's attention was not drawn to the fact that the package had been placed on the table before him, as the evidence showed, and he did not know it was there, it could not be said that it had been placed in his possession or power. For this reason judgment was given for the full amount claimed to the plaintiff. It however appears that there was forgetfulness on the part of the plaintiff's agent and it seems to us that he did not take proper means and precautions to secure the package which he went to obtain and which he receipted for. The judge, however, did not seem to consider this fact in his decision, attaching little importance to the evidence that the package was placed on the table before the plaintiff's agent even though the attention of the agent was not called to the fact that the package was there.

The *Albany Journal*, in speaking of the March number of the *Green Bag*, and of the article by Irving Browne on Charles O'Connor, says: "Irving Browne, formerly an Albany lawyer, who now makes extracts from judicial opinions and writes humorous paragraphs for the *Green Bag*, replies to criticisms in the *New York Tribune* on his recent sketch of Charles O'Connor. He denies that he was moved by spite in paying almost exclusive attention to the unpleasant features in Mr. O'Connor's career. He does in his sketch of the lawyer give some praise to Mr. O'Connor's ability, but he does not yet explain why he devoted so much space to those comically insignificant parts of Mr. O'Connor's

career as a lawyer, which members of the New York bar remember with little pride. He gives up only half a column to speaking of the remarkable series of legal battles in the Forrest case, and then devotes six times that space to telling of the unfortunate controversy as to his liberality in dealing with his client, Mrs. Forrest. Some of Mr. O'Connor's greatest legal triumphs are dismissed in a curt paragraph, but page after page is filled with an account of his ill-tempered attack on the judges, a labored attempt to show that Mr. O'Connor was, as his friends acknowledge, not a great legal reformer, and some extracts from old speeches on the slavery question. The criticism remains true that the reader of Mr. Browne's sketch would obtain an inadequate and distorted idea of Mr. O'Connor's qualities and his position in the esteem of his associates."

We believe, though we do not pass judgment in this case, that too often biographers attempt to demonstrate only the good characteristics of the subject of a sketch, and carefully omit any of the unfortunate parts of the life which sharply define the personal qualities of any individual. It is truly impossible, from some of the biographies which have been written, to distinguish between the angel and the dissembler who has utilized tissue paper and sticks to construct an apparatus which may have given him to some the appearance of a heavenly being. With such feelings, we do not try to discriminate in the present case, and say whether Mr. Browne has angelized or damned Charles O'Connor, as no one would attempt it did he not consider himself more able to write the article than the biographer.

In an action (Schroeder v. Flint & P. M. R. Co., Mich. Sup. Ct.) to recover from a railroad company for injuries sustained by one of its employes occupied in unloading dirt from its cars and leveling it upon its premises, it appeared that plaintiff was one of a gang of men under a foreman, who directed the men where and how to work, saw that they did their work properly, assisting them therein, and himself under the control of a higher official of defendant, who was often present, but by whom he was sometimes invested with the power of discharging men. *Held*, that the foreman was plaintiff's fellow-servant.

## THE ROMAN LAW IN LEGAL EDUCATION.

Rome is the grandest empire presented in the great spectacle of the history of nations. From the limits of a few square miles on the southeast bank of the lower course of the Tiber, Rome stretched her territorial dominions to the pillars of Hercules on the west, to the Euphrates on the east, to the German ocean and the Grampian hills on the north, and to the cataracts of the Nile and the African deserts on the south. Over this vast territory she extended her government, her laws and her language, till she was truly the "mistress of the world." And when at last she fell, there emerged from the storm floods that made wreck of her greatness, defaced, but not broken, the solid fabric of Roman law — that broad and noble system of jurisprudence which, having followed her arms and survived her power, is still the basis of law wherever the Latin race holds sway. Not by any command or ordinance of princes, but by the inherent power of its name and traditions that legal system rose to supremacy among the ruins of Roman dominion, and seemed for a time supreme in the civilized world. In only one corner of Europe it finally failed of obedience. Rude and obscure in its beginnings, unobserved or despised by the doctors and glossators, there rose in the island of England a home-grown stock of laws and a home-grown type of legal institutions, "whose original," says Lord Hale, "is as undiscoverable as the sources of the Nile." They grew in rugged exclusiveness, disdaining fellowship with the more polished learning of the civilians. These heterogeneous customs became the law common to us and to England. And from the first it regarded the civil law with a feeling less favorable than mere indifference, with a tinge of jealousy or repugnance. Blackstone, the greatest expositor of our law, seldom speaks of the civil law save in terms of disparagement; in general only referring to it to point out its inferiority to the common law, much like the Frenchman who avowed that he learned English in order to see how far inferior Shakespeare was to the great Corneille. The victory of Feudalism in England did much to place the common law at variance with the Roman jurists; and by a historic accident the contest of English laymen for supremacy over the ecclesiastics led to a violent and ill-founded hatred of the very name of Roman law. But these mephitic vapors of unreasoning prejudice are fast dissolving in the genial glow of a better enlightenment which recognizes the worth of every branch of science which is of the sum of human knowledge. And of recent years in England there has been a grown regard for the civil law, fostered largely by the eminent civilians, Brice and Maine. And its great importance in legal studies has come to be recognized. This is

evidenced by the consolidated regulations of the several societies of Lincoln's Inn, the Middle Temple, the Inner Temple and Gray's Inn, as to the examination and admission of candidates to the bar. And in the great universities of Cambridge and Oxford the course in civil law has attained a prominence superior even to that assigned the study of the common law. In our own country while it has not as yet received the recognition as a factor in legal training, which it will be my aim, in these pages, to show that it deserves, yet it is gradually assuming a fixed place in our leading law schools. According to the Report on Legal Education, (published in 1893), prepared by a committee of the American Bar association and the United States Bureau of Education, out of the fifty-six law schools in the land, only eight include a course in the Roman civil law. Of these the course is optional in the school of law of Columbia college in the city of New York, the St. Louis Law School and the Washington State University. In the law department of the Tulane University of Louisiana, the Northwestern University Law School, Chicago, the Department of law of the University of the city of New York, Yale University, and the University of Colorado, the Roman law forms part of the regular course of instruction. And of the 240 classical and commercial colleges in the United States, nineteen furnish instruction in the civil law of Rome. Since the date of that report, its study has been inaugurated in several other schools, notably in the Law Department of Georgetown University, where a written examination in it has been made a prerequisite to the postgraduate diploma. Also in the Columbian University of this city lectures are delivered on the civil law. And so its influence is destined to widen, according as the necessity becomes recognized of a higher training and a broader culture in those who aspire to the high profession of the law. But why should it find a place in legal education? Of what *practical* use, it may be asked, to an American lawyer is an acquaintance with the legal system of an empire which has been dead for a thousand years? It is to be hoped that future generations will not judge the present by its use of the word "practical." This solitary term serves a large number of people as a substitute for all patient and steady thought; and instead of meaning that which is useful as opposed to that which is useless, it constantly signifies that of which the use is grossly and immediately palpable, as distinguished from that of which the usefulness can only be discerned after attention and exertion, and must be chiefly believed on the faith of authority. There are certain studies that carry their purpose and justification, so to speak, on their face. It requires no argument to show that a dentist should poss-

some knowledge of the anatomy of the teeth, that a chemist should learn the reactions of the substances he has to compound, that a surgeon should study general anatomy, or a physician physiology and pathology, but the proposition involved in the subject I have chosen, namely, that the Roman law — which as written law has no binding sanctions in our courts, from which no adjudicated cases are ever cited, or judicial dicta quoted — should find a place in the curriculum of legal studies, is one which at first blush appears so easily maintainable.

But if by a knowledge of the elements of the Roman law we are brought to recognize that it is historically and scientifically the basis in a great measure of our own law, that it is the key to international law — public and private — and to the civil law of nearly all Europe, that from it have sprung some of the most important doctrines known to the common law, that on it is built our grand system of equity, if it furnishes an opportunity for the study of comparative jurisprudence, then its uses must be allowed not to lie very remote from the pursuits of the members of a profession, the sphere of which is necessarily of vast extent and of varied ramifications. That these and other advantages do accrue from a study of this most enduring monument of Rome's greatness, I shall attempt to show in the subsequent pages of this essay.

From a historical point of view, this great legal system is worthy the consideration of those who would add to their other accomplishments a history of the law, and who would make of the profession they have chosen an honorable pursuit and not a mere trade or calling. The paths that lead to the temple of justice are the lawyer's paths; he must reject no aid that will be a lamp to his footsteps, nor ought he disdain to pluck the fadeless flowers of the law that grow by the way, lest, heedless of their fragrance and beauty, he be a less worthy worshiper before that sacred shrine. Professor Robinson, of Yale University, in a recent work of his, says, "that nothing knowable, human or divine, should be beyond the efforts of the true lawyer to acquire; that occasions may arise when he shall need a range of information which is simply without boundary, embracing all the ages of biography and history, all the stores of wisdom that are crystallized in proverb or in song — all the phenomena of earth, sea and air." Now, while this may seem tinged with a little rhetorical exaggeration, it undoubtedly speaks much of truth, and, if so, it needs little argument to demonstrate the advantages and importance of some knowledge of a science not *extraneous* to the pursuit of the lawyer, but of its very essence: of a system of jurisprudence which for unrivaled excellence has for ages stood the admiration of the world. Because, unless we are pre-

pared to believe that for five or six centuries the world's collective intellect was smitten with a paralysis which never visited it before or since, we are constrained to admit that the civil law of Rome may be all that its least cautious encomiasts have ventured to pronounce it, and that the language of conventional panegyric may even fall short of the unvarnished truth. Any why, we might inquire, does it maintain such enduring high repute? Why is it that, as Chancellor Kent observes, it is "not merely a majestic ruin, as some might assert, but an imposing edifice, where the doubting jurist, lost in the mazes of uncertainty, or the bewildered judge, perplexed by conflicting decisions, may still find secure refuge?" My answer to this query will be at the same time illustrative of my first general proposition, namely, that the study of the Roman law is of advantage historically. The secret, then, of its excellence is to be sought chiefly in this, that it is a structure reared by the skilled hands of genius. For, though the Roman law rests primarily on the Law of the Twelve Tables, it is in reality, to a great extent, the work of jurists — of men whose position and relation towards the people finds no parallel either before or since their time. They were not a paid profession; yet they were men who, in their own times, held the highest judicial offices, who were regarded as living oracles of the law, possessing the inventive genius of the true lawyer and knowing the great art of applying the principles of law to the relations of life. And in the development of these principles they proceeded with such consummate skill and method as to draw from the celebrated Leibnitz the avowal that, "next to the writings of the geometers, there is nothing which in force and subtlety is at all comparable to the writings of the Roman jurists." All the greatest minds of the time devoted their energy and talents to the building up of this wondrous scheme of law. No one can estimate the advantages that would accrue to our law and juristic literature if, in addition to the illustrious names that are forever linked with it, the brilliant luminaries in the firmament of letters, the profound thinkers in the realm of philosophy, or the tireless workers in the domain of science, had also dedicated their genius to the law. But this was precisely the case with the great minds among the Romans. They rejected philosophy and poetry as the toys of a childish race, and instead of becoming teachers of rhetoric, or commanders of frontier posts, or professional writers of panegyrics, they chose the only other walk of life — the law. Through that lay the approach to fame, to office, to the council chamber of the monarch — it may be to the very throne itself. Much like the great possibilities of the profession of to-day. As I heard it facetiously remarked recently by a distinguished

lawyer of our city, that the American youth, when he enters on the study of law, dreaming of fame, starts to the law school with a copy of Blackstone under his arm and — his eye on the White House. But to revert. It is easy to see what an enormous power a body of men like these Roman jurists is likely to exercise in a state of society where there is no bench, in the sense which we attach to the word, and direct legislation is very scant. By their "*responsa*" they were said to interpret, but, in fact, they legislated. An eminent writer on a kindred subject\* has lucidly explained how fortunate it was for the development of the Roman system that this indirect, unofficial legislation was carried on by lawyers instead of by judges. According to him, this is the reason for the superior scientific development of the civil over the common law, because these men were not restricted to the giving of decisions on cases which had actually arisen, but they were able to give authoritative opinions on any merely supposititious case, if, by its decision, light could be thrown on the state of the law. With them did the law become truly "the perfection of reason." But what, it may be asked, has an explanation of the methods or an eulogy of these men to do with the place which it is contended Roman law should occupy among legal studies? Is it practicable or even possible to make a profound study of the works of the Roman jurisconsults in an American law school? Assuredly not. But it is to be remembered that the aim of a preliminary legal education can go no farther than endeavor to inculcate certain general guiding principles. To point the way in which the lawyer, who intends to make his life one of study, ought to go. And if no other benefit is derivable from an acquaintance, however slight, with this great system of jurisprudence than that the student becomes familiar with the great names of those who reared it — that with the names of Blackstone, Mansfield, Coke, Kent and Story, he can associate that elder galaxy that numbers the learned Gaius, the oracular Paulus, Papinian, "the faultless model of a Roman jurist," Ulpian, and Modestinus — that alone would be no inconsiderable advantage to the lawyer who would also be a scholar. For these names are, in ecclesiastical parlance, the lawyer's "guardian angels." But, aside from this, to the inquiring mind which ever rejects what comes second-hand, it must be a mental pleasure while being of incalculable advantage to an intelligent appreciation of the philosophy and history of law, to observe the origin and gradual development of many important features known to our law. At first sight, for instance, nothing can be more dissimilar than our modern bill of exchange, and the Roman contract known as "*stipu-*

*latin*." The first, the product of modern commercial activity; the latter, formal, bound to strict words, and generally quoted as a proof of the extreme rigor and inflexibility of Roman law. Yet, despite their dissimilarity, we constantly find in the books on these subjects, that the authors, in order to explain the nature of the bill of exchange, refer continually to the old Roman contract. The statement is not infrequently found that in order to understand both well they must be explained one by the other; and the reason is that both fulfil the same want, viz.: the necessity of having a strict contract, independent of the relation between the original parties. The one is the rudimentary form of the other. I may also allude for a moment to another subject which has a great historical interest, and is also full of instruction to one whose study is the operation of law. I mean slavery. This is the subject beyond all others that divides the Roman from the English law. And though it is mainly of historical interest, and, indeed, much of it is antiquarian, nevertheless it is one that cannot be neglected by those who would obtain a knowledge of the history of law. So, too, is it interesting to remark the remote origin and development through the ages of the present status of women. And so might examples be multiplied. But these seem sufficient to illustrate generally this phase of my subject.

And now, as a logical consequence of the excellence of this grand system of law, it became widely diffused, as I have already hinted, throughout the civilized world. And so, by an easy transition, I pass to the second main reason why it seems to me that it should find a place in legal education, namely, because it is the key to international law, public and private, and to many other kindred subjects.

The French conquests planted this body of Roman laws over the whole extent of the French empire, and the kingdoms immediately dependent on it. And it is also known that, owing to a clever political move of the German emperors, who wished to be considered successors of the Roman *imperatores*, the work of Justinian was adopted nearly *in toto* during the thirteenth century, and that, modified by canon and customary law, it is the present law of Germany, except so far as it has been changed by statute. It is also at the present day the common law of Scotland. In fact, "none of the great nations," says Mr. Justice Markby,† "founded on the continent of western Europe after the fall of the Roman empire has constructed an independent legal system of its own." Italy, Austria, Holland and Spain, have every one of them adopted the Roman law as their general or common

\* Maine, Ancient Law.

† Markby, Elements of Law.



law, and have only departed from it so far as particular occasions might require. Every gap not filled up by special legislation, or specially recognized custom, has been supplied from the Roman law, and even modern codes, to a very large extent, only contain the ideas of the *corpus juris* in a nineteenth century dress. This being so, is it not manifest that a knowledge of the civil law is a *desideratum* to the complete rounding out of a legal education? Is it not equally manifest that some knowledge of it is a pre-requisite to a thorough acquaintance with international law? For "if international law be not studied historically," writes Sir Henry Maine, "if we fail to comprehend the influences of certain theories of the Roman writers on the mind of Hugo Grotius, we lose all chance of comprehending that body of rules which governs nearly all Europe." And, besides being the key to international law, it has also given birth to the law of war, and is the source of most of the special ideas as to law, politics, diplomacy and society, which, for over a hundred years, have been diffused over the enlightened nations of the old world. The technicalities of Roman law are as really, though not so visibly, mixed up with questions of diplomacy as are the technicalities of special pleading with points of the English common law. We must conclude, therefore, that ignorance of Roman law dooms us to ignorance of European institutions, based, as they are, on that law.

In the next place the study of this system should be of peculiar interest and furnish manifest advantage to the student of the common law, in that it is largely the scientific basis of that law. The recognition of this fact alone ought to constitute a sufficient plea for its place among legal studies. "He knows not the law who knows not the reason thereof," says Lord Coke. As a knowledge of the classics is admittedly of inestimable value to the man who aims to be a thorough English scholar, as enabling him to trace the etymological derivation of words, and note the changes they have undergone in transition to the mother tongue, so an acquaintance with the principles of the civil law will show the origin of those of the common law, and illustrate and clarify them.

And, first, as to the scientific arrangement of our legal system. Who led the way in this undertaking? Glanvil, Bracton and the unknown author of "Fleta." The opening page of Glanvil is a literal transcript from Justinian's Institutes, and in the margins of Bracton and "Fleta" are found numerous manuscript references to parallel passages in the same Roman work. Indeed, nearly the third of Bracton consists of quotations (unacknowledged quotations) from the *corpus juris* and from commentators on it. The earliest elementary arrangement

of the Roman law now extant is that of Gaius (A. D. 170), whose fundamental division is into persons, things and actions; and Blackstone himself has made the old division of Gaius the basis of his arrangement; for his first book answers to Gaius' first book, his second to Gaius' second and third, and a great portion of his third and fourth to Gaius' fourth.

So is it both interesting and instructive to trace the origin and development of those many branches of our law which have sprung from the civil. The law of obligations (contracts and delicts), of the theory of possession, of the natural modes of acquisition of property by occupancy, accession, specification, is taken entirely from the civil law of Rome. In the development of commercial law in its various departments the common law owes likewise a great debt to the civil. The early English law was almost exclusively a law of real estate. Tenures of land, the modes of creating and transferring them — these are the great subjects of the early English law, while other species of property receive scarcely any attention. Hence, as personal property rose into greater relative importance as trade became more developed, and business relations more complicated, cases were continually arising for which the English law had no rule or principle, but in the civil law the English judges found ready to their hand a rich store of such principles carefully worked out and copiously illustrated. These they quietly absorbed, adopted in their decisions, and incorporated into the English law. And that grand palladium of our civil rights, trial by jury, though not indeed directly handed down from the Romans, still the early Roman law furnishes a proceeding strikingly analogous to the modern jury system, in that the power and duty of the "judices" was confined, as that of our jurors has always been, to questions of fact alone. And it may, perhaps, be thought remarkable that the challenge of jurors should find a type in the Roman law. Yet such, Sir Henry Maine says, was the effect of a *plebiscitum* which Cicero terms "*lex æqua*." So, too, the compulsory unanimity of our juries, which has been deemed so singular a feature of their practice, finds an analogy in the Roman law.\* A careful research would also disclose the fact that all those maxims of the common law which are not restricted to feudal institutions originated in the sound sense of the old Roman jurists, who united with a penetrating intellect a Spartan brevity of expression. And from the same sources have flowed many common-law writs, notably the writ *de ventre inspiciendo*, which, though rare, is still in use.

Through the ecclesiastical courts, also, the doctrines of the civil law filtered into and permeated

important departments of our law. The Church at an early period claimed and secured the right of jurisdiction in cases where her own interests or those of her ministers were involved. The ecclesiastical courts assumed jurisdiction of all offenses committed against clergymen and offenses committed (or alleged to have been committed) by clergymen, and of all encroachments, real or supposed, on the property rights of the Church. And this jurisdiction took even a wider range. On the ground that marriage was a sacrament, it was extended to matrimonial law, to cases of divorce, alimony, and the like. From the connection of wills or testaments with death, the solemn transition to a spiritual world, it was extended to cases of testamentary law, to the proof and execution of wills, and even to the administration of properties whose owners died intestate. To all these cases the ecclesiastical courts applied the principles of the civil as modified by their own canon law.

Yet, again, through the Court of Chancery. This was not an ecclesiastical court, but for a long time its presiding officer, the king's chancellor (the keeper of the royal conscience) was an ecclesiastic. Hence it was only natural that the doctrines and methods of the civil law should find entrance into this branch of jurisprudence. Hence we find that trusts soon offered a wide field for its jurisdiction. But "they answer," says Blackstone, "to the *fidei commissum* of the civil law."

And it is not uninteresting to note their gradual evolution. This doctrine was in the Roman law applied at first only to inheritances and legacies; for when testators were desirous, explains Tribonian, of giving an inheritance to persons to whom for certain legal reasons they could not directly bequeath it, they trusted to the honor of some one legally capable of taking the bequest, and enjoined him to transmit it to the person intended to be benefited. In the course of time many complaints were made of the breach of confidence thus reposed, till at length the Emperor Augustus ordered the consuls to enforce such trusts by their magisterial authority. When "testamentary trusts" had thus been established by law, the transition was easy to trusts created *inter vivos*, and these were eventually recognized as obligatory by a rescript of the Emperor Antoninus Pius. Bankruptcy presents another wide field of equitable jurisdiction, and the appointment of assignees is a main feature of our bankrupt laws. Now, this is plainly taken from the prætorian law, for the prætor might put several creditors in the possession of the debtor's goods, and they might commit to one of their number the task of selling the property and distributing the proceeds, and if they could not agree in the nomination, the prætor, taking summary cognizance of

the matter, might himself appoint to the like office a *magister*, *i. e.*, an assignee. Composition with creditors was also provided for by the prætorian law. And among other points on which the Roman law has come under careful consideration in the Court of Chancery is the effect of domicile on the succession to personalty. And, finally, from the prætorian interdicts, our chancery injunctions derive their origin.

Another reason that makes for the importance of some knowledge of the Roman law to the legal student is to be found in the fact that it has been the source of much of our present technical phraseology. The writings of the classical jurists are particularly distinguished for the precision and elegance with which technical language is employed. And the expressions even outside of the law, current in elegant English, which are at all expressive of fundamental juristic conception, come to us almost without an exception from the Roman law. The common law has no distinctive glossary of legal phrases, and there is no consensus among writers as to the meaning of its technical terms. In this connection I quote from Prof. Russell, of New York: \* "The popularization of the study of the Roman law would certainly be influential in giving greater certainty and precision to the technical language of the law. Opinions of the law would be abbreviated, and acts of the legislature clarified. The chaotic condition of the present statutory law results not only from its ponderous mass and undigested contents, but in large measure from composite authority and the law's lack of a legislative dialect. This lack is not likely to be supplied till Roman law is more generally studied." And the luminous author of "Ancient Law," says: "The use of the Roman jurisprudence to the student of legislative and legal expression is easily indicated. First, it serves him as a great model, not only because a rigorous consistency of usage pervades its whole texture, but because it shows by the history of the institutional treatises, in what way an undergrowth of new technical language may be constantly reared to furnish the means of expression to new legal conceptions, and to supply the place of older technicalities, as they fall into desuetude. Next, it is the actual source of what has been called the popular part of our legal phraseology; a host of words and phrases of which 'obligation,' 'convention,' 'contract,' 'consent,' 'possession' and 'prescription' are but a few samples, come from the language that clothes the Roman jurisprudence. But perhaps, he continues, the greatest of all the advantages which would flow from the cultivation of this great system would be the acquisition of a phraseology not too rigid for employment upon

\* Lectures on Law for Women, Isaac Franklin Russell, LL. D.

points of the philosophy of law, nor too lax or elastic for their lucid and accurate discussion."

In the next place, as an efficient aid to the study of comparative jurisprudence, some familiarity with the civil law is an absolute necessity. There are but two grand systems of law in the world, and manifestly a study of both will lead to a more intimate acquaintance with either. And while the common law is our law, and its rules will be often better suited to us than the corresponding rules of the Roman, yet the real reason and *raison d'être* of these will be much better understood by the comparison. We shall then no longer consider them as logical necessities and accept them as existing facts, but we shall have adopted them as our deliberate choice. Noting the imperfections of one, or the excellencies of another, we shall form an idea of the ultimate perfection which all law is destined to reach in the march of enlightened progress. The civil law never drew the puzzling distinction between real and personal property which encumber the legal system of ownership under the common law, which causes different species of property to descend in varying lines and to different persons which oblige the heir in a will suit of his ancestor to litigate in different courts, attended at times with opposite success and discordant decisions. The civil law knew no feudal fictions which hamper alienations of English estates, and encumber conveyances already intricate. The Roman, unlike the English law of primogeniture, paid no reverence to the first born, and preference of the male to the female line, though common to the laws of many civilized countries, was singularly absent in the Roman code. The Roman law allowed an inheritance to ascend, rejecting the feudal principle that estates must never ascend. And, under it also, even incorporeal things, such as debts and actions, might have been the subject matter of a mortgage. While, according to English law, the rule, subject to some exceptions, is that choses in action are non-transferable. On the other hand, there are many points in which our law is vastly superior to that of the Romans. We cannot fail to admire the free spirit of the common law as contrasted with the despotic tendencies of the civil; for that law which defines the form and power of the government must necessarily be despotic if the government is a despotism. The English law claims as its crowning glory that its rules exclude the exercise of arbitrary power. A man may be punished for a breach of the law, but he can be punished for nothing else. Not only so, but equally, if not more important, is the principle that this breach of the law must be established as to all classes, and all persons, official and unofficial, in the ordinary courts of justice. Arbitrary power and special ad-

ministrative tribunals, such as we find in France and other countries following the civil law, and administering what the French call *droit administratif*, do not exist. In England the same law applies to all persons, and it is administered for and against all persons in the great law courts, so also direct personal responsibility for torts exists without limit or exception. No command of an official, not even of the Crown, can be pleaded in bar to any wrongful act. These great and glorious characteristics — these fundamental and immortal principles of the English law have been inherited or adopted in all their amplitude in this country. And in these vital and essential respects the law of England and America is far superior to the Roman law, either as it anciently existed or as it exists to-day in the States of modern continental Europe. Yet a study of that ancient law will but foster a veneration and create an enthusiasm in the lawyer for his own law as he learns to regard the latter as pre-eminently that of a free people. But to the American student peculiarly does that study commend itself, for it has been the spirit of the founders of this republic to absorb the wisdom and reject the follies of every system and people. And, although during many years after the severance of the United States from the mother country, the new States, successively formed out of the unoccupied territory of the Federation, did, all of them, assume as a standard of decision for the courts in cases not provided for by legislation, either the common law of England or the common law as transformed by early New England statutes into something closely resembling the custom of London. But this adherence to a single model ceased about 1825. The State of Louisiana for a considerable period after it had passed under the dominion of the United States, observed a set of civil rules strangely compounded of English code-law, French code-law and Spanish usages. The consolidation of this mass of incongruous jurisprudence was confided to Mr. Livingston, the first legal genius of modern times. Almost unassisted he produced the code of Louisiana. "Of all republications of Roman law, the one," says Sir Henry Maine, to whom I have so repeatedly referred in this essay, "which appears to us the fullest, the clearest, the most philosophical, and the one best adapted to the exigencies of modern society." And some have seen, as a reason inducing President Cleveland to call Mr. Justice White to sit among the "ermined sages of the Supreme bench," the latter's familiarity with this code. "Certain it is," continues Mr. Maine, "that it is this code, and not the common law, which the newest American States are taking as the substratum of their laws. The diffusion of the code of Louisiana,"

he avers, "does in fact exactly keep step with the extension of the territory of the Federation. And, moreover, it is producing sensible effects on the older American States. But for its success and popularity we should not probably have had the advantage of watching the greatest experiment which has ever been tried on English jurisprudence — the codification and consolidation of the entire law of New York."\*

And now, without protracting this essay beyond reasonable limits, I trust that, under the fascination of my subject, and inspired with an enthusiasm to continue to add to the little I have already learned of the Roman law, I have been able to show its place and importance in legal education. To me it appears to occupy the same position in the lawyer's training that pure scientific study does in medical education. It is a preparatory study, familiarizing the mind with the methods, and to a certain extent with the subject-matter of the strictly professional work. It is such studies that dignify a profession, elevating the minds of professional men, and enabling them to take a wide view of their life's work. And although the Roman civil law has long ceased to retain the full authority of written law, it can never cease to attract the notice and excite the admiration of lawyers who are capable of ascending to this clear and copious fountain of juridical science. For, unlike the language that embalmed it, and the commonwealth that produced it, it is not dead to the present uses and practical experience of mankind. Like the Coliseum which speaks Rome's physical grandeur, this, the greatest monument of man's juristic labor, tells of her intellectual greatness. And to the student who would fitly prepare himself for the noble but exacting work which the profession of the law imposes — to the student who, in this day, when the profession is becoming daily more crowded, the supply greatly exceeding the demand, hopes that, as he has been "bred to the law, the law may become bread to him" — to the mind and soul of the student who would be a scholar, as every good lawyer now must be, to such must the enduring monument of the Roman civil law ever appeal more strongly, than do the thronging visions of the past, which crowd upon the wondering traveler, as he surveys the splintered plinth and the broken column of the Coliseum.

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Filling a claim for mechanic's lien for too large a sum does not invalidate the lien unless the mistake is intentional. (*McMonagle v. Wilson* [Mich.], 61 N. W. Rep. 485.)

\* H. S. Maine, Cambridge Lectures.

## SOME HISTORY OF ENGLISH CRIMINAL LAW.

IT would be wearisome and of little profit to detail all the cruel and malignant punishments inflicted on English men; women, and children, from the age of the Tudors on into the second quarter of our own century. Long after "the spacious times of great Elizabeth" the ordinary Englishman retained much of the savage in his disposition. One observes how little value was set on human life; how callous everybody was in respect of human suffering; how gross in its partisanship against the accused was the attitude of the bench. Shakespeare, penning his lofty lines upon the "quality of mercy," might have caught the roar of the mob on their way to gloat over the disemboweling of one condemned as a traitor, or to surround, with shouts of exultation, the stake at which a woman was dying in the flames. Persons able to write intelligently of these scenes cannot restrain their satisfaction at the execution of a sentence than which the annals of the Indians of North America or of the South Sea Islanders have nothing more fiendish to reveal. No one feels any pity when, in the reign of Henry VIII. Richard Mekins, a boy of fifteen, is publicly burned for "heresy." Judicial torture excites no horror and no sympathy. The court is crowded to witness the sufferings of a prisoner when his thumbs are tied with cords to make him plead, and eager eyes follow his exit when he is sent below, to be slowly pressed to death under a quarter of a ton's weight of stone and iron. A woman servant named Rose, convicted of poisoning, was boiled to death in Smithfield in the middle of the sixteenth century; it was regarded as an interesting novelty in punishment.

Torture continued long in use without evoking any sentiment of discontent. Compressed within the iron bands of the Scavenger's Daughter, which "the torturers drew together with all their strength," the victim "lost all form but that of a globe." On the rack, if the torture were severely applied, the prisoner was in danger of having the fingers torn from the hands, the hands from the arms, the forearms from the upper arms; the toes from the feet, the feet from the legs, the legs from the thighs; and the thighs and the upper arms from the trunk.

The chamber in the Tower known as Little Ease, the occupant of which could neither stand upright nor lie at length, has been celebrated in romance; but less has been told of that "Dungeon among the Rats" in which, in Shakespeare's day, certain bold or stubborn spirits were given ample time for reflection.

Under Edward VI.'s Statute of Vagabonds, idleness and vagrancy were made penal "in as high degree as any offence except treason," and the

punishments were branding, beating, chaining up, and burning through the gristle of the ear. In Henry VIII.'s time, for merely striking so as to draw blood, the penalty was the loss of the right hand. The cocking-stool, the brank, and the scold's bridle were in general use for scolds. Vagabonds were "grievously whipped" for their first offence, and were liable to death for the second.

But of all public punishments the pillory was certainly one of the very cruelest. Here the populace was called in to aid the vengeance of the law; and terrible in many instances were the sufferings inflicted on an unpopular offender. In 1756, a man named Egan, pilloried for conspiracy, was literally stoned to death. The pillory had an extraordinary vitality. Various offenders suffered in it as late as the year 1816, and it was applicable to perjurers and suborners of perjury in the year in which Queen Victoria came to the throne. Mr. Gladstone might easily have seen this punishment inflicted.

More horrible than the pillory, however, was the practice of burning women in public, which at one time was not of very rare occurrence, and which was not entirely disused until within sixteen years of the present century. The punishment of hanging, as in ordinary cases of murder, was not substituted by statute for that of burning until the thirtieth year of the reign of George III.

Late in the eighteenth century the *peine forte et dure* was still in use for prisoners who refused to plead, and who might be and were pressed to death precisely as in the middle ages. Branding in the cheek was not discontinued until the reign of George III. Long, indeed, were the framers of the law and its administrators in discerning that crime, of whatever kind, is not to be repressed, nor the morals of a nation improved, by barbarous examples in punishment.

So dark was the state of the country at the time of the Revolution that it might have seemed as if no previous state could have been darker; in William III.'s day many of the penal enactments would have disgraced a tribe of savages; and during a considerable portion of the century in which we live the criminal law was, in many respects, quite as much open to reproach as it had been when William the Conqueror ascended the throne. The spirit of the "hideous old mediæval law" survived the dawn of this century, and our posterity may say that it was not quite extinct at the end of it.

For all this it is possible to trace, over long periods of time, a steady and almost continuous improvement. Punishments which we look back upon with indignation and with loathing were not illogical at their date; some of them were light by comparison with those which they had superseded; and they marked steps toward the realization of the humani-

tarian idea. The abolition of horrid public punishments, not greatly efficacious in checking crime, and most demoralizing in their effects upon those who witnessed them, was an unspeakable gain to humanity. With the abolition of public burnings, public floggings, and the pillory, an ancient principle perished, an ancient and detestable school was closed. "The change in the character of later crimes, there can be little doubt," says a historian, "has been caused, in no slight degree, by the disappearance of spectacles which, if by any chance they acted on anyone as deterrents, converted whole crowds into rioters and discouraged the sentiment of pity." Public punishments savage in their nature are neither more nor less than examples of "a ferocity which, in one form or another, will be followed in private life;" and as punishments began to lose their cruel character, and to be more and more withdrawn from the public gaze, the national life took on a wholesomer tone, sentiments of kindness and pity were gradually evolved, a love of social order arose, and crimes of exceeding violence became rarer and more rare.

But the old Adam in the English law died hard. Long after the pillory had vanished hanging continued to be a public show; and, as such, it was unquestionably the most degrading influence which this century has known. The saturnalia in front of Newgate on the morning of a hanging Monday (continuation of the revels of the night preceding) are fresh in the memories of elder citizens. Townsend, the Bow street runner, saw forty men hanged in a batch, on two several occasions. Capital punishment remained for generations the greatest curiosity of the criminal law of England. It was not until the year 1773, for example, that Parliament began seriously to consider whether or no it should be abolished for the crime of sheep stealing; and at the time when Howard began his investigations there was not in Britain so much consideration for prisoners, in respect of their liability to a shameful public death, as there had been during the reign of the Emperor Constantine, 1400 years before.

One statement must be made (in parenthesis) which at this day has the air of paradox. It is, that the extension of the list of felonies in the eighteenth century—barbarous enough in the modern point of view—was in reality a sign of progress. With the development of commerce, stimulated by mechanical invention, new frauds became possible. These frauds in the eighteenth century were all made punishable by death; but the idea at the back of the sentence was the increasingly important one of the value and sacredness of property, and it was in accordance with analogy that crimes arising out of the new industries were as serious to the Commonwealth as larceny above the value of a

shilling had been held to be at a much earlier period. Trade and the means for its propagation were perpetually outgrowing "the primitive laws of an uncivilized people," and the punishment by death of offences against trade was really an attempt to adjust penalties to the heinousness of the offence. There was a certain justice in the idea, but the start was made in a wrong direction, and the new legislation went to pieces in a chaos of inconsistencies.

Year by year one ridiculous offence after another was awarded the penalty of death "in proportion to the increase in the number of conceivable offences against property." Reformers at the beginning of this century had much ado to persuade the Legislature that it was as absurd as it was inhuman to condemn a man to the gallows for stealing 40s. from a dwelling-house. The State still labored under the mediæval belief that the severity of a sentence was more deterrent than the certainty of its infliction, for these extravagant penalties were not commonly enforced, and a petty offender sentenced to be hanged might escape with three months' imprisonment. The death penalty for misdemeanors was therefore no check upon the lawless. They might be sent to the gallows, but they counted on getting scot free. Yet, with this knowledge before them, the House of Lords would not vote for Romilly's bill to abolish capital punishment for the offence of stealing 5s. from a shop. Lord Ellenborough thought that, if any change of punishment were necessary, "it should be transportation for life." It is to be noted, by the way, that the bitterest opponents of reform in the criminal law have almost always been the lawyers in the House of Lords. Lord Ellenborough solemnly assured his colleagues in the upper chamber that, if they abolished the death penalty for shoplifting they must abolish it also for horse stealing, which "would be perfectly ludicrous." Sir James Mackintosh, who followed Sir Samuel Romilly as a reformer of the criminal law, failed to persuade the Legislature that a man ought not to be hanged in 1820 for wounding a cow or spoiling a tree. In the ministerial ranks the first reformer was Sir Robert Peel, and in his day there were forty kinds of forgery on the list of capital offences. The fiercest conflict was necessary between the old spirit and the new—between the philosophers and the lawyers—before, in 1835, a man or woman could be saved from the halter for the misappropriation of a letter.—*Law Times*.

The overt act, as hostile demonstration of the deceased against the accused, must be proved before the introduction of evidence as to the dangerous character of the deceased. (*State v. Green* [La.], 16 South. Rep. 367.)

## Abstracts of Recent Decisions.

**ADMINISTRATORS—APPOINTMENT BY FRAUD.**—Letters of administration granted to the second son of decedent upon the representation that he is the only son, will be revoked for fraud, notwithstanding the eldest son may since have filed a renunciation of his right to the appointment. (*Lutz v. Mahan* [Md.], 30 Atl. Rep. 645.)

**ASSOCIATION—DISSOLUTION.**—Where a voluntary society dissolves before the expiration of a lease of a hall, the lease becomes the property of the members, who may exercise it jointly. (*Sommers v. Reynolds* [Mich.], 61 N. W. Rep. 501.)

**CHATTEL MORTGAGE.**—A mortgage on a stock of merchandise, conditioned on the payment of certain debts "when due," provided that the mortgagor was to remain in possession until the condition was broken. The debts at the time of the execution of the mortgage were past due, and the mortgagee took possession the day after the mortgage was executed. *Held*, that the mortgage was valid as against creditors of the mortgagor. (*Kub v. Garvin* [Mo.], 28 S. W. Rep. 847.)

**COMBINATION BY INDIVIDUALS.**—A refusal by a number of pilots who own and operate their own boat, and, who have the boat properly manned, to allow a pilot designated by the pilot commissioners to cruise on her, is not a combination to prevent a person from executing the duties of a pilot, within act of April 5, 1891, providing for the forfeiture of the license of a pilot entering into such a combination. (*Morris v. Board of Pilot Com'rs* [Del.], 30 Atl. Rep. 667.)

**CRIMINAL LAW—"THREATS."**—The fact that threats had been made against a defendant under and indictment for murder, by his victim, indicative of a motive on the part of the latter to take defendant's life, will not render his crime one without express malice, and so bailable. (*Ex parte Taylor* [Tex.], 28 S. W. Rep. 957.)

**DEPOSITION—FAILURE TO ANSWER.**—Interrogatories in a deposition of a party to an action will not be taken as confessed, on his refusal to answer, unless the refusal was willful. (*Rushing v. Willis* [Tex.], 28 S. W. Rep. 921.)

**EMINENT DOMAIN—ELEVATED ROAD.**—Where a city council is by statute authorized "to provide for the location of any railroad" within the city limits, and "to pass all ordinances proper or necessary to carry into effect the powers granted," an ordinance giving a railroad the right to construct its road along a certain route, subject to certain restrictions and limitations, is, when formerly accepted by the railroad company, as binding upon the company as a statute. (*Tudor v. Chicago & S. S. Rapid Transit R. Co.* [Ill.], 39 N. E. Rep. 186.)

### New Books and New Editions.

#### ANDREWS' STEPHEN'S PLEADINGS.

By James De Witt Andrews, of the Chicago bar. This edition of the work is one which should receive careful consideration and kindly attention from members of the bar who desire a general work on the principles of pleading in civil actions. The carefulness with which the work has been prepared, and the thoroughness with which the editor has gone into the different subjects, makes it a book of more than ordinary utility. The first part deals with the Development of Procedure, the Joinder of Parties and the Election of Remedies. The second part deals with the Proceeding in an Action from its Commencement to its Termination. The third part is devoted to the Principal Rules of Pleading, and embraces Rules which tend simply to the Production of an Issue; Rules which tend to Secure the Materiality of the Issue; Rules which tend to produce Singleness or Unity in the Issue; Rules which tend to Produce Certainty or Particularity in the Issue; Rules which tend to prevent Obscurity and Confusion in Pleading; Rules which tend to prevent Proximity and Delay in Pleading, together with certain Miscellaneous Rules, and the last chapter deals with remarks on the merits of the system of pleading. This work should be of great value, even in a code State, and even with the visions of simplification and reform of the code which are in the air, for it contains rules which are of the very foundation of any code of procedure, and which must be known to understand thoroughly and to appreciate a code of procedure. It is a work which should be of considerable aid to students; in fact it should be so to all who desire to have a complete knowledge of the rules of procedure, whether they practice in a code State or not. From its reception it would seem to have received the most favorable consideration from the members of the bar throughout the country. The price of this work is \$4. Published by Callaghan & Co., 114 Monroe street, Chicago, Ill.

#### GARDNER'S REVIEW IN LAW AND EQUITY.

This is a work which is designed for students who are making their last review preparatory to taking their final examination for admission to the bar. The value of a work of such a character is to express with brevity and simplicity the general principles of law which are so necessary to a thorough understanding of the science of law. The book deals with Real Property, Freeholds of Inheritance, Freeholds Not of Inheritance, Estates Less Than Freehold, Estate Upon Condition, and other kinds of estates; Personal Property, Contracts, Sales, Bailments, Agency, Bills and Notes, Partnership, Quasi-Contracts, Torts, Equity, Pleading, Evidence, Criminal Law and Corporations. From the variety of subjects, it can be seen that only the most

general principles are stated, and, for the purpose we have mentioned, we think it should be of value and assistance to students. The work is edited by George E. Gardner, of the Massachusetts bar, and is published by Baker, Voorhis & Co., 66 Nassau street, New York.

#### A SYSTEM OF LEGAL MEDICINE — ALLAN McLANE HAMILTON AND OTHERS.

The importance of medical expert testimony has been of late, by now celebrated trials in this State, more demonstrated than ever, and the change in the action of death causes by the advances made in modern weapons and scientific discoveries, has created a want of medico-legal literature which deals with such subjects and reflects all the light that can now be given by the status of the present scientific world. This the author of "A System of Legal Medicine" has, with the assistance of able co-laborators, each a specialist in the subject of which he writes, sought to do. For years, and in the main principles still, the old authorities from Casper down have had no antagonists, but "the old order changeth," and subjects which, when written upon by those writers, were then looked on in the light of great discoveries and scientific advance, are now, owing to the further strides by the "searchers after hidden truths" concerning the human body and its ills, carried far beyond the first positions, so that medical jurists have had to supplement the accepted writings on legal medicine with the discoveries of the day. This book does this in itself, and brings up to date, in a most presentable form, the study of medical jurisprudence. It would be difficult to single out articles in it for special commendation when all are so well done, and where, evidently, care and experience have been brought to bear on the preparation of each monograph, special distinction would be invidious. The large number of new cases bearing upon the points discussed, cases which have not before been brought to the attention of the profession, is a most valuable feature in the work, and the arrangement of the subjects shows most excellent care on the part of the editor in chief. The selections of the various contributors is wisely done. Each known for his ability in the subject assigned him, makes the whole a collection of valuable treatises upon the general subject. The book has a brilliant future before it, and is one well adapted for the use of both doctor and lawyer. In two volumes. E. B. Neat, New York.

#### AMERICAN STATE REPORTS; VOL. 39.

This volume contains opinions and decisions from 98 Alabama, 33 Florida, 148 Illinois, 134 Indiana, 85 Iowa, 52 Kansas, 77 Maryland, 160 Massachusetts, 98 Michigan, 53 Minnesota, 55 New Jersey, 159 Pennsylvania, 39 South Carolina, 2 South Dakota and 85-86 Wisconsin. Published by Bancroft-Whitney Co., San Francisco, Cal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

DESPITE the fact that the highest development of the law should tend to secure personal safety and to prevent loss of property and life, it is a matter of general regret and menace to the public welfare that the people and, especially, the lawyers do not take a deeper and keener interest in questions of national importance and world-wide magnitude, though it is to be hoped that such lack of proper attention and of remedial suggestions will not result in having some great disaster confront the country from which the nation could have escaped through the wisdom and the combined efforts of the educated and thinking classes. Are the mocking sayings true which allege that the only chance of the overthrow of a representative form of government lies in the failure of the general public to interest themselves with the questions of state? The rise of politicians is marked by the decrease of public knowledge of national, State and municipal necessities, while the town meeting too often resembles the council of the leaders of the party. Flashy literature is now sought with greedy rapacity, while historical landmarks are relegated to the school boy and the grind; exhibitions of artless nudity receive the plaudits of the pink-checked, brainless, precocious prodigies and tottering decrepits with sepulchral environments though writers of national importance receive their reward in the failure of their enlightening enterprises; women seek the sterner pursuits of men with shameless persistence and ill-advised solicitations for that which might degrade them, while the so-called failure of a jury to convict a man is greeted by the whistling cowhides in the hands of members of the gentler sex who do not recognize the justice of the law which their sisters seek to assist in framing. Public schools would give a greater benefit if the history of

our country supplanted the smatterings of knowledge of a foreign tongue. The Monroe doctrine, from the time of Jefferson, has been recognized as one of our American principles in the law of nations, and one which tends to protect our own country from the usurpation of a foreign power. The *Washington Post* most ably discusses the subject which we publish as a clear and concise statement of the existing difficulties and one which should receive careful study and thought. It says:

"With British war vessels headed toward Nicaragua to compel the payment of an indemnity for an alleged outrage upon a British subject, and with French and German gunboats moving upon Venezuela with more or less hostile intent, to say nothing of the English usurpations in that republic, the administration will have its hands full, as stated yesterday, if the Monroe doctrine is to be enforced. The question is a delicate and most important one, and only the exercise of great diplomatic tact can prevent unpleasant consequences. What is the Monroe doctrine? How did it happen to be enunciated, and how far is the United States committed to it? These are questions of timely interest. To their consideration the President and his advisers are giving careful thought. The result of this deliberation will be seen in the instructions which this administration will give to our ministers and naval officers in South America. Great Britain and the European powers are, of course, greatly concerned in the position which this government will assume, and it may be that the diplomatic correspondence of the next few months will leave a lasting impression upon the future of this country. The Monroe doctrine is the principle of foreign non-intervention with affairs upon the American continents, and especially the prevention of any colonization by foreign powers. It was called forth by the organization in the fall of 1815 of what was known as the Holy Alliance, a treaty signed by the Czar of Russia, the Emperor of Austria, and the King of Prussia. While the ostensible object of this alliance was the subordination of politics to the Christian religion, the worldly wise statesmen of this country and of Europe knew well enough that the three sovereigns were seeking more practical ends than the advancement of religion. It was known that they



were resolved to uphold monarchical institutions, and were anxious to assist Spain in subduing her independence-seeking colonies in South America. This fact presented a question which, in the language of Thomas Jefferson, was the most momentous which had been offered since the signing of the Declaration of Independence. Mr. Monroe, who was President in 1823, when the matter assumed formidable shape, at once sought the advice of Mr. Jefferson, who was then living in retirement at Monticello. Mr. Jefferson's reply was positive. 'Our first and fundamental maxim should be,' he said, 'never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs.' Mr. Jefferson, it might be added, in the same letter, favored the acquisition of Cuba to the United States. In previous correspondence Mr. Jefferson had, while President, expressed the same hostility to foreign intervention, so that the doctrine which is now associated with the name of President Monroe really belongs to his predecessor. The emphatic language of Mr. Monroe in his message to Congress on December 2, 1823, left no doubt, however, of the intentions of this government, and the frankness of the utterance commanded general attention. He deemed the occasion proper for asserting, as a principle in which the rights and interests of the United States are involved, the following: 'That the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.'

"Discussing the attitude of Spain and Portugal toward the South American nations, and the policy of the allied powers, President Monroe said: 'We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration

and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States.'

"Concluding his discussion of this subject, President Monroe asserted that it was the duty of this government not to interfere with any of the internal concerns of European powers; to hold toward them a frank, firm and manly policy, meeting, in all instances, the just claims of every power, submitting to injuries from none. Then he added: 'But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference.'

"Such was the Monroe doctrine. It is interesting to add, however, that never has this doctrine received the official or formal sanction of Congress. In the same session during which the message was delivered, Mr. Clay presented in the Senate a resolution embodying the president's views, but it was never brought up for action or discussion. In the Clayton-Bulwer treaty the principle was, to say the least, partially abandoned. Eminent authorities have also differed as to the constitutionality of Mr. Monroe's declaration. Mr. Clayton of Clayton-Bulwer treaty fame; Mr. Cass, Mr. Clay, Mr. Seward, President Polk, Secretary Fish, Secretary Frelinghuysen, and Secretary Blaine are among those who have indorsed it. Mr. Frelinghuysen went so far as to assert, on the ground that the decision of American questions pertains to America itself, that the arbitration by European States of South American difficulties would not be sanctioned by this government, even with the consent of the parties interested. Secretary Fish summed up the influence of the Monroe doctrine in these words: 'It has exercised a permanent influence upon this continent. It was at once invoked in consequence of the sup-

posed peril of Cuba on the side of Europe ; it was applied to a similar danger threatening Yucatan ; it was embodied in the treaty of the United States and Great Britain as to Central America ; it produced the successful opposition of the United States to the attempt of Great Britain to exercise dominion in Nicaragua under the cover of the Mosquito Indians, and it operated in a like manner to prevent the establishment of a European dynasty in Mexico. The United States stand solemnly committed by repeated declarations and repeated acts to this doctrine and its application to the affairs of this continent.' "

Two important hearings have been had during the present session before the joint committees of the Legislature affecting the interests of the bar of the State. The first, a few days since, upon the question of dividing the State into judicial departments, brought together a large number of lawyers, representing every judicial district of the State. On Tuesday of this week a hearing was given by the joint judiciary committee of the Senate and committee on codes of the Assembly upon the bills conforming the Code of Procedure to the requirements of the new Judiciary Article, which two bills were presented, one prepared by Louis Marshall and the other by justices of the Supreme Court. In the main, the two bills were alike, but differed with reference to the matter of findings by the court, and also as to costs to be allowed in the Court of Appeals; the Marshall bill restoring provisions of the Code with reference to findings, and both bills increasing to a considerable amount costs in the Court of Appeals; the Marshall bill making the costs \$250, the other, \$175. The discussion was opened before the committee, presided over by Senator O'Connor, by Judge Ingraham, of the New York city Supreme Court, who stated the different features of the two bills and the views of the New York judges upon the subject. He was followed by Judge Beekman, who was elected to the Supreme Court last fall, and who indorsed the suggestions made by Judge Ingraham and urged the features in the bill he had prepared at the instance of the judges. A discussion of the merits of the two bills followed in which Messrs. Marshall, Fiero, Elihu Root and Cephas Brainerd took part.

Mr. Brainerd represented the New York City Bar Association, being chairman of the committee on amendment to the law. Mr. Hubbell, secretary of that committee, was also present on behalf of the association. They favored the bill presented by the New York judges. The result of the discussion was the adoption of a suggestion that the framers of the two bills should conform them to the views suggested upon the argument and eliminate everything which was not necessary in order to carry out the terms of the new judiciary article, embodying those matters in a separate bill. The sentiment of the committee, as indicated upon the hearing, seemed to be very strongly in favor of leaving the matter of findings as it now stands under the provisions of the Code of 1894. and decidedly against any increase in costs on appeal to the Court of Appeals.

We publish in this issue of the JOURNAL an article on "The Taxing Power of the United States" by James J. H. Hamilton, Esq., of the Scranton, Pa., bar, which is in accord with many of the arguments which have been made against the constitutionality of the income tax but which presents several new theories on the subject of taxation. So much has been written against the income tax that it is apparent that lawyers, theorists, and a large majority of the people are against the recognition by the courts of this species of class taxation and unjust discrimination. The necessary cost of collecting such a revenue is proportionately too great for the net return to the government and the absolute lack of certainty in securing proper returns demonstrates the futility of this scheme to gain suitable moneys for governmental purposes.

In connection with the Hon. Joseph H. Choate's argument before the Supreme Court in relation to the income tax, Francis J. Lippitt, Esq., of Annapolis, Md., writes to the *Nation*: "I have read the arguments before the United States Supreme Court on the question of the constitutionality of the income tax as reported in my newspaper. Mr. Choate's position is, that a tax on the income from land is a tax on the land itself, and, therefore, a direct tax which, under article I, section two,

of the Constitution, must be laid according to numbers. But this objection would invalidate the act only *pro tanto* — in respect only to incomes arising from land. It strikes me that the true ground is that the tax is virtually a capitation tax, which is forbidden unless laid in proportionate numbers (article I, section 9.) Now, there can be but two kinds of tax in respect to the *subject* of taxation — a tax on persons and a tax on things. A tax on things belongs to one or other of these two heads: (1) Imports, synonymous (see Worcester) with customs, and duties on imports; or (2) Excises, which (I quote from Walker's 'American Law,' a standard authority), 'are impositions exacted upon the manufacture, retail, or consumption of commodities.' Thus imports, customs, duties, embrace things imported from abroad, and excises are taxes on things made, sold or consumed at home. And both these taxes have for their sole subject, not persons, but things; and things that are tangible, that can be — not indirectly or potentially, but directly and actually — used or consumed. Now, does the income tax belong to this category? If it does not — if it is not a tax on things — it must be a tax on persons; in other words, virtually a capitation tax. It is true that there exist taxes which are neither on persons nor on things that are tangible, such as license taxes, or taxes imposed to authorize the pursuit of a certain trade or business. But this species of taxation is exercised under the general police powers that inhere in every State or national government, and the real object of which is not revenue, but the regulation of certain trades or businesses or to subserve some special public policy under those same police powers which are practically unlimited. An instance of this is the ten per cent tax on the circulation of State banks, the object of which, as every one knows, was not to add to the nation's revenues, but to secure to the people a safe and sound currency. Such taxes may bring in more or less income to the government, but this effect is only incidental. They would often be laid and continued even if they brought nothing into the treasury at all; and, relating only to the exercise of police, or *quasi*-police, powers, they are not such taxes as are contemplated in the Constitution. My conclusion is, that the income tax, being a direct tax on per-

sons, and laid, not according to numbers, but according to the incomes of the taxpayers, is unconstitutional."

The decision rendered by the Supreme Court of Illinois against the constitutionality of a recent eight-hour law of that State is essentially a declaration in favor of the right of free contract. The law provided that "no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week." The court holds that women and men are on the same footing as regards contracts regulating their labor and hours of work; that the restriction made by the law is in conflict with the provision of the State Constitution that "no person shall be deprived of life, liberty, or property without due process of law," the right to labor or employ labor and to make contracts being included in this provision, the section which forbids women to work more than eight hours a day in a manufacturing establishment, while permitting them to work as many hours as they see fit at other occupations, is declared to be an unconstitutional discrimination. The court decides that the Legislature has no power to substitute its own judgment for the judgment of an employer and employe in a matter about which the latter are competent to reach an agreement, and it will not accept the plea that the provision quoted is a sanitary provision, and therefore justifiable as an exercise of the police authority of the State. This power the court does not think can be invoked to prevent injury to an individual in a particular calling. The object of this law was to protect women from the exactions of "sweat shops."

On Saturday, March 23d, the Hillmon jury came into court at Topeka, Kansas, and announced that they were unable to agree. This is the fourth trial of this now celebrated case and the third disagreement which has occurred in this cause. In looking up the history of the case we find that in 1882 Mrs. Hillmon began suit in the United States District Court at Leavenworth against the Connecticut Mutual, the Mutual Life of New York, and the New York Life Insurance companies for the recovery of \$25,000 and interest alleged to be due on

policies taken out by her husband, John W. Hillmon, through Lawrence agents, in 1878 and 1879, and made payable by the death of her husband near Medicine Lodge, in March, 1879. There was a tedious three weeks' trial before Judge Foster, which resulted in a disagreement, the jury standing ten for a verdict for the plaintiff and two against. Three years later there was another trial of the case at Leavenworth before Judge Brewer, now Associate Justice of the Supreme Court of the United States. This time the jury disagreed again, standing six and six. After another three years there was a third trial before Judge Shiras, of Iowa, at Topeka. This time the jury returned a verdict for the plaintiff for the amount sued for, which, together with interest and costs, amounted to about \$53,000. The defendants appealed to the Supreme Court of the United States on a writ of error and were sustained, the case being remanded for a new trial. On Jan. 9 last began the desperate legal struggle which resulted in this disagreement. For more than ten weeks some of the ablest lawyers in the country, an army of witnesses, twelve of the most intelligent jurymen that could be found in the State, and a judge detailed from North Dakota by the Judiciary Department because of his well-known fairness, legal acumen, and common sense disregard of petty technicalities have been endeavoring to arrive at a settlement of this question, which has been the subject of thirteen years' litigation. It is the largest insurance case the world has ever known, by reason of the amount involved, the length of time during which it has been pending, the number of witnesses subpoenaed, the amount of costs incurred, and the length of each of the four jury trials. Judge Alfred D. Thomas, of the North Dakota circuit, has presided at the trial. The counsel for the plaintiff were Charles F. Hutchings, of Kansas City, Kan.; Samuel A. Riggs, of Lawrence; Lysander B. Wheat, of Leavenworth, and A. C. Quinton, of Topeka. These attorneys hold liens for nearly the full value of the policies on which the suit was brought. Mrs. Hillmon, the plaintiff, has been supposed to own a considerable interest in the prospective judgment, but it came out at the trial just ended that she had given up virtually all of her rights and was de-

pendent merely on a verbal agreement with her attorneys that they would make settlement with her for the trouble to which she has been put. The attorneys for the defendants were Edward S. Isham, of the firm of Isham, Lincoln & Beale, Chicago; George W. Hubbell, general solicitor of the New York Life Insurance Company; J. W. Green and George J. Barker, of Lawrence; W. R. Sweet, of Kansas City, Kan., and Eugene F. Ware, of the Topeka firm of Gleed, Ware & Gleed. John W. Hillmon came to Kansas from Indiana with his parents in 1854, and settled near Valley Falls, Jefferson county. He was then nine years of age. When he became of age young Hillmon engaged successively in the occupations of mining, bull teaming, and cattle herding, and was an all-around frontiersman. On Oct. 3, 1878, he married Miss Sallie E. Quinn, whose home had been near Tongonoxie, Leavenworth county, but who at the time of her marriage was working in Lawrence. For several weeks after their marriage Hillmon and his bride lived in rooms in Lawrence, never appearing to have much means or any of the comforts of life. During this time Hillmon made application to various life insurance companies, including the Travelers', the Connecticut Mutual, the Mutual Life of New York, and the New York Life, for insurance. As a result of these applications the three defendant companies issued insurance to Hillmon to the aggregate value of \$25,000, the policies dating from December, 1878, and from March, 1879, and all naming Mrs. Hillmon as the beneficiary. The premiums on these policies amounted to over \$600 a year. The first payment was made by Levi Baldwin, a prosperous stockman of Douglas county. Late in December, 1878, after some of the policies had been issued, Hillmon and a man named John H. Brown started overland with a team for Wichita, ostensibly for the purpose of starting a cattle or sheep ranch near that place. An extensive tour of the country to the southwest of Wichita was made, in spite of the very cold weather, expressed by Hillmon in his diary as "very cold, with a bitter north wind—the coldest weather I ever saw." Late in January the two men drove to Wichita, where Brown remained and from which place Hillmon returned to Lawrence, where he made application for and secured an additional \$10,000 insurance on his life.

On the last day of February, 1879, he returned to Wichita, and very shortly thereafter set out with his old companion, Brown, and a third person, who, the insurance companies allege, was Frederick Adolph Walters, a young cigarmaker from Fort Madison, Ia. On March 17, 1879, the little party camped in a secluded spot on Crooked or Elm Creek, not far from Medicine Lodge, in Barber county. Then and there some one met his death by a gunshot wound in the head, and the sixteen years' legal disputation has been over the dead man's identity. The day of the death, John H. Brown notified the coroner at Medicine Lodge that he had accidentally shot Hillmon in taking a gun out of the wagon. The coroner went through the form of holding an inquest without arriving at any other verdict than that the man was surely dead, and the body was buried. Shortly thereafter, Mrs. Hillmon, who had been notified by Brown of the alleged death of her husband, made application for the life insurance that was in force. The companies, doubting that the man who had met death was Hillmon, sent agents to Medicine Lodge, who exhumed the body and took it to Lawrence, hauling it overland to Hutchinson, on the Santa Fe. At Lawrence the body was exposed to public view for a day or two, and hundreds gazed upon it, some identifying it as the remains of Hillmon and others failing to discover any resemblance. Another coroner's inquest was held, the jury declining to find that the body was that of Hillmon. As a result of the verdict, a warrant was issued for the arrest of John H. Brown for murder, but he had left the country and was not apprehended. Several months thereafter W. J. Buchan, an attorney of Kansas City, Kan., was summoned to a town in central Missouri by John H. H. Brown, who, after retaining Buchan as his attorney, made a so-called confession as to the Hillmon matter, taking oath as to the truth of his statements. His story was to the effect that John W. Hillmon, Levi Baldwin and himself had entered into a conspiracy to defraud the three insurance companies. The plan was to have Hillmon's life insured for \$25,000, Baldwin furnishing the means, and then for Hillmon to disappear. A body was to be secured to palm off as Hillmon's, and Brown

was to attend to the proof of death and make the necessary explanations. Brown said that the first trip which he and Hillmon made southwest from Wichita during the winter of 1878-9 was made in the hope of finding the frozen body of a ranchman or cowboy. In this they were unsuccessful. Just before starting out on the second trip they encountered the young man Walters, and induced him to accompany them with the understanding that he was to be employed as a sheep herder on a ranch to which they represented to him they were going. On March 17 Hillmon shot Walters, and after changing clothes with him, started off on foot, leaving Brown to tell the proper story and assist in making proof of death.

On the strength of this confession of Brown's, Mrs. Hillmon was induced to sign releases for the policies which were in force on the life of her husband. The policies, however, were in the hands of her attorneys and they refused to give them up. Afterward Brown repudiated his confession, saying it was wrung from him by the insurance companies by threats, and Mrs. Hillmon took her case against the companies into court. In all these years neither Hillmon nor Walters has been apprehended. The companies offered a reward of \$20,000 for the arrest of Hillmon, and it has been reported at least a dozen times that he had been seen at different places in the west and southwest. Once he was said to be under arrest at Tombstone, Ariz., but before the companies could send a man to identify him he had escaped. At the trial just closed several witnesses swore positively that they had seen Hillmon since his alleged death in 1879. Only last summer it was reported that Hillmon was under arrest in New Mexico, and two Jefferson county men who had known him went down in the hope of identifying him and earning the reward, but the man was not Hillmon. Walters, whose disappearance was even more absolute than Hillmon's, inasmuch as no one has ever professed to have seen him since March 17, 1879, was a young man who had just come west a few weeks before meeting Hillmon. He was from Fort Madison, Ia., where he left his parents, several brothers and sisters, and a young woman to whom he was to have been married as soon as he had acquired a competency in the west. Until the Sunday before he set out from

Wichita with Hillmon and Brown, he wrote home regularly. Since that time no word has been received from him.

The chief point of dispute at each of the trials of the case has been the identity of the body brought to Lawrence. The plaintiffs have brought numerous witnesses, who swear that the body was that of John W. Hillmon, and who gave descriptions of Hillmon as they knew him which correspond with the agreed-upon description of the body. A great point was made of the fact that the body bore a fresh vaccine scar of but a few weeks' standing, it being a matter of no dispute that Hillmon had been vaccinated on order of the insurance companies at the time he took out his last policy, shortly before starting out on the last trip. The defendant set up and attempted to prove that Hillmon had a missing front tooth, while the teeth of the body were perfect; that Hillmon was but 5 feet 9 inches in height, whereas the body measured more than 5 feet 11 inches; that Hillmon had a scar on the ball of his left thumb and another on his head, whereas the body was not thus marked. Not stopping with attempting to refute the identification of the body as that of Hillmon, the defendants also sought to establish that the body was that of Walters by having it identified as such by numerous friends and relatives of Walters, and by proving that moles found on the body corresponded with moles upon the body of Walters, and that there was a marked facial and bodily resemblance between the body and the other members of the Walters family. Every point made by either side has been so strongly contested and the evidence has been so conflicting and contradictory that it has been thought that it would be little less than a marvel if twelve jurymen could be persuaded to think alike upon the question and be able to return a verdict. No one at any time, excepting those directly interested in the case, has ventured to predict or even to hazard a guess as to the outcome.

Already several important decisions have been made in regard to property subject to the operation of the income tax. Acting Commissioner Wilson has recently held as follows: Money received from pensions is taxable as income. Money received on life insurance poli-

cies, when paid during life, is not taxable as income. Money received on life insurance and distributed to the heirs is subject to tax. Where corporations declare and distribute dividends in excess of the net earnings, the excess of such dividends over the net profits is not subject to tax. National banks may deduct the one per cent tax on their circulation. The value of real estate acquired by inheritance should not be returned as income; only the profits. All premiums paid for fire insurance policies must be allowed as a deduction. Only debts contracted in the year 1894, and found to be worthless, can be deducted from income for said year. Co-operative creameries, if doing business for profits, are liable to income tax upon their net profits. Life insurance premiums cannot be deducted as a business expense. In the case of the taxation of pensions as income, it is much like the case of the "Injun giver," and it would seem as if Uncle Sam wanted to "keep a string" on what he gave away.

A "Barrister" has written to the *Law Times* a letter which is of interest to Americans, as it contains considerable criticism of the home office, of the action of the home secretary, and of the Maybrick case. The letter, as published, is: "The home office is really on its trial in the case of Mrs. Maybrick, and the sooner the home secretary recognizes the fact the better. It cannot be denied that there are other cases in which its late decisions have failed to give satisfaction to those who were acquainted with the facts, and which throw very grave doubts on its fairness in dealing with claims for mercy based not on extenuating circumstances or ill health, but on the innocence of the prisoner. Thus, in the case of a man named Potter, of Bradford, the home secretary, had, I believe, all the evidence on which his accuser was afterward convicted of perjury laid before him, but declined to interfere. On the subsequent trial the jury was, of course, bound to give the benefit of the doubt to the accuser instead of her victim; yet they reversed the decision of the home secretary, who took more than a month longer before he could make up his mind to release the prisoner. Potter's term of penal servitude for a felonious assault on Smith, running concurrently with Smith's sen-

tence for falsely swearing that Potter had assaulted him, for upward of a month, was an incident that could hardly have occurred in any civilized country except England. In another case a man named John Kelsall has been kept in penal servitude for nearly a year and a half after the principal crown witness confessed that she committed perjury, and that he was wholly innocent of the crime imputed to him. His release will probably have become compulsory by the time this letter can appear; but the fact remains that these two innocent men would have probably served out their respective sentences if they had not succeeded in bringing their cases into a court of law. Now the allegation is plainly made by persons by no means ignorant either of the law or of the facts, that Mrs. Maybrick's is a similar case, and that the only reason why she has not been released before this is that she has not been able to bring her case before any legal tribunal. And I confess that when I learned that the home secretary had not thought it worth his while to interview (personally or by means of some other official) any of the witnesses whose evidence was tendered to him by Mr. Harris in April last, and had not instituted any of the inquiries suggested by their testimony (such as whether the packet of arsenic and charcoal found in the house was Mr. Blake's packet, and whether he could identify the handwriting upon it) my feeling was one of simple amazement. I could hardly believe that any tribunal could be so utterly careless about ascertaining the truth in matters of such vital importance to the case as the tracing of the arsenic found in the house on the one hand and the explanation of the purchase of the fly-papers on the other. But if Mr. Asquith had any good reasons for his decision, he can easily set the public mind at rest on the subject by holding a public inquiry, examining witnesses, hearing arguments and pronouncing his decision on judicial grounds. If the home office came successfully through this ordeal a good deal would be done to restore public confidence in it. But would it come through the ordeal successfully? My private opinion is that it would not, and that the home secretary himself has a shrewd suspicion that if its action in the Maybrick case were tried in the balances it would be found wanting. Surely, if so, it is high time to mend the department or to end it."

## THE TAXING POWER OF THE UNITED STATES.

**T**HE failure of the government of the United States under the articles of Confederation arose chiefly from the fact that the central government did not possess the power to lay and collect taxes and that to regulate commerce. This impotence of the Federal government was so great that the obligations of the nation could not be met, and its bills were dishonored at home and abroad. The Articles of Confederation required that all charges of war and all other expenses which should be incurred for the common defense or general welfare, and allowed by Congress, should be defrayed out of a common treasury, which should be maintained by the several States in proportion to the value of all land within each State granted to or surveyed for any person, as such land and the buildings and improvements thereon should be estimated according to such mode as Congress should from time to time direct; and the taxes for paying that proportion were required to be laid and levied by the authority and direction of the Legislatures of the several States.<sup>1</sup>

Under a system so poor as this, the government, even during the war for independence, was often without funds to pay the public debt and meet the exigencies of the public service; and there were times when the private credit of her treasurer was more powerful than her own to secure the nation against her creditors, obtain her loans, and prevent the ignominious failure of the revolutionary cause. After the conclusion of peace, in 1783, when the presence of an armed and hostile force in their midst no longer incited the people to grant the requisitions of Congress, the States became utterly indifferent on this subject, disregarded the recommendations of Congress, and refused to levy and collect the taxes asked for by that body. The nation was on the verge of bankruptcy. This being the condition of affairs, it is little wonder that upon the organization of a more perfect government, under a national Constitution, the first power conferred upon Congress by that Constitution is the power "to lay and collect taxes, duties, imposts and excises." It was the purpose to grant this power to the general government so that she should not, in the slightest degree, be dependent upon the States for her revenues, and that her power to raise revenue should be adequate to her wants. The great object of the Constitution was to give Congress power to lay taxes adequate to the exigencies of the government,<sup>2</sup> and its grant was, therefore, a general grant, without limitation as to place. It

<sup>1</sup> Articles of Confederation, Art. VIII.

<sup>2</sup> *Hylton v. United States*, 3 Dal. 171.

consequently extends to all places over which the government extends.<sup>3</sup>

The provisions of the Constitution upon the subject follow:

1. Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.<sup>4</sup>

2. No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.<sup>5</sup>

3. No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.<sup>6</sup>

4. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.<sup>7</sup>

The words used in giving the power of taxation to the national government describe the whole power, and it was the intention of the convention that the whole power should be conferred; and that both persons and property should be subject to taxation. "And nothing is clearer," said Mr. Chief Justice Chase, in a celebrated case, "from the discussions in the convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent."<sup>8</sup> The only express limitation, then, upon the taxing power of the national government is that which forbids it to lay duties upon exports. There are, however, certain implied limitations upon that power which arise from the nature and organization of the government itself. Both the nation and the States existed before the adoption of the Constitution. The purpose of the Constitution was not to destroy either, but to preserve both; for both are essential to the preservation of our form of government. Thus, while the government of the Union is limited in the scope of its powers, it is supreme within its

sphere of action; and is not dependent upon the States for the execution of the powers assigned to it. It follows, therefore, that a State cannot impose a tax upon an agency of the national government so as to impair its efficiency,<sup>9</sup> nor can it tax the securities<sup>10</sup> or property<sup>11</sup> of the United States. On the other hand, there is the corresponding limitation upon the power of the United States which makes it an abuse of the power of taxation if that power be so exercised as to impair the separate existence and independent self-government of the States."<sup>12</sup>

But while there are only these two limitations upon the taxing power of the United States, there are certain directions, or rules, as to the mode of exercising the power. These rules are, that "all duties, imposts and excises shall be uniform throughout the United States," and that capitation and other direct taxes "shall be apportioned among the several States according to their respective numbers." These directions as to the mode of exercising the power are not strictly limitations of the power. "It still extends to every object of taxation except exports, and may be applied to every object of taxation to which it extends, in such measure as Congress may determine."<sup>13</sup> It is at once apparent that for the purposes of applying these rules, the taxes levied by the United States are divided into two classes.

The first class comprises duties, imposts and excises; the second, capitation and other direct taxes. The former must be laid by the rule of uniformity; the latter, by the rule of apportionment. It will be seen, also, that in the directions for laying duties and excises they must be "uniform throughout the United States," while direct taxes need to be apportioned only "among the several States which shall be included within the Union." These terms are

<sup>9</sup> *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738.

<sup>10</sup> *Society for Savings v. Coite*, 6 Wall. 594; *Palmer v. McMahon*, 133 U. S. 660; *Home Ins. Co. v. New York*, 134 id. 594; *New York v. Comrs. of Taxes*, 2 Black. 620; *Bank Tax Case*, 2 Wall. 200; *Provident Inst. v. Massachusetts*, 6 id. 611; *Weston v. Charleston*, 2 Peter. 449; *Mitchell v. Leavenworth Co.*, 91 U. S. 206; *New York v. Hoffman*, 7 Wall. 16; *First Nat. Bank of Louisville v. Kentucky*, 9 id. 353.

<sup>11</sup> *McGoon v. Scales*, 9 Wall. 23; *Kas. Pac. R. R. Co. v. Prescott*, 16 id. 603; *Tucker v. Ferguson*, 22 id. 527; *Union Pacific R. R. Co. v. McShane*, 22 id. 444; *North Pac. R. R. Co. v. Trill Co.*, 115 U. S. 600; *Van Brocklin v. Tennessee*, 117 id. 151; *Wisconsin Cent. Ry. Co. v. Price Co.*, 133 U. S. 496.

<sup>12</sup> *County of Lane v. Oregon*, 7 Wall. 71.

<sup>13</sup> *Veazie Bank v. Fenno*, 8 Wall. 553.

<sup>3</sup> *Loughborough v. Blake*, 5 Wheat. 317.

<sup>4</sup> Art. I, § 8, cl. 1.

<sup>5</sup> Art. I, § 9, cl. 4.

<sup>6</sup> Art. I, § 9, cl. 5.

<sup>7</sup> Art. I, § 2, cl. 3.

<sup>8</sup> *Veazie Bank v. Fenno*, 8 Wall. 553.



not identical. "The United States" includes the Territories as well as the States, and the clause requires uniformity throughout the whole national domain. But the "several States which are included within the Union" do not include the Territories, and the requirements of this rule are satisfied without extending direct taxes to the Territories or the District of Columbia. But if they are extended to these places they must be apportioned there as in the States.<sup>14</sup>

The question as to what is a direct tax is one exclusively in American jurisprudence, and in determining it we can obtain little assistance from the conclusions of modern political economists. It is of the nature of an historical question, and to decide it we must determine what the Constitutional Convention understood by the term. When that convention met, the science of political economy had not yet put off its swaddling clothes. The first really great work upon the subject, in English, Smith's "Wealth of Nations," had appeared but eleven years before, while Malthus's "Essay on Population" did not appear until 1798 — eleven years after. The classifications of modern political economists have been made since the Constitution itself, and have little weight in determining the question.

It will be remembered that the Congress under the Confederation was required to apportion taxes among the States in proportion to the land and improvements thereon.<sup>15</sup> This, a land tax, was regarded as a direct tax, and was so understood by the members of the convention. When, after considerable discussion, it was at last agreed that representatives should be "apportioned among the several States according to their respective numbers," it was agreed as a part of this compromise that these taxes, or direct taxes, should be apportioned in the same way. And as the only fair way of laying a poll tax is in proportion to numbers, the term "capitation tax" was added to the directory clause, and it became —

"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."

The original resolution, as offered by Gouverneur Morris, having in mind the taxes already existing, used simply the term "taxes." This was amended by prefixing the word "direct," and thus we find it in clause 3, section 2, Article I. Afterward the term "capitation tax" was inserted, as in clause 4, section 9, of the same article. It is evident, then, that the convention recognized two direct taxes,

viz., capitation or poll taxes and taxes upon land and its improvements. The great writer in the *Federalist*, in discussing the question of taxation, says that direct taxes principally relate to lands and buildings, and may admit of a rule of apportionment, and that either the value of the land or the number of people may serve as a standard.<sup>16</sup> The same writer says again, in speaking of internal taxes, that they are divided "into those of the *direct* and those of the *indirect* kind."<sup>17</sup> In connection with this he discusses land taxes and poll taxes, but mentions no other direct tax. Then, too, the practice of the legislative department of the national government has been uniformly in accordance with this from the first; and Congress has in every instance laid all taxes, with the two exceptions named, according to the rule of uniformity. Direct taxes have been laid five times since the adoption of the Constitution: — in 1798,<sup>18</sup> in 1813,<sup>19</sup> in 1815,<sup>20</sup> in 1816<sup>21</sup> and in 1861.<sup>22</sup> The first of these imposed a tax upon real estate, and a capitation tax upon slaves. The last was a tax upon real estate exclusively. Each of the other acts imposed a tax upon real estate and slaves, the tax being required to be levied upon both land and slaves according to their respective values. The fact that slaves were taxed both by capitation tax and according to their value, has led some persons to the opinion that the practice of Congress has not been uniform in respect to this, and the opinion has been expressed that Congress regarded a tax on personal property as a direct tax. A writer has said, "There is no other way of reaching a distinction between a specific tax on a carriage and an *ad valorem* tax on a slave, except to follow it into the class of assessment on what is being consumed, and connect it with the idea of expense."<sup>23</sup> But this does not follow. The slave occupied a peculiar position. He partook of the nature of both *person* and *property*. As a person he was counted in the population to determine the basis of representation; but, being also property, he was not counted in the same proportion as his white brother. Partaking of this dual nature he was liable to a capitation tax as a person and to an *ad valorem* tax as property. The tax upon him as property partook of the nature of a *land tax*, for in many of the southern States the

<sup>16</sup> The *Federalist*, No. XXI, by Hamilton.

<sup>17</sup> The *Federalist*, No. XXXVI.

<sup>18</sup> 1 Stat. at Large, 597.

<sup>19</sup> 3 Stat. at Large, 53.

<sup>20</sup> 3 Stat. at Large, 167.

<sup>21</sup> 8 Stat. at Large, 255.

<sup>22</sup> 12 Stat. at Large, 294.

<sup>23</sup> Geo. Ticknor Curtis in *Harper's Magazine*, Aug. 1866.

<sup>14</sup> *Loughborough v. Blake*, 5 Wheat. 317.

<sup>15</sup> *Springer v. United States*, 102 U. S. 586.

slave partook of the nature of realty,<sup>24</sup> and passed to the heir rather than to the administrator.<sup>25</sup>

Not only do the action of the Constitutional Convention and the practice of Congress agree upon this matter, but the decisions of the Supreme Court of the United States also support the same view. In 1794, Congress, whose members had largely composed the convention of 1787, passed an act laying a tax upon carriages according to the rule of uniformity. Its collection was resisted on the ground that it was a direct tax and *should* have been apportioned. The case was argued on behalf of the United States by General Hamilton, who was, without doubt, the greatest constitutional lawyer of his age. Of the six judges of the Supreme Court at the time, four—Ellsworth, Wilson, Patterson, and Chase—had been prominent members of the Constitutional Convention, while another, Iredel, had been a member of the ratifying convention of North Carolina. In this case all the judges who took part in the decision were unanimously of the opinion that a tax on carriages was not a direct tax, but a duty or excise, and being laid according to the rule of uniformity, was constitutional. And the opinion was expressed by the court that the only direct taxes in the constitutional sense are poll taxes and taxes upon land, and its improvements.<sup>26</sup> This opinion has since been repeatedly affirmed by the Supreme Court,<sup>27</sup> acquiesced in by the ablest writers on constitutional law, and can no longer be questioned. Thus in the sense of the Constitution an income tax is not a direct tax but a duty or excise;<sup>28</sup> and this is true whether the tax be levied upon the income of an individual<sup>29</sup> or that of a corporation;<sup>30</sup> nor can the constitutional power of Congress to lay such taxes be doubted.<sup>31</sup>

Since an income tax is a duty or excise, it must be uniform throughout the United States, and any such tax which is not uniform is necessarily invalid.

<sup>24</sup> Chinn v. Respass, 1 T. B. Mon. 25; Thomas v. Tanner, 6 id. 52; Wells v. Bowling, 2 Dana, 41; Plumpton v. Cook, 2 Marsh. 451; Copley v. Sanford, 2 La. An. 335; Sneed v. Ewing, 5 J. J. Marshall, 460.

<sup>25</sup> Hogan v. Bell, 4 Stew. & P. (Ala.) 286; Gray v. Suffolk, 5 Ark. 637; Rogers v. Farrar, 6 T. B. Mon. 421; Justices v. Lee, 1 id. 247; Ratcliff v. Ratcliff, 12 Smed. & M. 134; Read v. Manning, 30 Miss. 308; Wright v. Lowe, 2 Murph. 354.

<sup>26</sup> Hylton v. United States, 3 Dall. 171.

<sup>27</sup> Veazie Bank v. Fenno, 8 Wall. 533; Springer v. United States, 102 U. S. 586; Pacific Insurance Co. v. Soule, 7 Wall. 433.

<sup>28</sup> William M. Springer v. U. S., 102 U. S. 586; Pacific Ins. Co. v. Soule, 7 Wall. 433.

<sup>29</sup> Springer v. United States, 102 U. S. 586.

<sup>30</sup> Pacific Insurance Co. v. Soule, 7 Wall. 433.

<sup>31</sup> United States v. Balt. & Ohio R. R. Co., 17 Wall. 322.

But it is to be remarked that the constitutional direction requires *uniformity*, not *equality*. A tax is uniform when its rates and provisions are the same throughout the entire United States; it is equal when the same *rate* applies to all the subjects upon which it is or may be laid. A tax may be uniform and yet exempt certain articles or classes of articles from taxation, or apply to different articles at different rates, *provided*, that no exemption shall be made in one State or section which shall not extend to all other States and sections, and the same rates upon the same articles shall be in force everywhere. In short, the constitutional rule for laying duties, imposts and excises, means simply this,—that these taxes shall be laid by a general law which shall be in force throughout the entire territorial extent of the United States; and that they shall not be laid by special laws applicable to different localities. A tax is *uniform*, within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity, because the thing taxed is not equally distributed in all parts of the United States.<sup>32</sup> The fact that a tax bears heavily upon a corporation, or class of corporations, is not ground for declaring it unconstitutional,<sup>33</sup> and Congress may discriminate in favor of a class, as it has done in the act taxing the circulation of State banks. The power of Congress to discriminate in laying an income tax is just as great as its power to discriminate in laying customs, for both must be laid according to the same rule. The income tax act of 1864 exempted incomes to the extent of \$600, and what was annually paid for rent or repairs to residence; and laid the tax at different rates. Five per cent per annum was levied on incomes above \$5,000 and not in excess of \$10,000. The seven States of Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Illinois and California paid three-fourths of this tax, yet they had only about one-fifth of the population of the United States, and about the same proportion of the assessed property. Yet after the fiercest contests this act was repeatedly sustained by the courts.

But, as has already been said, the national government cannot exert the taxing power so as to impair the separate existence and independent self-government of the several States; and, as a municipal corporation is an agent of the State and is a portion of the governmental power, it follows that Congress cannot tax the income of a municipality; and where a municipal corporation held a mortgage upon the

<sup>32</sup> Edge v. Robertson, 112 U. S. 580.

<sup>33</sup> Veazie Bank v. Fenno, 8 Wall. 533.

<sup>34</sup> United States v. Balt. & Ohio R. R. Co., 17 Wall. 322.

property of a railroad company, and the mortgagor was required to deduct from the interest due the mortgagee each year a tax thereon and pay the same to the government, such tax was held to be a tax upon the income of the city and void.<sup>34</sup>

For the same reason Congress cannot impose a tax upon the salary of a judicial officer of a State, which is paid out of the State treasury;<sup>35</sup> nor can it tax the processes issuing out of State courts,<sup>36</sup> nor a railroad owned by a State.<sup>37</sup> But where Congress imposed upon every national banking association, State bank or banker or association, a tax of ten per cent of the amount of notes of any town, city or municipal corporation paid out by them, it was held to be not a tax upon the obligation, but upon its use in a particular way, that is, as a circulating medium, and therefore, valid. And the fact that Congress intended to destroy the use does not alter the case; for Congress has this power.<sup>38</sup>

The capital of a State bank invested in foreign countries can be taxed by the United States;<sup>39</sup> and where an alien takes a devise he cannot set up his alienage as a ground of recovering back the succession tax paid by him under the act of June 30, 1864, which laid a tax upon the devolution or disposition of real property by deed, will or descent. Such a tax, however, is neither a tax on land nor a capitation tax. It is not a direct tax within the meaning of the Constitution, but is an excise.<sup>40</sup>

It has been held that the act of Congress of August 3, 1882, to regulate immigration, which imposes upon the owners of vessels who shall bring passengers from a foreign port into the United States a duty of fifty cents for each such passenger not a citizen of this country, is a valid exercise of the power to regulate commerce with foreign nations, and the tax laid by the act complies with the constitutional requirement of uniformity.<sup>41</sup>

The direct tax laid by act of Congress of August 5, 1861, did not create any liability on the part of the States in which the lands taxed were situated to pay the tax.<sup>42</sup> But the assessment of this tax under section 4 of the act of June 7, 1862, for the collection of taxes in insurrectionary districts, created a lien on the land which might be discharged

by payment.<sup>43</sup> But where payment was not made, and the land was sold to pay the tax, and the surplus arising from the sale was deposited in the treasury, the owner has no right of action against the United States prior to his application therefor, and the statute of limitation runs only from the date of such application. His sale of his right of redemption does not affect his right to recover such surplus.<sup>44</sup>

The Internal Revenue Acts of the United States, relating to licenses for selling liquors, etc., do not authorize the licensee to carry on the licensed business within a State, but are only a mode of imposing taxes upon the licensed business, with provisions for enforcing payment of such taxes. These provisions are not contrary to the Constitution nor to public policy.<sup>45</sup>

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### THE FAILURE OF JUSTICE.

THE universal disgust which pervades this country at the manner in which the criminal law is administered is beginning to take form, and the better elements of society are just beginning to assert themselves, although the prospects for an immediate change in matters appears to be somewhat discouraging.

At the recent municipal election in San Francisco a large number of the best citizens signed a manifesto in which the charge was made that justice was constantly defeated in their courts, owing to the technicalities and quibbles indulged in by the judges; that the public rights were habitually ignored; that everything was ruled against the State, and that criminals seemed to be better treated than honest men, or words to that effect. A similar condition of things exists to-day in many of the western States, notably in Missouri, Iowa and Illinois.

The administration of the criminal law in Illinois is perhaps the most vicious and unfair toward the public of any that ever has enabled rogues to escape justice. It is not the fault of trial judges. The situation in which unwise and stupid legislation has placed them is the most pusillanimous and degrading that ever a judicial officer has occupied. Indeed, it seems to be the fixed policy of this Commonwealth, as indicated both by the General Assembly and the Supreme Court, to treat *nisi prius* judges as incapable of discharging their duties properly, and to degrade them to the character of a moderator of a town meeting. Proceeding on the notion that a trial by jury means a trial by twelve

<sup>35</sup> *Buffington v. Day*, 1 Wall. 113.

<sup>36</sup> *Warren v. Paul*, 22 Ind. 276; *Union Bank v. Hill*, 3 Cold. 325; *Moore v. Quick*, 105 Mass. 49.

<sup>37</sup> *Georgia v. Atkins*, 1 Abb. (U. S.) 22.

<sup>38</sup> *Merchants' National Bank of Little Rock v. United States*, 111 U. S. 1.

<sup>39</sup> *Nevada Bank of San Francisco v. Sedgwick*, 14 Otto, 101.

<sup>40</sup> *Scholey v. Rew*, 23 Wall. 381.

<sup>41</sup> *Edge v. Robertson*, 112 U. S. 580.

<sup>42</sup> *United States v. Louisiana*, 123 U. S. 32.

<sup>43</sup> *Bennett v. Hunter*, 9 Wall. 826.

<sup>44</sup> *United States v. Cooper*, 120 U. S. 124.

<sup>45</sup> *License Tax Cases*, 5 Wall. 462.

men alone, with the judge left out, statutes have been passed which utterly deprive judges of all power to promote justice or to do anything to enlighten the jury on any question the decision or elucidation of which pertains to the judicial function.

At the common law a judge always assists the jury to arrive at a correct conclusion by summing up the evidence, explaining the case and the issues involved, and by grouping together the main facts and analyzing them, and stating what is essential and what is not essential. In this way the understanding of the jury is both quickened and enlightened, and if they possess the average brains of an American citizen their conclusions will not be far out of the way, if they are not absolutely correct. But by our statutes the judge is forbidden to open his mouth or say a word to a jury without subjecting himself to criticism or having some astute counsel interpose an objection. He is forbidden to explain to the jury the nature of the action or to charge on the facts or to sum up the evidence. He is forbidden to express any opinion on the value of testimony or to indicate in the remotest manner what the salient points of the case are, and is expressly required to confine his charge to reading written instructions that often amount to nothing more nor less than so many conundrums, and produce on the mind of the average juror nothing but confusion and disgust.

There are not many States where such a practice prevails, but Illinois stands in the front rank of those that undertake to administer the law through the instrumentality of judges that are deprived of their most important functions. If we are to expect satisfactory verdicts, the presiding judge must have power to make the way of the jury plain and clear. This can never be done as long as we restrict a judge to simply reading instructions, drawn by opposing attorneys, which are so inconsistent in their nature as to slap each other in the face with every sentence.

Judge Dillon, a jurist of national reputation, who spent twenty years on the bench, and more than twenty years in active practice at the bar, in his recent work on "The Laws and Jurisprudence of England and America," says: "The implication of such legislation, although not pleasant to contemplate, may be useful to weigh and consider. Such legislation implies the existence of a judicial system that works in an imperfect and unsatisfactory manner. Soften or disguise the fact as best one may, such legislation implies a distrust either of the capacity or of the integrity of the judges. Doubtless it is the former, for integrity on the benches of our courts is a common and almost universal possession. Such legislation, therefore, im-

plies a distrust of the capacity of the judge to deal with the evidence in summing up, and overlooks the need on the part of the jury of intelligent judicial instructions and guidance. The remedy is not in the life of these statutes, which are based on the assumed continued existence of the cause of such statutes, but the true remedy is to remove the cause by securing judges who are competent to the full discharge of the high and delicate duties of the judicial office. Under the practice required by these statutes mistaken verdicts are greatly multiplied, and it is to such causes that the trial by jury has declined to such an extent that it has come in many cases to be an avowed maxim of professional action that a good cause is for the court; a bad or doubtful cause is for the jury."

We do not believe that this system should be any longer continued. The administration of the criminal law, rightly understood, is one of the highest functions ever conferred on mortals. And those who take part in it should be held responsible to society for the manner in which they discharge their duties, whether judge, jury, counsel or advocate.

A trial in this country for the commission of a crime ought to be something else besides a forensic combat between opposing counsel, where either party is privileged to conceal the truth and trick his adversary. It is a solemn proceeding, instituted and carried on by the sovereign power of the State at public expense and inconvenience for the redress of grievances, the ascertaining of truth and the doing of justice. Such a proceeding should be characterized by the utmost fairness, and the absolute truth and justice of the matter should be the end and aim of all concerned in the same.

If a person accused of crime is justified in standing on all of his rights, and waiving none of them, then let it be remembered that society has rights as well as those who violate its laws, and that in upholding the rights of the criminal, the rights of honest men ought not to be forgotten or disregarded. What society demands in every case where a person is charged with the commission of a crime is to ascertain in the plainest and simplest manner the guilt or innocence of such person, and when he is put on trial he should be tried, and nobody else.

No lawyer who appears for the defense is entitled to have his client acquitted, irrespective of the law and of the facts, and it is, in our judgment, an outrageous conception of the high office of an attorney that he has a right to adopt as a rule that the end justifies the means.

Every criminal is by the Constitution of this State entitled to a fair and impartial trial by a jury of his country, and nothing else. He has no right to demand of society that he shall be tried by saints and

angels, but only by mortals, who shall conduct the trial as fairly and impartially as the imperfection of humanity will allow. Lawyers have no right to use their position to defeat justice, and if fame and fortune cannot be obtained without resorting to legerdemain and the tricks of the fakir, they are purchased at too great a price.—*Legal Adviser.*

### Abstracts of Recent Decisions.

**CONSTITUTIONAL LAW—CONTROL OF PARKS.**—The Legislature may limit the use of a public park by prohibiting addresses to be delivered therein. (*Commonwealth v. Davis* [Mass.], 39 N. E. Rep. 113.)

**CONTRACT—BREACH OF CONTRACTOR.**—Non-payment of an installment due under a building contract is such a breach of the contract as will justify the contractor in leaving the work. (*Golden Gate Lumber Co. v. Sahrbacher* [Cal.], 38 Pac. Rep. 635.)

**CORPORATION—TRANSFER OF CORPORATE STOCK.**—Where a corporation recognizes a transfer of its stock, and treats the transferee as a debtor for the subscription, he is substituted for the transferor as owner thereof, though no entry of the transfer is made on the books. (*Kruger v. Hanover Nat. Bank* [Miss.], 16 South. Rep. 353.)

**UNLAWFUL PREFERENCE.**—The president of an insolvent corporation, whose tangible property was in the custody of the law, gave a bank the company's note, payable on demand, for a debt not due. Suit was commenced on it the next day. The company filed its appearance, pleaded the general issue, waived a jury, and consented to an immediate hearing. Execution was issued, and returned *nulla bona*, and on the same day the bank filed a creditor's bill. A director of the company was individually liable, as guarantor and otherwise, for the debt due such bank. *Held*, an unlawful attempt to give the bank a preference over other creditors of such company. (*Wisconsin Marine & Fire Ins. Co.'s Bank v. Lehigh & F. Coal Co.*, U. S. C. C. [Ill.], 64 Fed. Rep. 497.)

**COURTS—FRAUDULENT JURISDICTION.**—To defeat the jurisdiction of a court, when the case stated in the petition is within it, the jurisdictional allegations must have been "fraudulently" made, for the purpose of conferring jurisdiction. (*Gulf, C. & S. F. Ry. Co. v. Wilm* [Tex.], 28 S. W. Rep. 925.)

**CRIMINAL LAW—HOMICIDE—INTOXICATION.**—The fact that defendant was intoxicated at the time the crime was committed is no justification therefor, if his mind was still sufficiently clear to plan a formed design to kill in consequence of which he deliberated and premeditated upon the killing. (*State v. McDaniel* [N. C.], 20 S. E. Rep. 622.)

**DEED TO MORTGAGEE.**—In order to sustain a deed by a mortgagor to the mortgagee of the mortgaged premises in satisfaction of the debt, a new consideration, passing from the mortgagee to the mortgagor, need not be shown. (*Watson v. Edwards* [Cal.], 38 Pac. Rep. 527.)

**ESTOPPEL BY DEED—MORTGAGE.**—A husband and wife, owners of land as tenants by the entirety, made a joint mortgage of it, with covenants of warranty, to secure the husband's debt, the mortgagee believing the title to be in the husband alone. The husband and wife then conveyed to a third party, who reconveyed to the husband, and afterward, by a similar process, the husband and wife became tenants by the entirety: *Held*, that the want of title in the husband at the time of the execution of the mortgage was cured by the subsequent vesting of the title in him alone, and that the title of the mortgagee was not affected by the subsequent conveyance. (*Thalls v. Smith* [Ind.], 39 N. E. Rep. 154.)

**GIFT—WHAT CONSTITUTES.**—The apprehension of death from some present disease or impending danger is essential to the validity of a gift *causa mortis*. (*Zeller v. Jordan* [Cal.], 38 Pac. Rep. 640.)

**INSURANCE—PLEADING.**—In an action on an insurance policy, by the terms of which a loss is not payable until sixty days after notice and proofs of loss are made by the assured and received by the company, a complaint that states that such notice and proofs were made immediately after the fire, but neither states nor shows upon its face that sixty days thereafter had elapsed before the commencement of the suit, fails to state a cause of action. (*First Nat. Bank of Baton Rouge v. Dakota Fire and Marine Ins. Co.* [S. Dak.], 61 N. W. Rep. 439.)

**MARRIED WOMAN—WIFE'S SEPARATE ESTATE—INTENTION TO CHARGE.**—A book account against a married woman for medical service rendered her and her children while living with her husband is no evidence of an express undertaking by her to subject her separate estate for their payment. (*Moore v. Copeley* [Penn.], 30 Atl. Rep. 829.)

**MASTER AND SERVANT—FELLOW-SERVANTS.**—A foreman of a railroad's bridge carpenters, who has by the order of his immediate superior (the superintendent of the bridge-building department) gone on a train, to be transported to his place of work, is not, while being transported, a fellow-servant of the conductor. (*Northern Pac. R. Co. v. Beaton* [U. S. C. C. of App.], 64 Fed. Rep. 568.)

**MORTGAGE—PAROL EVIDENCE.**—An instrument which, on its face, is a mortgage, cannot be shown by parol evidence to have been intended as the conveyance in a conditional sale. (*Eckford v. Berry* [Tex.], 28 S. W. Rep. 987.)

**MUNICIPAL CORPORATION—NEGLIGENCE—DEFECTIVE SIDEWALKS.**—In an action against a city for injuries caused by a defective sidewalk, evidence of the condition of the sidewalk two days after the injury is admissible where there was no change therein. (*Lohr v. Borough of Philipsburg* [Penn.], 30 Atl. Rep. 822.)

**NEGLIGENCE—PASSENGER ELEVATOR.**—In an action against the owner of a building for the death of a child through the sudden and negligent starting of a passenger elevator by the elevator boy, evidence that the boy had on previous occasions started the elevator in a like sudden and negligent manner is not admissible. (*T. & H. Pueblo Bldg. Co. v. Klein* [Colo.], 38 Pac. Rep. 608.)

**NEGOTIABLE INSTRUMENT—NOTE—RELEASE OF INDORSER.**—A note indorsed by defendant as an accommodation was transferred by the plaintiff payee to a bank, and, when due, was substituted, without defendant's knowledge, by two new notes by the same makers, and indorsed by plaintiff and another, the original note being surrendered to the makers: *Held*, that defendant was discharged from liability, although the makers of the original note afterward delivered it to plaintiff, that he might hold defendant as an indorser. (*Green v. Skinner* [Miss.], 16 South. Rep. 878.)

**NUISANCE—LIABILITY OF PURCHASER.**—Where the owner of land erects upon it a structure which is a nuisance to the owner of adjoining land, a purchaser or lessee from him who erects the nuisance is not liable for continuing to maintain the offending structure without notice from the adjoining owner, and a request to remove it. (*Philadelphia and R. R. Co. v. Smith* [U. S. C. C. of App.], 64 Fed. Rep. 679.)

**PUBLIC LANDS—LAND CERTIFICATE.**—The assignment of a land certificate conveys an equitable title to the land if the grantor had title, though the transfer was made after a patent had been issued. (*Hume v. Ware* [Tex.], 28 S. W. Rep. 935.)

**RAILROAD COMPANY—DEDICATION—RIGHT TO CROSS RAILWAY TRACKS.**—A railroad company to which Congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public the right to cross its tracks and right of way. (*Northern Pac. R. Co. v. City of Spokane* [U. S. C. C. of App.], 64 Fed. Rep. 506.)

**REAL ESTATE AGENTS—COMMISSIONS.**—A real estate broker who procures a purchaser for realty, and brings the parties together, is entitled to his commission, although the sale is consummated by another broker upon different terms. (*Wood v. Wells* [Mich.], 61 N. W. Rep. 508.)

**RES JUDICATA—ENJOINING EXECUTION.**—A judgment debtor is not estopped, by the date of the note upon which the judgment is founded, to show, in a suit to restrain the sale of his homestead under execution, that the note was not in fact executed and delivered until after his homestead deed had been recorded. (*Ingraham v. Dyer* [Mo.], 28 S. W. Rep. 840.)

**SALE—WARRANTY.**—Defendant agreed to ship to plaintiff a certain amount of paving stone, according to dimensions set forth in specifications furnished by plaintiff: *Held*, that there was no implied warranty that the stone would be suitable for a particular work, in the absence of evidence that defendant knew what such work required, and agreed that the stone should be tested by its requirements. (*Talbot Paving Co. v. Gorman* [Mich.], 61 N. W. Rep. 665.)

**TROVER—DAMAGES.**—In an action of trover for the wrongful conversion of property, where the trespass is the result of an inadvertence or mistake, and the wrong was not intentional, the value of the property at the time and place of its conversion must govern the admeasurement of damage. (*Wright v. Skinner* [Fla.], 16 South. Rep. 335.)

**WILLS—CONTEST.**—Where a physician, who knew testatrix for several years, and attended her in her last sickness, testifies fully as to her condition on the day the will was executed, stating that her mind seemed clear, and that she answered all questions intelligently, and appreciated everything that was going on about her, he may state that, in his opinion, she was competent to make a will. (*McHugh v. Fitzgerald* [Mich.], 61 N. W. Rep. 354.)

**NATURE OF ESTATE DEVISED.**—A testator devised land to two persons, stating that such devisees were to enable them to support his insane brother for life, and also that they were made on the condition that said devisees "will agree with my executor to do this." The insane brother died before the death of the testator: *Held*, that the provision for support was a condition subsequent, and excused, and that the provision for the agreement with the executor was a collateral requirement, to be fulfilled after the title had vested. (*Hoss v. Hoss* [Ind.], 39 N. E. Rep. 255.)

**WITNESS—PRIVILEGED COMMUNICATIONS.**—Confidential communications between attorney and client are privileged, and neither client or his attorney can be compelled to reveal them; but such communications being overheard by a third party, either by accident or design, such third person can be compelled to testify to them. (*Perry v. State* [Idaho], 38 Pac. Rep. 655.)

## New Books and New Editions.

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### AMERICAN STATE REPORTS; VOL. 40.

This number of these reports contains opinions and decisions from 101 California, 7 Houston's Delaware Reports, 93 Kentucky, 45 Louisiana, 54 Minnesota, 118 Missouri, 13 Montana, 37 Nebraska, 51 New Jersey, 142 New York, 50 Ohio, 160 Pennsylvania State Reports, 32 Texas Criminal Reports, 85 Texas Reports and 8 Washington Reports. Published by Bancroft-Whitney Co., San Francisco, Cal.

### NEW YORK DIGEST, REPORTS AND STATUTES.

This is the first volume of this edition of the Digest of the Reports and Session Laws of the State of New York, and is for the year 1894. It is well known, and hardly needs commenting on, that this is a work which has been carried on in connection with the Official Series of the State of New York. The compiler is Willard S. Gibbons, who has the approval of the official reporters, while the publisher, James B. Lyon, is one of the publishers of the Official Series. The Digest appears in weekly parts, and this is the first annual which has been published. The enterprise of the publisher of this work is admirable, and should receive marked success from those who are subscribers to the Official Series, as this weekly Digest is a most important adjunct to the Official Series. The publisher has also arranged covers for the weekly issue of the Digest, so that they can be conveniently kept together, and this will add greatly to their value. Published by James B. Lyon, Albany, N. Y.

### BISHOP ON INSOLVENT DEBTORS; THIRD EDITION.

By James L. Bishop, author of "Code Practice in Civil Actions." The last edition of this work was published over ten years ago, and the present treatise brings down to date the former edition, and deals with the common and statute law of New York State relating to insolvent debtors, and includes articles 1, 2 and 3 of title 1, chapter 17 of the Code of Civil Procedure, and the law of voluntary assignments for the benefit of creditors, including the General Assignment Act of 1877, as amended, together with a chapter on Composition and Composition Deeds. There has been a need of this later edition of this work, which has been so constantly used by members of the legal profession. The change in the statute law and the addition of many decisions to those existing ten years ago, has necessitated this later edition, which is compiled with even greater care than the former work. The number of cases cited is most numerous, and they are arranged either after the section or at the foot of the page, so as to be easy of access. Part I deals with the "Discharge of an Insolvent from His Debts;" Part II, of "Proceedings by and against Insolvent Debtors, Imprisoned or Liable to Arrest in Civil Actions." Part III deals with "General Assignments for the Benefit of Creditors." The forms at the end of the book are most full and complete, and will be found of great value to active practitioners. The work contains over 750 pages, and the last fifty are devoted to the general index, which is entire and full, with cross-references to the various subjects, which makes the book very easy of access. It is published by Baker, Voorhis & Co., 66 Nassau street, New York.

# The Albany Law Journal.

ALBANY, APRIL 6, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

AS the Supreme Court did not, on Monday last, hand down a decision on the Income Tax case, there is still an opportunity to comment on several points which have suggested themselves recently. In the first place we think there has been too much attempt to throw mystery and ambiguity around the meaning of the words which are now to be construed by the court of last resort, and that too much credence is given to the theory that the framers of the Constitution sought to find some strange and hidden meaning in the words which they placed in the Constitution. It is true that the members of that constitutional convention were not able to see all the exigencies which might arise and to which certain provisions of the Constitution would have to apply, but of the ideas which they had on the subject of taxation there seems to be no doubt, and it is useless for any court to attempt to persuade an intelligent public that any unusual meaning was given to the words which are found in the Constitution in regard to taxation. Why should the framers of the Constitution have attempted to raise some new and unusual form of taxation, or why should they have sought to clothe their meanings in peculiar language? They certainly did not intend to give the power to the Supreme Court to alter the nomenclature and to try to give a meaning to a word which it never possessed and which it never could have in the minds of thinking men. The members of the convention never desired to be understood to say that, while all the rest of the world understood that an income tax was a direct tax, they intended that it should be considered an indirect tax. Nor could they have thought that when they said that all excises, imposts and taxes should be uniform throughout the United States that any judicial officers would later attempt to quibble with the meaning of the word "uniform" and

say that it was simply equivalent to "extend." Those common sense, wise and straightforward progenitors of ours tried to express what they meant in the simplest terms, and their faithful souls and shadows would accept as a second edition of the Arabian Nights the judicial construction of their "intent" expressed in the Constitution. Those same framers of the Constitution were conversant with the writers of the time, and accepted the general ideas of the political economists who expounded their views at the time of the making of the fundamental law.

Another idea which impresses the public is, that if Congress has the power to divide the persons taxed into two classes, viz., those with \$4,000 income and those with less, and to collect from the one a part of the revenue of the government and to require the other to pay nothing, that it may at any time contend that it has the power to divide the country into many classes, taking from one a greater or less proportion of their property, and accepting little or none from the others; giving to him that hath and taking away from him that hath not, thus encouraging anarchists and socialists, recognizing the vast body of communists and those who believe in confiscating enough from the rich to properly support their shiftless and useless existences. As Mr. Choate most ably put it in his argument, in speaking of those who sympathized with the law: "that spirit which invaded the halls of Congress is now seeking, as we see by its representatives here this morning, to throw up its entrenchments in this court. They are watching for the result of this case. If they carry this they will carry their first parallel, and then how easy it will be for the whole fortress upon which the rights of the people depend to be overcome."

A statement of the condition of the movement in favor of a revision of the Code of Procedure is given in this issue. The unanimity with which the different bar associations of the State have acted in this matter is so unusual as to be quite extraordinary in view of the fact that upon all questions of practice and procedure the bar is exceedingly conservative. The concerted action of the State Bar Association, the Association of the City of New York and the associations of Brooklyn, Roches-



ter and Syracuse must be deemed to fairly represent the sentiment of the bar of the State, and when to this is added the fact that the action of the State Bar Association upon this subject, after an agitation of two years, was unanimously in favor of the movement at the close of a discussion of the topic, of which notice had been given several weeks in advance, it being one of the features of the programme of the annual meeting, the conclusion is inevitable that the lawyers of the State are decided in their views that some action must be taken at a very early day for a revision and rearrangement of the present cumbrous Code of Procedure. Nor is this action an expression of sentiment confined to the associations of lawyers throughout the State, but individual members of the bar of standing in the profession, as well as those occupying official positions, are pronounced in their views in the same direction. The extracts from correspondence of prominent lawyers throughout the State indicates a strong feeling in every section on behalf of the movement. Apparently but a single fear is expressed with regard to the matter; that is, to the effect that there is danger of greater complications in case the work of revision should be confided to incompetent hands. This view we do not think is well founded, since Governor Morton may certainly be trusted to select from the members of the bar of the State competent men who have the confidence of the lawyers and judges, and who are best equipped for the work proposed.

There can certainly be no question of politics entering into this matter, more particularly as no compensation is provided for the persons to be designated, as they are to be allowed only the expense incurred in the work.

We venture to say Mr. O'Grady's bill, with the support of the associations of the bar and the lawyers, will receive substantially the unanimous approval of the Legislature, and we hope to see it become a law at a very early day.

To fully appreciate the magnificent argument of the Hon. Joseph H. Choate in regard to the constitutionality of the Income Tax law, it must be remembered that when he began his closing address to the court many learned counselors had been heard who amplified and

enlarged upon the theories and arguments against the sanctioning of the law by the Supreme Court of the United States. The argument of Mr. Choate was replete with wit, logic, discrimination and good judgment. In speaking of the difference between real estate and the rent of real estate, Mr. Choate said :

"If a man seized of land in fee by his deed granteth to another the profit of those lands to have and to hold to him and his heires and maketh livery *secundum formam chartæ*, the whole land itselfe doth passe. For what is the land but the profits thereof?" That is from Coke upon Littleton. That has been law ever since in every court in English Christendom. It is applied now just the same as it was in the time of Coke. It was applied in the State of New York to the matter of a devise. "A devise of the interest, or of the rents and profits, is a devise of the thing itself, out of which that interest or those rents and profits may issue." That is the law as administered by the Supreme Court of the State of New York when your late associate, Mr. Justice Nelson, was a member of it.

The act of 1894 (§ 27) specifies the rents as a cardinal part and element of this income return, and every man who goes up to make his return has to state under oath what rent he got last year.

This fiction — this difference between the name and the thing, between the substance and the shadow — urged by the attorney-general, is that, though you cannot tax rent, you can tax the money in the owner's pocket received from rent. If there is one factitious argument, one pretense of a reason, one attempt to make a distinction without a difference, that this court has uniformly stamped upon with all its might, it is just that. This court has repeatedly decided that such an argument is wholly unsound. What did the court mean, in *Brown v. Maryland*, when it held that a tax on the occupation of an importer is the same as a tax on imports, and is therefore void? It is the source, the substance, that the act strikes at, that the court always looks to, and always has looked to, in every form and case that has ever come before it until now. Chief Justice Marshall said — I read from the twenty-eighth page of our principal brief:

"It is impossible to conceal from ourselves

that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

What did the court mean, in *McCulloch v. Maryland*, by saying that a State law levying a tax in the shape of a stamp upon bills issued by the Bank of the United States was a tax upon the bank? What did it mean, in the case of *Osborn v. Bank of the United States*, by declaring that a State law requiring a payment of \$5,000 or \$50,000 before a bank could begin business was a tax upon the actual powers of the Federal government? The case of *Weston v. Charleston* is very conclusive on this point. There it was held that a tax upon the income of United States bonds was a tax upon the securities themselves, and equally inadmissible. Chief Justice Marshall and four of his associates held that, although Mr. Justice Thompson and Mr. Justice Johnson dissented on the ground that it was palpably an income tax, which the learned chief justice did not contradict.

The case of *Dobbins v. Commissioners* is one of the most instructive cases on this very point ever decided. What was that? The commissioners of Erie county, in Pennsylvania, had a revenue cutter captain residing there, the captain of a Federal vessel. They were levying their annual taxes upon their citizens, and they said: "You have got this office from which you have received this salary, and we want \$10.50 from you for that." What was the plea then in the court? Exactly the one now made here. It was insisted that it was not a tax upon his salary, that it was not a tax upon his office, but a tax upon the money in his pocket. What did this court say? Mr. Justice Wayne was not in the habit of using strong language, but your honors will find how sternly he condemned such a pretense as that.

In *Almy v. California* it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented. In *Railroad Company v. Jackson* it was held that a tax upon the interest payable upon bonds was a tax not upon the debtor, but upon the security, the bonds. Have not your honors held over

and over again that a tax on a broker or an importer—that a license fee before he could handle an imported article in its original package—was a tax on the imports which no State had a right to levy? I need not weary your honors further with cases. They are all set forth here on pages 28, 29 and 30 of our brief.

"The value of property results from the use to which it is put, and varies with the profitability of that use." (*Postal Telegraph Co. v. Adams*, 155 U. S. 688, 697). A tax upon the profitability of the use is, therefore, a tax falling directly upon the value of the property. So I submit that a tax on rents is in substance a tax on real estate and should be made the subject of apportionment, as required by the Constitution in respect of all direct taxes.

If your honors please, how in principle does the corpus of personal property differ from a piece of real estate? I own a house to-day and sell it to-morrow, and take as its consideration a mortgage on the same property for \$10,000, the value of the house. Is a tax upon the house one kind of a tax and a tax upon the proceeds of the house another? It cannot be; it is impossible. There is no real or substantial difference between a general tax on personal and on real property. No such thing has ever been decided; no such thing has ever been hinted at. A tax on personalty has all the elements of a direct tax exactly as a tax upon real estate. It is directly imposed; it is presently paid; it is ultimately borne by the party owning it. There is no choice for him to escape from the tax but to abandon the property. There is no volition about it, as there is in the case of any consumable commodities upon which excises are laid.

In contending that the income tax, if indirect, was not uniform, and hence was unconstitutional, Mr. Choate argued:

There is no mistake as to what the meaning of the word "uniform" is as an essential quality as a duty, impost, or excise. It must operate alike upon the class of things or of persons subject to it. The class may be fixed and bounded by Congress in its discretion. It is for the courts to say whether this rule of uniformity has been applied within and throughout the class.

The contrast or antithesis between the rule

of apportionment prescribed for direct taxes and the rule of uniformity prescribed for "duties, imposts, and excises" was designed. The contrast was intended to be complete and perfect between each element of the two rules.

The rule of apportionment was known and intended to be a rule of *inequality*. This inequality was inevitable and existed in the very nature of the compromise out of which it resulted. This inequality was recognized as certain to increase as one State grew in population faster than another; hence the requirement of a decennial census to correct this inequality, so far as that might do it. But there were features of inequality as between different States which were radical and incurable by any census. There was and there could be no such coincidence between population and wealth as the rule assumed, and the divergence from any approximate coincidence would grow, as it has grown with every census.

The rule of uniformity, on the other hand, as applied to "duties, imposts and excises," was known and intended to be a rule of approximate and reasonable equality among those embraced in the class affected by it — everywhere and at all times — and no changes of population or of wealth anywhere would or could affect its force and effect.

The constitutions of nearly all the States have adopted from the United States Constitution this rule of uniformity, and in its practical application the courts of all speak with one voice as to its meaning, that it is exactly that for which we contend.

But there is another cardinal difference between the two rules which is even more radical and far-reaching and compels the construction of the rule of uniformity for which we contend. It must be observed that the first clause of section 8, Article I, taken by itself, gave to Congress the complete and unqualified power of taxation, only limited to national purposes, but wholly unlimited as to place. As it stood alone the power extended to every inch of the territory and to every person and everything within the dominion of the government created by the Constitution. As it stood alone Congress could have laid and collected taxes of every kind, direct and indirect, for national purposes, without regard to population or wealth or to State boundaries, restrained only

by those fundamental limitations inherent in the very power of taxation and indispensable in the government of a free people.

At last, what Washington and Hamilton and Madison and all the other great national leaders had so long been contending for as the only possible basis of "a more perfect Union" was achieved, viz., power in the National Government to reach directly and not by requisition on the States, which had proved to be of no use, every man, every dollar, every thing, and every inch of land within the States or the United States; but it was no part of the plan of any of them that this power in the new government should be absolute or unqualified, except as to place and persons. As to place and persons it should forever remain unqualified and reach as far and as wide as the territory of the United States and touch every person and every thing therein. And so they proceeded to modify and to qualify this power, except as to its extent in place or space through the whole territory of the nation, and except as to its hold upon every person and thing, by prescribing the different measures by which the burden of the different kinds of taxes, direct and indirect, should be meted out. As to indirect taxes, the modification or qualification was applied by section 8. As to direct taxes, the measure was prescribed by section 2.

And just here differences of geographical relation and of the political relation of the government to the different divisions of the entire people confronted them, and these differences entered into and in fact formed the basis of the different measures prescribed for the laying of the two different kinds of taxes. This directs our attention to the different geographical expressions used in the two rules by which the taxes were to be measured out: "*among the States*" and "*throughout the United States*," wholly different measures.

There were the thirteen States, all seaboard, and behind them a vast stretch of territory, occupied or unoccupied, explored or unexplored, which in due time, but not yet, would form new States of the Union. This vast territory was beginning to fill. Burke in one of his great speeches for America ten years before had remarked as unparalleled "the vast force with which population shoots in that

quarter of the world." The political relations of the new government to the people in the old States and to those in the new Territories were to be wholly different. On the one hand the State governments intervened between the United States and their people, the States retaining all their powers not granted to the United States. On the other hand the relation of the government to the growing of the people of the Territories was direct and immediate. What constitutions, what laws would prevail in the future new States was wholly unknown, except that each was to have a republican form of government.

As to representation in Congress and direct taxes — taxes on property — the people in the Territories had little concern and would not have until from time to time new States were created. But the thirteen old States were in a hopeless conflict with each other — conflict as to both representation and taxation — which was only solved by the happy compromise resulting in section 2, that representation and direct taxes should be apportioned among the several States according to their respective numbers; new States as admitted were to come under that rule.

Thus the Constitution, in prescribing the rule of measuring direct taxes, deals with the States and with the people therein. It allots to each State its aliquot part of the total amount to be collected according to numbers, and the quota of each is levied and collected from the property of the States, in substance though not in form, as other State taxes are collected.

But as to taxes not direct — "duties, imposts and excises" — the situation was wholly different. These, which had belonged absolutely to the States and which they had persistently refused to part with, were now surrendered to Congress — the imposts absolutely; the excises and duties on consumable commodities to a great extent — because of the impracticability of any State maintaining them against competition with other and adjoining States, and because of the "commerce" clause and the "immunities" clause in the Federal Constitution which cut them off from all manner of excises upon interstate commerce and upon incomers from other States who could no longer be treated as foreigners.

In dealing with these the Constitution no longer dealt with the States or with the citizens through the States, but directly with the individual citizen — the individual thing to be subjected to the tax. It wiped out all State lines, ignored the States entirely, and went directly for the man or the thing, and whether he or it was found in a State or in the Territories or in the District of Columbia was all one. On all these alike the purpose was to provide for the exercise of the taxing power "*throughout the United States*" whenever it should be exercised at all. In each and every part of the territory of the United States the excise or duty laid or imposed must rest and operate.

This direct relation between the nation and the individual citizen, by means of which the nation was to lay its hand upon the citizen without any regard to his State, was now and here for the first time attained. It had failed to be attained under the Confederation, because the States had stubbornly refused to grant it any power of taxation. It had failed under this very Constitution, as to direct taxes, because of the equally stubborn refusal of the States to permit them at all unless apportioned according to numbers.

By what rule or measure, then, was this new power in the new government to be wielded or exercised *throughout the United States*? That was the question. The equality of all men before the law was the fundamental principle of the new government. It was this that dictated the rule of uniformity — not a nominal or formal uniformity, not a uniformity of plan or method in the different States, but an actual and substantial uniformity in the nature and quality of the taxes so to be levied. There had been an effort at such uniformity in respect to direct taxes, but the quarrels and rivalries between the States, driving them into the compromise of apportionment by numbers, had defeated and produced as to those an utter lack of uniformity. But here there were no States in the way. Provision could be made, and was made, in respect to these kinds of taxes for substantial equality in the treatment by the government of all the people; in other words, for uniformity.

Of course, it was necessary for the Constitution not to attempt to legislate, but only to pre-

scribe the rule. It was necessarily to be left to Congress to select the subject of taxation, the class of things or persons or occupations on which the excise or duty should fall. It might make that class as narrow or as broad as it chose in its discretion, subject only to the limits inherent in the nature of taxation itself, but every man within the class must fare alike. There had been an infinite variety of excises as to the subject of taxation, infinite variety as to rates, and even distinction as to persons. It was well known that even as to persons there had been variety as to the same tax. In England, during the commonwealth, foreigners were always charged a double tax on the same imports, and this had been possible among the States in dealing with incomers from other States. It was to put an end to this pre-existing rule of variety which led to marked inequality and frequent oppression that the rule of uniformity was introduced; not as between the States or the citizens of States; for the States had and were to have absolutely nothing to do with it, but as between all citizens standing alike before the government and entitled to just and equal treatment at its hands.

It is impossible to impute to the framers of this rule of uniformity the intention that, on the same identical article subjected to duty or excise, any one citizen, simply because of his age or size, or sex, or condition, or any other personal difference, should pay a higher or a lower rate of tax than any other citizen, or that, as an impost on the same article imported, the rich man should pay a larger or a smaller rate of duty than a poor man. In this respect all were to be treated alike in the laying of the new duties. In this sense every such duty or excise or impost was to be a uniform duty, excise, or impost, and this rule of uniformity securing just and equal treatment by the government was to prevail *throughout the United States*, wherever the authority of the government extended, and so, to make this absolutely certain against all possible doubts and contingencies, the clause was formulated as a limit or modification of the power to lay these duties, etc., "*but all duties, imposts and excises shall be uniform throughout the United States*," and every word of it is full of meaning.

There is an active effort on foot in California to reform the system of courts at present in force in that State, and to relieve the Supreme Court from the final determination of all the appellate work of the State. With the ever-present doubt and suspicion in the minds of the lawyers of this State that the Court of Appeals were not sufficiently relieved by the Judiciary Article of the new Constitution, it may be well to give the simpler method which has been devised by John A. Wright, Esq., of the California bar. It will be noticed that the features of the scheme will be to prevent what, it is intimated, exists in California, namely, the influence of certain attorneys over some of the judges of the courts, and the proper supervision of any irregularities of practice which may come to the attention of the Court of Discipline, which is to be created, as the article demonstrates. The attempt of the measure to elevate the bench and bar, and to separate judicial offices from politics, is praiseworthy in its aim, and should receive considerate attention from the bar of other States. The *San Francisco Examiner* gives this outline of the plan, which, in theory at least, has much on its face to commend it: "The system, in brief, proposes to add two courts to those now in existence, and a third court on special occasions — one as a group of intermediate appellate tribunals or Courts of Appeal, to dispose finally of the greater part of the appellate business that now takes up the time of the Supreme Court, and the others as Courts of Discipline for attorneys and judges. Under this system the main legal business of the State would be handled by a Supreme Court of five members, three Courts of Appeals of three members each for the three judicial districts of the State, and the Superior Courts organized as now. The main change in this part is the substitution of the three Courts of Appeal for the clumsy device of the Supreme Court Commission. To prevent the Courts of Appeal from becoming merely another stage on the way to a final determination of cases, as is their tendency, it is proposed to limit strictly the kind of cases that may be appealed from these courts to the Supreme Court, and make their decision final in most of the causes that can be brought before them. The appeal to the Supreme Court is

directly from the Superior Court in cases involving constitutional questions, taxes, public offices, charters, franchises and criminal cases where the punishment is greater than imprisonment for five years. The mass of civil business and the other criminal business is to be carried from the Superior Court to the District Court of Appeals. This system is meant to reduce the time of litigation by taking the place of the hearing by the commissioners, the subsequent hearing by the Supreme Court in department, and the final hearing by the court *in banc* that often consumes so much time under the present management. But a greater change is made in the practice than in the organization of the courts. The judges are required to have all cases presented on oral argument in open court, no causes are to be decided solely on written briefs, the judges are to decide each cause presented before considering the next, each of the justices is to pronounce from the bench his decision and his reasons for it, and, finally, no rehearing is to be allowed. Only a lawyer can appreciate the magnitude of the changes that these provisions would bring about. It is stated on behalf of the propositions, however, that the prohibition of rehearings will lead lawyers to prepare their cases more thoroughly, that open oral argument will lead to a better understanding of the facts, the law and the merits of the dispute by the justices, that the requirement that one cause shall be decided before another is taken up increases the chance of a just decision by forcing it to be made while the case is fresh in the minds of the justices, and that the requirement that each justice shall pronounce from the bench his opinion and the reasons for it increases the chance that he will have made the attempt to understand the case before he decides it. But delay of justice and inattention of justices that these provisions are supposed to meet are not the choicest defects of our present system. Greater evils come from the popular belief that corrupt men find their way to the bench and are common among those who practice at the bar. Mr. Wright's scheme includes a measure that he believes will correct this State of affairs by furnishing the machinery for getting corrupt men off the bench, vindicating those who are accused, but innocent, and purifying the bar of those who disgrace it. To this end he would form a permanent Court of Discipline within

each of the three judicial districts, to be known as trustees of the bar. These trustees are to be nine or more in number, elected by the whole body of attorneys who have practiced a year or more, and to be chosen from attorneys who have been five years or more in practice. Their duty would be 'to make summary preliminary examinations into all public rumors which may have a tendency to impair respect for justice.' They may make an advisory report concerning judges, and in the case of attorneys may 'pronounce judgment of exoneration, warning, reprimand, suspension or removal from office, as the case shall seem to require.' In all investigations public prosecutors are to be provided. The ordinary Court of Discipline thus would have actual authority over only the attorneys. It would only investigate judges and judicial officers. For the trial of these it is provided that a Special Court of Discipline may be established at any time. The authority for calling it is widely distributed. The governor, or the chief justice, or any two justices of the Supreme Court, may call one of their own motion. Or, if the majority of the trustees of the bar, or an equal number of the members of the bar, or the same number of freeholders, or any judge or justice of a permanent court of record request it, they must convene the court without delay. In the case of a judge of a court of permanent record the Court of Discipline is to consist of twelve or more citizens, one-fourth to be judges, one-fourth to be trustees of the bar, one-fourth to be members of the bar in good standing, and one-fourth to be freeholders. The trial is to proceed with dispatch, and the court may exonerate, warn, reprimand or suspend from office the accused judge—in the latter case to await action by the Legislature. Trustees of the bar and judges of courts not of record may, in addition, be removed from office. Such courts would have the chance to play an important part in the field of law. If one had been in existence last year, for instance, doubtless Justice Harrison would have taken occasion to have his conduct in the Levinson case cleared up; Judge Levy would have asked for an inquiry into his record; Philbrook would not have been tried by the men he was accused of insulting, and Kowalsky might have had company on trial for disbarment. Another innovation is found in the subdivision that is intended

to take the judiciary out of politics. This provides that candidates for the judgeships shall be nominated only by petition, and that neither in the petition nor in the ballot shall they be given any party designation. In behalf of this device, it is urged that it would put an end to the haunting of conventions and the button-holing of delegates by judges, the bargaining of candidates with bosses that sometimes takes place, the accusations of selling nominations at \$1,000 apiece that have sometimes been heard, and the slaughtering of a De Haven in a boss-ridden convention. In the present state of our judiciary system, any scheme of reform is worthy of careful consideration. Mr. Wright's suggestions will rouse interest in a matter of the first importance."

An application to the attorney-general asking permission to bring an action against certain officers of the Coffee Exchange of the city of New York, to procure a judgment of suspension or removal of them from office for abuse of trust or misconduct, arising out of transactions in adulterated coffee, has been granted. The attorney-general in granting the application hands down the following opinion:

"We have consigned the proofs and briefs and arguments of the parties, and believe that evidence was presented to the adjudicating committee that this coffee was adulterated food. It was their duty to have examined that question. If it were adulterated it was not the subject of commerce and trade. The said committee, therefore, failed to discharge its duty and fostered by its action trade in such food. It is seriously claimed upon the part of the exchange and its officers that no evidence was submitted to show that such coffee was artificially colored with intent to conceal damage or make the same appear better than it really was. The question of intent is one largely to be determined from conditions and circumstances. Here the standards chosen by the grade arbitrators were before the officers, the artificial coloring of the coffee visible to the naked eye. Why was it colored? and what purpose could coloring said coffee serve, except to make it more salable, and to hide its defects and make it appear better than it really was? We have no doubt that every officer of the exchange who has examined such coffee knew it was an article

traffic in which the statute prohibits. The State out of the plenitude of its power gave a charter to this corporation to accomplish the purpose expressed in the statute, and as described in *People, ex rel. Thatcher v. The New York Commercial Association*, 18 Abb. P. R., 271-179. 'To establish a high moral standard in conducting business transactions and to exercise somewhat of a control over those who belonged to it. It reaches a little beyond the precise legal rights of its members in their business conduct, subjecting them to a supervisory care, so far as fair dealing is concerned, to which they would not ordinarily be amendable in any tribunal known to the land.' The presence of adulterated food in the market is a nuisance. It jeopardizes the health and lives of the people. A corporation which sanctions, suffers, and regulates such traffic is at war with the best interests of society, and officers who knowingly permit, suffer, and compel traffic therein offend the laws of the State, as above quoted, encourage the existence of a nuisance, and violate the just principles of trade by placing a fraud upon the market. The State is interested in the highest degree in the protection of the lives of its inhabitants, and when any officer of a private corporation is guilty of the acts aforesaid there can be no question but that the conduct of such officer has been 'misconduct' and that he has been guilty of an 'abuse of his trust.' We think the purposes of the State would be subserved if an action should be brought to suspend or remove the members of the adjudicating committee and such members of the board of managers as sustained them in their decisions compelling the selection of a grader. The grade arbitrators acted under the rules of the exchange, without knowledge of the parties or the claim that the coffee was adulterated, and hence are scarcely open to accusation of misconduct. Upon the filing of the usual bond in the sum of \$2,000, and the making of the stipulation required by the rules of this office, the action may be brought."

In *Milbourn v. David*, decided in the Supreme Court of Delaware, it was held that where one tenant has sole possession of the common property, it is presumed to be with the consent of his cotenants.

## REVISION OF THE CODE OF PROCEDURE.

**T**HE movement in favor of a revision and simplification of the Code of Procedure in this State has been taken up recently, not only by individual members of the bar throughout the State, but by the different bar associations, and a careful revision with a view to condensation is a question of the near future, in view of the substantially unanimous action of the lawyers and association of lawyers on the subject.

At the meeting of the New York State Bar Association in January, a resolution was adopted, upon the unanimous recommendation of the committee on law reform, by the unanimous vote of the association as follows:

*"Resolved,* That the Legislature is earnestly requested to make proper provision for a careful and thorough examination of the Codes of Procedure of this and other States, including the so-called Practice Acts in force in this country and abroad, and the rules of court adopted in connection therewith, and report in what respects the Civil Procedure in the courts of this State can be revised and simplified."

A proposed bill for the purpose of carrying out the views of the association was also presented, being substantially that which is presented to the Legislature for that purpose, and with reference to the bill it was

*"Resolved,* That the association recommends to the Legislature the enactment of the following bill and that the members of the association and the bar of the State be requested to aid in its passage by correspondence, petition and by all other legitimate and proper means."

This was also unanimously adopted.

This action had been preceded by a report of the Committee on Law Reform, made to the association in the following terms:

*"Your committee* is of the opinion that a careful examination should be made by competent authority of the provisions of the present Code of Procedure, as to the necessity and propriety of a partial revision, and with a view to its condensation and simplification, and to inquire whether a rearrangement upon a more scientific basis would not make it more valuable and convenient."

Also by action taken by the committee, by way of memorandum, setting out the advantages of revision, as follows:

*"First.* The original Code of Procedure, consisting of four hundred and seventy-three sections, and covering all general matters of practice, has been increased by the addition of rules relative to special actions and proceedings and enactments as to the organization of the courts, together with rules of evidence, until, as the Code of Civil Procedure of

1877 and 1880, it contains thirty-three hundred and ninety-seven sections, and others must be added regulating procedure as to mechanics' liens, receiverships, general assignments and other matters, in order to complete a system of practice.

*"Second.* By including provisions not only for the organization of courts of record, but minute details as to their powers, and the duties of officials connected with them, with rules for the government of inferior tribunals, and enactments as to the admissibility of evidence, it has become cumbersome and unwieldy as a Code of Procedure, and is so arranged as to render it inconvenient as to form and difficult for reference and examination.

*"Third.* Many provisions of the substantive law have been included in different portions of the work relative to procedure interfering with its symmetry as a system of practice, and giving unnecessary labor to the practitioner in referring to such enactments.

*"Fourth.* Very many of the provisions and sections of the Code have been so construed and interpreted by judicial decision that it is necessary to carefully examine a number of authorities to find the precise meaning placed upon the language used by the courts; this, in most instances, where a clear and explicit statement of the rule finally adopted could be readily made.

*"Fifth.* Very many of the provisions are reenactments of statutory provisions, which should be much condensed, and the proceedings rendered less complex and intricate. In other instances, the Code is exceedingly diffuse and minute in detail, embarrassing rather than aiding in the administration of justice.

*"Sixth.* Its classification of topics is neither scientific nor practical; and is misleading and perplexing alike to the student and practitioner.

*"In view of these considerations,* we respectfully request that provisions be made by law for an examination by competent and authorized authority as to whether it is desirable that the Code of Procedure should be simplified and revised, separating those portions relative to organization of the courts from that part relative to actual practice therein and from the matters relating to the admissibility of evidence, leaving the practice substantially as at present, but more simple and less technical."

This memorandum was presented by J. Newton Fiero, R. F. Wilkinson, John J. Linson, Z. S. Westbrook, Irvin W. Near, Joseph Mason, Adelbert Moot, William B. Hornblower, Garret J. Garretson, G. M. Diven, Henry H. Seymour, Charles T. Saxton, John Cuneen, Charles A. Collin, A. H. Sawyer and Louis M. Brown, members of the Committee on Law Reform.

The proposed action has also been heartily in-



dorsed by Austin Abbott in a memorandum prepared and published by him.

In accordance with this action, the matter was taken up by the Committee on Law Reform and a correspondence had with leading members of the bar throughout the State. We are permitted to give extracts showing the views of the leading lawyers upon the subject.

Elihu Root says: "I think the Code of Procedure ought to be revised and simplified. We ought to return to the original idea of the code—to simplify practice. I have always regarded Mr. Throop's revision as an unwarrantable departure from that original idea. That revision and the subsequent host of amendments have given us a code of which every lawyer in the State ought to be ashamed.

"It is huge, cumbrous, intricate; its mass of petty details is full of traps for the unwary and of obstructions to prevent courts from doing justice. There is something amazing in the muddle-headed ingenuity which has been expended to make things naturally simple and easy, as complicated and difficult as possible.

"I hope the Legislature will take the matter up seriously and give us speedy relief."

Ex-Judge A. B. Tappan says: "The Code of Procedure should be revised for the purpose of condensation, not enlargement; it is too bulky."

Walter S. Logan says: "There is no doubt but that the Code of Procedure needs revision. There are many crudities and absurdities in it. It seems to me that the revision should be entirely in the way of simplification.

"I appreciate fully the difficulties which lie in the way of providing a system which shall enable the honest litigant to fairly present his case, and shall not permit the machinery to be used by a dishonest plaintiff or defendant to harass and annoy his adversary or procure undue delay; but I think the object to be gained is worth all the effort, and that much can be accomplished in this direction by a wise and careful revision of the Code of Procedure."

County Judge D. W. Guernsey, of Poughkeepsie, says: "As to whether it is desirable to take steps to have a revision of the present Code of Procedure by bill for the appointment of counsel to report to the next Legislature, I say decidedly, yes. In many of the sections there is much ambiguity and much surplusage. The revisers, whoever they are, should aim at simplicity and directness."

David Millar, county judge of Niagara county, says with regard to the revision: "It should be done guardedly and chiefly upon the lines of the changes recommended by the committee of the Bar Association in the report made just prior to the last meeting. I should consider it of the first importance to

have the proposed committee so constructed as to represent the views of the judges who have to pass upon the matters eventually, as well as the most expert practitioners from different parts of the State."

Edwin A. Nash, county judge of Livingston county, says: "I am decidedly in favor of an intelligent revision of the Code of Civil Procedure. The proportions of the Code might, it seems to me, be greatly reduced. Redundancy is the one great defect in Mr. Throop's additions to the Code of Civil Procedure; his nomenclature has not taken root and can easily be dispensed with as surplusage. There is no reason why our Code should not speak the same language we use in court."

John E. Parsons says: "In my judgment, the question resolves itself into the consideration of who, if the work is to be done, should do it. That a revision is needed, it seems to me to be clear. The doubt comes from the uncertainty whether the revised work will be an improvement."

Delos McCurdy says: "If we could have a revision of the present Code which would take us back to the brevity and simplicity of the Code as it was prior to the passage of the act of 1876, I should be pleased. If, however, revision means extension and amplification, I want none of it. Of that kind of revision which merely extends, amplifies and multiplies provisions until a concordance is required, we have had quite enough."

Charles E. Hughes, late lecturer in Cornell University and member of the firm of Carter, Hughes and Dwight of New York city, says: "It seem to me very necessary that something should be done in this direction and that the Legislature should pass the proposed bill."

Robert E. Deyo says: "I entirely approve of revision on the lines suggested in the articles that have appeared in the ALBANY LAW JOURNAL."

Hamilton Odell says: "I am opposed to any bill which concedes that possibly the Code of Civil Procedure does not need to be revised. I would have a commission appointed at once with power to revise the thing to death. Let us have something new, something coherent and conservative and within the reach of the average mind."

H. D. Wright, district attorney of Fulton county, says: "I believe that the Code needs a further revision so as to make it more concise and clear. A comparison of our Code with that of Massachusetts and Kansas shows it may be revised to a considerable degree. I believe the appointment of counsel as proposed would be very beneficial."

Frederick G. Paddock, district attorney of Franklin county, says: "I approve of the appointment of a committee by the Legislature to make a revision of the Code, and that the revision should

be made along the lines marked out and proposed by the State Bar Association."

Safford E. North, county judge of Genesee county, says: "I am in favor of a systematic effort to have the Code of Procedure revised, condensed and improved. I think no time should be lost in securing the proper legislation to the end in view, and it seems to me that the suggestion that counsel be designated to report to the next Legislature as to the desirability of revision is on the whole a judicious preliminary step."

Ledyard P. Hale, district attorney of St. Lawrence county, says: "The whole question of a revision of the Code of Procedure is, who is going to revise it; if it is to be revised with intelligence, it can certainly be improved; if not, it will certainly be made worse. Whether I should favor a revision would depend upon the men selected to do the revising. The Throop Code is like the Albany capitol, but whether it would be advisable to undertake a reconstruction would depend wholly upon the architects employed."

Joseph V. Seaver, county judge of Erie county, says: "I believe such an act as suggested should be passed at once and I fully concur in the movement."

Owen T. Coffin, surrogate of Westchester county, says: "It is now nearly fifty years since we first heard of the Code, and after all the legislation on the subject since, it would be strange indeed if a revision of the whole subject would not be advantageous."

William J. Curtis, of Sullivan and Cromwell, says: "It would be infinitely preferable, in my judgment, to return to common-law pleading rather than to submit to the annoyance of trying to practice under such an incongruous and ridiculous act as the present Code of Civil Procedure."

Austin G. Fox says: "Could less be put in a Code and more left to rules of court, we should, I think, be better off. Could it be repealed and replaced by an act framed by men who had no private notions which they desired to embody in the act, and who were qualified by sound training and long experience, we might, indeed, expect relief."

Francis Lynde Stetson says: "I heartily concur in the desirability of some effort to condense our present huge and cumbersome Code. Benisons await the successful and genuine codifier, as distinguished from a reformer of our laws."

J. A. La Seuer, district-attorney of Genesee county, says: "In my judgment, a revision of the Code is desirable, not so much for the purpose of extension or abbreviation as for the purpose of making more clear that which is already embodied therein."

Albert Stickney says: "My present impression is quite strong that there should be some further re-

vision of the Code of Procedure. Whatever revision we have, in my opinion, should be in the hands of a commission very carefully selected and of reasonably large number."

Ex-Judge George M. Van Hoesen says: "There ought to be a revision and a thorough one. The Code of practice ought to be brought within reasonable limits and put into simple English. Two able men, accustomed to express themselves clearly and concisely, with a knowledge of practice, and with a natural inclination to make the practice easy and convenient, could, I believe, do the work of revising the Code and place the public and the bar under lasting obligations."

Ex-Judge George G. Reynolds, of Brooklyn, says: "As the Code, by numerous amendments from time to time, has become a patch-work affair and there are still many crudities and much that needs amendment about it, I think the proposed measure would be a good thing."

Joseph Larocque, President of the Association of the Bar of the city of New York, writes: "That the Code of Procedure, in its present form, is subject to many of the criticisms and objections referred to in the paper presented at a joint meeting of the executive committee and committee on law reform of the New York State Bar Association, October 9, 1894, is, I think, beyond question. That it might be revised and greatly improved seems to me equally clear. On the other hand, our past experience indicates that we may perhaps better bear the ills we have than fly to others we know not of. All would depend upon the competency and thoroughness of those to whom the work of revision might be entrusted. I hesitate, therefore, to pronounce decidedly in favor of the attempt."

William B. Davenport, public administrator of Kings county, says: "It seems to me most important that care should be taken in the appointment of attorneys to report upon the question of the revision of the Code of Civil Procedure, whose actual experience in practice will fit them to appreciate changes necessary. That such revision is needed goes without saying. To enter into minute consideration of the changes needed would be impossible within the limits of a letter."

Charles Stewart Davison says: "The appointment of two conservative counsel to report to the next Legislature in relation to a revision of the Code of Civil Procedure would be, in my opinion, desirable. I believe that the enormous increase of the technicalities of practice with the incident reduplication of labor, is to a large extent, attributable to the embracing in the Code of Procedure a vast amount of matter which should be dealt with by the rules of court and matters which in no wise relate to Civil Procedure. I therefore deem it wise

that efforts should be made in the direction of simplification of the practice in this State. I regard the present statute as to a large extent the result of the attempt to provide for every possible contingency by a hard and vast rule, which rule of itself requires construction. Should the intent, with which the present revision is sought, be to still further enlarge and increase the specifications of the Code, I should regret the appointment of revisers. If it be intended in the direction of simplification, I should welcome it."

Eugene E. Sheldon, county judge of Herkimer county, says: "I am inclined to favor the act referred to."

George Underwood, county judge of Cayuga county, says: "I am heartily in favor of the revision of the present Code of Procedure. I have no doubt that careful work can reduce the bulk of the present Code at least one-half, possibly much more. I should hardly think it necessary to appoint counsel to report to the Legislature as to whether a revision is desirable, because it seems to me that very little effort would be needed to convince the Legislature that such revision is desirable. The remedy, it seems to me, would be to apply for a committee on revision."

A. A. Van Dusen, county judge of Chautauqua county, says: "I am in favor of the passage of the act. The details of the work must be left to those who have it in charge, but the time for revision has come."

George H. Adams, of Holmes & Adams, New York city, says: "I very cordially approve of the proposition for a revision of the Code of Procedure. I should advocate some plan for selection of proper counsel, by which joint action could be obtained through committees of conference or otherwise of the bar associations of the State, or be selected by the Governor, who would appoint upon proper investigation and probably upon recommendation of the associations."

Adrian H. Joline, as to the Code, says: "I regard it as a most unwieldy, cumbersome and unscientific thing, and most cordially approve of the proposition to revise it, hence I am in favor of the passage of the act which is in contemplation."

Everett P. Wheeler says: "Our Code of Procedure seems to me entirely too complex. The general criticism I will make upon it is that it attempts to deal too much with details. I own I should like to see it revised and simplified, but I fear that if the attempt should be made, it would have the same result as the last; that is to say, we should have a more rather than a less complicated system."

John L. Cadwalader says: "I believe the work would be better done through the bar associations,

and, at any rate, if any such thing is to be done, that the limits of inquiry and the points to be reached should be very sharply defined by careful consideration before hand."

Francis C. Barlow says: "The Code (which is a combination of the Revised Statutes and the old Code of Procedure) ought to be carefully condensed and simplified, and some 'brains put into it,' as Governor Tilden was accustomed to say. I quite agree about the appointment of a commission to amend it."

William D. Veeder, late surrogate of Kings county, says: "Much of the Code is purely statutory law, and has no place in a Code of Procedure, which should relate exclusively to practice in the courts. I therefore think it proper that an act should be passed providing for the appointment of a commission for the revision of the Code, for the purpose of securing the advice and knowledge of our best practitioners."

John Brooks Leavitt says: "We ought to go further, and instead of trying to amend our present Code of Procedure, abolish it altogether, and have, instead of it, a short practice act, giving courts the power, by appropriate rules, to provide for the practice."

James C. Carter says: "The question of the expediency of a revision of the Code of Procedure is a difficult one. There are revisions and revisions. What we now have is the last of a series of successive revisions, each of which has made the condition of things worse than that which preceded it. It is the easier and more probable thing that a new revision will be of the same character. If such a work could be put in the hands of one or two of the very ablest minds, who perfectly comprehended the subject and perceived the feasibility and necessity of going back to the simplest principles of the law of procedure, and would confine the statutory provisions within a very brief compass and leave all details to be shaped by judicial action in the form of rules of court, a very useful result might be produced."

If, on the other hand, the work is put into ordinary hands, not thoroughly imbued with a scientific knowledge of procedure and with the history of that department of law, we should have another merely perfunctory performance which would tend to increase instead of diminishing the present perplexity."

Wheeler H. Peckham says: "In my judgment, there is nothing which needs revision more than the Code; it is altogether too complex in details, and three times too long. I would be decidedly in favor of a bill, such as is suggested, and that a commission, appointed for the purpose, should have ample power of amendment as well as revision."

The bar associations of the State have taken action in the matter as follows: At a meeting of the Onondaga County Bar Association held at the Court House in the city of Syracuse, on the 19th day of February, 1895, the following resolution was adopted:

*Resolved*, That it is the sense of this association that the present Legislature should provide for the appointment of suitable persons to make the necessary investigation and report to the next Legislature whether or not, in their opinion, a revision of the Code of Procedure should be had, and if so, to what extent, and in what respect.

W. P. GOODELLE,

*President Onondaga Co. Bar Association.*

I do hereby certify the following to be a correct transcript from the proceedings of the Rochester Bar Association of date, January 14, 1895:

*Resolved*, That it is the opinion of this association that the Code of Civil Procedure should be revised and simplified.

*Resolved*, That copies of these resolutions be sent to the Senator and Assemblymen from Monroe county, and to the President of the State Bar Association.

Dated January 15, 1895.

HENRY W. GREGG,

*Secretary.*

At a meeting of the law reform committee of the Bar Association of the city of Brooklyn a resolution was unanimously passed heartily endorsing the proposed act providing for the appointment of counsel to examine and report upon a revision of the Code of Civil Procedure.

HENRY S. RASQUIN,

*Corresponding Secretary.*

At a stated meeting of the Association of the Bar of the city of New York, held on the 12th day of March, 1895, the committee on the amendment of the law presented a report, calling the attention of the association to the condensing and simplifying of the Code of Civil Procedure.

Mr. Cephas Brainerd presented the following resolution:

*Resolved*, That the Association of the Bar of the city of New York recommends the passage of an act by the present Legislature, authorizing the appointment by the Governor of three lawyers, who are to serve without salary, empowered to consider and report at the next session of the Legislature upon the advisability of condensing and simplifying the Code of Civil Procedure, with recommendations as to the respects in which the Code should be revised. Which was adopted.

S. B. BROWNELL,

*Recording Secretary.*

The action of the Bar Association of the city of New York was supplemented by that of its committee as follows referring to the act proposed by the State Association and which is in substance the one given below:

NEW YORK, March 22, 1895.

I hereby certify that at a meeting of the committee on the amendment of the law of the Bar Association of the city of New York, held at its house No. 7 West Twenty-ninth street, the annexed proposed bill entitled, "An act to examine and report upon a revision of the Code of Civil Procedure," a copy of which said proposed bill is annexed hereto, was considered, and after discussion by members of the said committee, the said proposed bill was approved and recommended for enactment. I further certify that the said meeting was held on the evening of March 21, 1895, and that a quorum was present.

CHAS. BULKLEY HUBBELL,

*Secretary of the Committee on the Amendment of the Law.*

As a result of this unanimous action of the Bar Associations of the State and the unanimity of sentiment among the lawyers, Hon. M. E. O'Grady has introduced the following bill in the Legislature:

AN ACT authorizing the appointment of three members of the bar to examine and report upon a revision of the Code of Civil Procedure.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. Within ten days after the passage of this act, the governor shall appoint three members of the bar of this State, who shall examine the Code of Procedure in this State and the Codes of Procedure and Practice Acts in force in other States and countries, and the rules of court adopted in connection therewith, and report thereon to the next legislature in what respects the Civil Procedure in the courts of this State can be revised, condensed and simplified.

§ 2. The persons so appointed shall receive the necessary expenses and disbursements incurred in the performance of the duties herein imposed when the same are properly audited by the comptroller of the State, and the same when so audited shall be paid, on the warrant of the comptroller, out of any moneys in the treasury not otherwise appropriated.

§ 3. The necessary printing in connection with such revision shall be done by the State printer, and copies of the report above provided for shall be distributed to judges of the Court of Appeals, justices of the Supreme Court, county judges and surrogates and to such members of the bar as may request the same, or as the persons so appointed may designate, by December 1, 1895.

§ 4. This act shall take effect immediately.

The proposed revision of chapter 16 of the Code of Procedure presented to the State Bar Association by the committee on law reform has also been put in form of a bill and presented to the Legislature, the article with reference to the writ of *habeas corpus* having been revised so that the proposed amendment includes sections 1991 to 2148 inclusive. We have heretofore published the revision as to the portions other than the writ of *habeas corpus* and proceedings to bring up a person to testify, which are to be found in this week's issue.

#### BRITISH TRANSPORT OF FRENCH WAR MATERIAL TO MADAGASCAR.

THE fact that an agreement has been entered into between the French government and a British firm of ship-owners to transport certain war material to Madagascar invites consideration of more than one interesting question of the incidence and of the limits of international law. The announcement that to avoid controversy the French government has decided that the ships should sail under the French flag by no means disposes of the interest of these questions. The chief among them are: First, has international law been violated by breach of neutrality, having regard, on the one hand, to the general rules of the law of nations on that head, and, on the other, to the treaty obligations of the British government? and, secondly, has the British neutrality law been violated? Taking the last question first, the rules of British neutrality are to be found in the Foreign Enlistment Act, 1870. That statute forbids, among other acts, the dispatching any ship to be employed in the military or naval service of any State at war with any friendly State (§§ 8-13). Augmenting the warlike force of any such ship is also forbidden (§ 10), as are naval and military expeditions against friendly States. If, therefore, the French expedition were directed against a friendly European State instead of against the Hova rulers of Madagascar, there can be little doubt that the British secretary of state would issue his warrant against the ship-owners and the ships. The general rules of international law are substantially the same, and indeed furnish the foundation of the British law of neutrality. In later times, such furnishing of ships for hostile purposes has been held a breach of neutrality, the most famous instance being furnished by the *Alabama* incident. There are, however, features of the present situation which remove the controversy between the French government and the Hovas from the plane of those in which the ordinary rules of international neutrality under the general law and the British statute are applicable. These features are that the British government is under treaty obligation to recognize the French Protectorate over Madagascar; and, to go deeper

still, the rules of European international law as to neutrality have no application to controversies with non-European peoples. As regards our treaty engagements, it is sufficient to say that by the convention of August 5, 1890, the British government undertakes to "recognize the French Protectorate over Madagascar, with all its consequences." The consideration for this promise is to be found in the French concession to the British of all French rights in Zanzibar. It is clear, from the non-interference of the secretary of state, that the interpretation put on that engagement by the British government is one that is incompatible with interference with the French military expedition against the Hova rulers. The varying shades of meaning attached to the term "protectorate" have been well analyzed in a recent work on international law. Protectorate over a fully-organized European State may be compatible with an almost complete condition of internal independence, while a protectorate over an African tribe means in reality the sovereignty of the protecting power over the territory occupied by the tribe. But the truth appears to be that we have another instance of the non-applicability of European rules of international law to controversies with non-European races. No proclamation of neutrality has been issued by any European government, or appears likely to be issued. Again, the French journals call attention to the fact that the rules of the Geneva convention have not been signed by the Hova governors of Madagascar; and, as a consequence, the French government does not anticipate any protection to its medical staff from the Geneva convention of August 22, 1864, and of October 20, 1868. The French government has therefore ordered that the surgeons and attendants of the ambulances and hospitals are to be armed. The surgeons are to retain their revolvers; the attendants are to carry rifles and the same number of cartridges as the soldiers on active service. It would seem that a parallel to this proceeding—and a further illustration of the applicability of European laws of war to non-Europeans—are to be found in the action of the Chinese, who treat the Japanese medical attendants as combatants.—*Law Journal*.

A San Antonio, Texas, lawyer was appealing most eloquently to the jury on behalf of his client, who was being tried for larceny. Even the prisoner himself was moved to tears, and was wiping his eyes with a handkerchief, when his attorney turned and ask the jury to gaze on the honest features of his client, and say if they could believe that it was possible for a man with such an honest face to be guilty of theft. Suddenly the lawyer paused, gasped for breath, and ejaculated: "Well, I'll be blowed if the blankety blank scoundrel hasn't swiped my pocket handkerchief."—*Argonaut*.

## Abstracts of Recent Decisions.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—COLLATERAL SECURITY.**—A creditor of an insolvent who holds collateral security must either surrender the collateral, or have its value determined by the court, and his claim will be allowed for the difference between the amount thereof and the value of the collateral. (*National Union Bank v. National Mechanics' Bank* [Md.], 30 Atl. Rep. 913.)

**ATTACHMENT—UNRECORDED DEED—NOTICE.**—An attaching creditor who, before the completion of his levy and the perfection of his attachment by the issuance of a proper warrant, discovers an unrecorded deed of certain realty from his debtor to another, for a valuable consideration, will be deemed to have such notice thereof as to deprive his subsequent judgment of priority. (*Merchants' Building & Loan Ass'n v. Barber* [N. J.], 80 Atl. Rep. 865.)

**BUILDING CONTRACT—PERFORMANCE.**—A building contract provided that the payments should be made on the architect's certificate, and that the second payment would be due when all the work was completed, and the final payment thirty days later. It was provided that no certificate given, except that for the final payment, should be conclusive evidence of the performance of the contract. *Held*, that a certificate for the second payment did not dispense with the necessity for the final certificate. (*Beharrell v. Quimby* [Mass.], 39 N. E. Rep. 407.)

**CARRIERS—INJURIES TO PASSENGERS.**—In an action against a carrier for personal injuries caused by the negligence of defendant's servant in driving the coach into a post, thereby causing the horses to run away, evidence of negligence on the part of the servant in deserting the coach after the collision is admissible. (*Caveny v. Neely* [S. Car.], 20 S. E. Rep. 806.)

**CORPORATIONS—INSOLVENCY—RECEIVER.**—While the mere insolvency of a corporation is not enough to authorize the appointment of a receiver at the suit of general creditors, yet when it clearly appears that on account of such insolvency, and the misconduct of its officers, the corporation is no longer able to proceed with its business, or its assets are in process of being fraudulently misapplied, to the injury of creditors, who are without other adequate means of relief, it becomes the duty of the court to appoint a receiver. Under such circumstances, the property of the corporation becomes a special fund, out of which creditors are entitled to satisfaction of their demands, and hence is the subject of an equitable lien or trust for their benefit. (*Doe v. Northwest Coal & Transportation Co.* [U. S. C. C., Ore.], 64 Fed. Rep. 928.)

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.**—An engineer who, to make necessary repairs, goes out on the running board of his locomotive while it is running at seventeen or eighteen miles an hour, and while it is unusually dangerous because of the defects in the engine, when the engine and train can be stopped or the speed slackened in a short distance, is guilty of such contributory negligence as will preclude a recovery for his death, caused by being thrown from the engine. (*Southern Pac. Co. v. Johnson* [U. S. C. C. of App.], 64 Fed. Rep. 951.)

**MUNICIPAL CORPORATION—INDEPENDENT CONTRACTOR.**—The defendant city contracted for the construction of certain sewers according to plans and specifications furnished by defendant. This work did not necessarily involve an injury to plaintiff's land. The defendant did not employ and had no power to dismiss workmen, though by the contract they were to be residents of the city. The superintendent of sewers and inspector, city officers, were authorized to give instructions so that certain results might be obtained, but had no control over the contractor's men. *Held*, that the contract being with an independent contractor, plaintiff could not recover from the defendant city for injuries caused by the negligence of the contractor's servant's. (*Harding v. City of Boston* [Mass.], 39 N. E. Rep. 411.)

**NEGLIGENCE—DEFECTIVE SIDEWALKS.**—In an action against a city for injuries caused by a defective sidewalk, evidence of the condition of the sidewalk two days after the injury is admissible where there was no change therein. (*Lohr v. Borough of Philipsburg* [Penn.], 30 Atl. Rep. 822.)

**MUNICIPAL IMPROVEMENTS—DELEGATION OF POWERS.**—The exclusive power over street improvements conferred by the Legislature on the legislative department of the various city governments cannot be delegated to any officer or committee, but must be exercised by that department itself as a body. (*Bolton v. Gilleran* [Cal.], 38 Pac. Rep. 881.)

**NEGLIGENCE—INJURIES—JUDGMENT—ACTION OVER.**—The lessee of a wharf who pays a judgment recovered against him for injuries caused by the negligence of his sub-lessee, without negligence on his part, may recover indemnity from the sub-lessee without having notified him of the pendency of the prior action. (*Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola* [N. Y.], 39 N. E. Rep. 360.)

**PASSENGER ELEVATOR.**—In an action against the owner of a building for the death

of a child through the sudden and negligent starting of a passenger elevator by the elevator boy, evidence that the boy had on previous occasions started the elevator in a like sudden and negligent manner is not admissible. (*T. & H. Pueblo Bldg. Co. v. Klein* [Colo.], 38 Pac. Rep. 608.)

**NEGOTIABLE INSTRUMENT—ACTION BY ASSIGNEE—SET OFF.**—In an action by an assignee of a note under seal against the maker, defendant having proved the purchase before suit brought of an overdue note of the payee of the note sued on, to defeat the rights of set-off, the burden of proving notice to defendant, at the time he bought the note, that the note sued on had been assigned to plaintiff, is on plaintiff. (*Burford v. Fergus* [Penn.], 30 Atl. Rep. 844.)

**NOTE—RELEASE OF INDORSER.**—A note indorsed by defendant as an accommodation was transferred by the plaintiff payee to a bank, and, when due, was substituted, without defendant's knowledge, by two new notes by the same makers, and indorsed by plaintiff and another, the original note being surrendered to the makers: *Held*, that defendant was discharged from liability, although the makers of the original note afterward delivered it to plaintiff, that he might hold defendant as an indorser. (*Green v. Skinner* [Miss.], 16 South. Rep. 378.)

**NEW TRIAL—INADEQUACY OF DAMAGES.**—Where, in an action for personal injuries, the jury finds, in effect, that the plaintiff has been injured through the negligence of the defendant, without any contributory negligence on his own part, and the evidence, without conflict, shows that his injuries were substantial, yet the jury awards him practically no damages at all, the verdict will be set aside and a new trial awarded. (*Carter v. Wells, Fargo & Co.* [U. S. C. C., Cal.], 64 Fed. Rep. 1005.)

**PUBLIC LAND—GRANT BY STATE—NAVIGABLE WATERS.**—The State holds the lands under the navigable or tide waters of the State as sovereign, and not as proprietary, and cannot grant them to private persons, to be by them reclaimed for private use. (*Coxe v. State* [N. Y.], 39 N. E. Rep. 400.)

**RAILROAD COMPANY—STREET RAILWAY.**—In a complaint in an action against a street railroad company for personal injuries is not demurrable because the only allegation as to negligence is that defendant's servant "negligently ran said car against the wagon." (*Citizens' Street R. Co. v. Lowe* [Ind.], 39 N. E. Rep. 165.)

**REMOVAL OF CAUSE—SEPARATE CONTROVERSY.**—There is not a separable controversy, as required by the removal statute, in an assessment proceeding for

municipal improvements, where the court which conducts it determines the district on which the assessment shall be laid, and therefore who shall be parties, and in a single judgment each piece of property is assessed for an amount bearing the same proportion to the full amount to be collected that its benefits bear to the full amount of benefits. (*In re City of Chicago* [U. S. C. C., Ill.], 64 Fed. Rep. 897.)

**TAXATION—RECOVERY OF TAXES PAID.**—A corporation which has paid a tax assessment upon its capital stock, levied erroneously, but within the jurisdiction of the assessing officers, and so not illegally, cannot recover the amount so paid. (*United States Trust Co. of New York v. Mayor, etc., of City of New York* [N. Y.], 89 N. E. Rep. 388.)

**WATERS—STREAMS ON PUBLIC LAND—APPROPRIATION FOR MINING PURPOSES.**—In localities where rights by prior appropriation of the streams on public lands for mining and irrigating purposes became lawful through the acquiescence of the government and the customs of the locality, the common-law rights of riparian owners were modified to the extent of the rights so acquired. (*Isaacs v. Barber* [Wash.], 38 Pac. Rep. 871.)

## New Books and New Editions.

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# The Albany Law Journal.

ALBANY, APRIL 13, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

**I**F the provisions of the Constitution can be set aside by an act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.

"If the court sanctions the power of discrimination in taxation, and nullifies the uniformity mandate of the Constitution, as said one who has made all his life a study of our institutions, it will mark the hour when the sure decadence of our present government will commence.

"If the purely arbitrary limitation of \$4,000 in the present law can be sustained, none having less than that amount of property being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum — parties possessing that amount alone being found to bear the burdens of government; or the limitation may be designated at such an amount as a board of 'walking delegates' may deem necessary.

"There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution, which require its taxation to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number."

(Judge Stephen J. Field in his opinion on the unconstitutionality of the Income Tax Act of 1894.)

"You can look all through this awful business with a learned spirit; no passionate hatred of this great fraud can cloud your mental vision or shake the even balance of your judgment.

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When the omnipotent lie shall be throned, and sceptered and crowned, you think we ought all of us to fall down and worship it as the hope of our political salvation. You teach us, and perhaps we will learn, that under such a rule we are better off than if the truth had prevailed and Justice been triumphant."

(Jeremiah S. Black to the Electoral Commission, Feb. 27, 1877. Cong. Rec., Part IV, vol. V, p. 190, 44th Cong.)

"In Rama was there a voice heard, lamentation and weeping and great mourning, Rachel weeping for her children and would not be comforted because they are not."

(Matt. II, 8.)

The majority of the Supreme Court of the United States, intrusted with the great responsibility of standing between the rights, equalities and privileges of the Constitution and the socialistic, vicious and pernicious acts of Congress, have refused to boldly assert their position and protect their country from the insidious evils of a nefarious statute. The issue in the legal fight which has ended so unsatisfactorily, and unjustly, was not whether certain individuals should bear the burdens of taxation, but rather whether the stamp of approval of socialism should be placed on a statute of this country, whose Constitution recognizes no classes, but only the equality of its citizens. There never should have entered into the determinations of some members of the court the question as to whether the residents of their sections should be relieved of their just part of the expenses of government, but the adjudication of each should have been actuated by the same spirit of loyalty of country which inspired other members of the same court to declare, that the Income Tax Act of 1894 was wholly against the clear intent, meaning and phraseology of the Constitution. There was no reason why a learned jurist should quibble with the right and duty of the Supreme Court of the United States, by declaring, that the power of the tribunal of passing on the constitutionality of acts of Congress, should be discreetly and carefully exercised, and it was a hollow mockery for the court to hold that the federal government has power to lay "direct taxes, and duties, imposts and excises" according to certain clear regulations, and then distort the meaning of words and phrases to please their local interests. The very action of the



court in only declaring the taxation on rents from real property, and interest on municipal bonds unconstitutional, laid the burden of paying the expenditures of the country on industry, and relieved property from its just proportion of the tax. Partial failure signalized the triumph of capital, and unworthy action will probably result in the repeal of the unhappy statute. At a critical time when the eyes of the whole country were watching the conflict, when broad minded men hoped for a crushing defeat of the pet schemes of the scum of Europe, there was a voice heard, lamentation and weeping, Rachel weeping for her children and would not be comforted because they are not (hers).

The holdings of the court are simple and clear, in so far as the construction of the Constitution as to taxation are concerned. They are:

"1. That, by the Constitution, federal taxation is divided into two great classes: Direct taxes and duties, imposts and excises.

"2. That the imposition of direct taxes is governed by the rule of apportionment among the several States according to numbers, and the imposition of duties, imposts, and excises by the rule of uniformity throughout the United States.

"3. That the principle that taxation and representation go together was intended to be and was preserved in the Constitution by the establishment of the rule of apportionment among the several States, so that such apportionment should be according to numbers in each State.

"4. That the States surrendered their power to levy imposts and to regulate commerce to the general government, and gave it the concurrent power to levy direct taxes in reliance on the protection afforded by the rules prescribed, and that the compromises of the Constitution cannot be disturbed by legislative action.

"5. That these conclusions result from the text of the Constitution, and are supported by the historical evidence furnished by the circumstances surrounding the framing and adoption of that instrument, and the views of those who framed and adopted it.

"6. That the understanding and expectation at the time of the adoption of the Constitution was, that direct taxes would not be levied

by the general government, except under the pressure of extraordinary exigency, and such has been the practice down to August 15, 1894. If the power to do so is to be exercised as an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection in disposing of the present case.

"7. That taxes on real estate belong to the class of direct taxes, and that the taxes on the rent or income of real estate, which is the incident of its ownership, belong to the same class.

"8. That by no previous decision of this court has this question been adjudicated to the contrary of the conclusions now announced.

"9. That so much of the act of August 15, 1894, as attempts to impose a tax upon the rent or income of real estate without apportionment is invalid."

And in relation to municipal bonds it is "the court is further of opinion that the act of August 15, 1894, is invalid so far as it attempts to levy a tax upon the income derived from municipal bonds. As a municipal corporation is the representative of the State and one of the instrumentalities of the State government, the property and revenue of municipal corporations are not the subjects of federal taxation, nor is the income derived from State, county and municipal securities, since taxation on the interest therefrom operates on the power to borrow before it is exercised, and has a sensible influence on the contract, and, therefore, such a tax is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

Turning from the unsatisfactory disagreement in relation to the rest of the act to the opinion of Justice Stephen J. Field, we may find a brilliant, intellectual and learned discussion of the power of the government to levy taxes; in speaking of the history of taxation in this country Justice Field says:

"The subject of taxation in the new government which was to be established created great interest in the convention which framed the Constitution, and was the cause of much difference of opinion among its members and earnest contention between the States. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it

was obliged to make requisitions upon the States, which were respected or disregarded at their pleasure. Great embarrassments followed the consequent inability to obtain the necessary funds to carry on the government. One of the principal objects of the proposed new government was to obviate this defect of the confederation by conferring authority upon the new government by which taxes could be directly laid whenever desired. Great difficulty in accomplishing this object was found to exist. The States bordering on the ocean were unwilling to give up their right to lay duties upon imports, which were their chief source of revenue. The inland States, on the other hand, were unwilling to make any agreement for the levying of taxes directly upon real and personal property, the smaller States fearing that they would be overborne by unequal burdens forced upon them by the action of the larger States.

In this condition of things great embarrassment was felt by the members of the convention. It was feared at times that the effort to form a new government would fail. But happily a compromise was effected by an agreement that direct taxes should be laid by Congress by apportioning them among the States according to their representation. In return for this concession by the inland States, the States bordering on navigable waters consented to relinquish to the new government the control of duties, imposts, and excises, and the regulation of commerce, with the condition that the duties, imposts, and excises should be uniform throughout the United States. So that, on the one hand, any thing like oppression or undue advantage of any one State over the others would be prevented by the apportionment of the direct taxes among the States according to their representation, and, on the other hand, any thing like oppression or hardship in the levying of duties, imposts, and excises would be avoided by the provision that they should be uniform throughout the United States. The Constitution, accordingly, when completed, divided the taxes which might be levied under the authority of Congress into those which were direct and those which were indirect."

In continuing, Justice Field says, concerning the tax on rents and income of real property:

"As stated, the rents and income of real

property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should, at this day, question a doctrine which has always been thus accepted by common-law lawyers. It is so declared in approved treatises upon real property and in accepted authorities upon particular branches of real-estate law, and has been so announced in decisions in the English courts and our own courts without number. Thus, in Washburn on Real Property, it is said that 'a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise.' (Vol. 2, p. 695, § 30.)

"In Jarman on Wills it is laid down that 'a devise of the rents and profits or of the income of land, passes the land itself, both at law and in equity, a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act of 1 Vict., ch. 26, such a devise carries the fee-simple, but before that act it carried no more than estate for life, unless words of inheritance were added.' Mr. Jarman cites numerous authorities in support of his statement. (South v. Alleine, 1 Salk. 228; Doe, d. Goldin, v. Lakeman, 2 B. & Ad. 42; Johnson v. Arnold, 1 Ves. 171; Baines v. Dixon, 1 D. 42; Mannox v. Greener, L. R., 14 Eq. 456; Bland v. Bill, 2 D. M. & G. 781; Plenty v. West, C. B. 201.)

"And what answer do we receive to the adjudications? Those rejecting them furnish no proof that the framers of the Constitution did not follow them, as the great body of the people of the country then did. An incident which occurred in this court and room twenty years ago may have become a precedent. To a powerful argument then being made by a distinguished counsel upon a public question, one of the judges exclaimed that there was a conclusive answer to his position, and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a

conclusive answer to them in the fact that they also are of a different opinion. I do not think so. The law, as expounded for centuries, cannot be set aside or disregarded because some of the judges are now of a different opinion from those who, a century ago, followed it in framing our Constitution. Hamilton, speaking on the subject, asks: 'What is property but a fiction without the beneficial use of it?' And adds: 'In many cases the income or annuity is the property itself.' It must be conceded that whatever affects any element that gives an article its value in the eye of the law affects the article itself. In *Brown v. Maryland* (12 Wheat. 419) it was held that a tax on the occupation of an importer is the same as a tax on his imports, and as such was invalid. It was contended that the State might tax occupations, and that this was nothing more, but the court said, by Chief Justice Marshall (p. 444): 'It is impossible to conceal from ourselves that it is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that the tax on the sale of an article imported only for sale is a tax on the article itself.' "

The clearness and conciseness of the opinion as to the question of uniformity of levying indirect taxes is a special feature; on this question Justice Field writes:

"But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and an equally cogent objection to it. In taxing incomes other than rents and profits of real estate, it disregards the rule of uniformity which is prescribed in such cases by the Constitution. The eighth section of the first article of the Constitution declares that 'the Congress shall have no power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States.' Excises are a species of tax consisting generally of duties laid upon the manufacture, sale or consumption of commodities within the country, or upon certain callings or occupations often taking the form of exactions for licenses to pursue them. The

taxes created by the law under consideration as applied to savings banks or to insurance companies, whether fire, life or marine, or to building, or other associations, or to conduct any other kind of business, are excise taxes, and fall within the requirements, so far as they are laid by Congress, that they must be uniform throughout the United States.

"The uniformity thus required is the uniformity throughout the United States of the duty, impost and excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done. If, for instance, one kind of wine or grain or produce has a certain duty laid upon it proportioned to its quantity in New York, it must have a like duty proportioned to its quantity when imported at Charleston or San Francisco, or if a tax be laid upon a certain kind of business proportioned to its extent at one place, it must be a like tax on the same kind of business proportioned to its extent at another place. In that sense the duty must be uniform throughout the United States."

It is contended by the government that the Constitution only requires an uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the States, however variant it might be in different places of the same State. But it could not be sustained in the latter case without defeating the equality, which is an essential element of the uniformity required so far as the same is practicable.

Mr. Justice Miller, in his lectures on the Constitution, 1889-90, pages 240 and 241, said of taxes levied by Congress: "The tax must be uniform on the particular article, and it is uniform if it is made to bear the same percentage over all the United States. That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the articles which it should tax."

In discussing generally the requirement of uniformity found in State Constitutions, he

said: "The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word 'uniform,' which has been adopted, holding that the uniformity must refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times."

One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts, and excises to be "uniform throughout the United States," is that the law imposing them should "have an equal and uniform application in every part of the Union." If there were any doubt as to the intention of the States to make the grant of the right to impose indirect taxes, subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt, as said by counsel, should be resolved, in the interest of justice, in favor of the taxpayer. Exemptions from the operation of a tax always create inequalities. Those not exempted must in the end bear an additional burden or pay more than their share. A law containing arbitrary exemption can in no just sense be termed uniform. We do not think that Congress has rightfully the power, at the expense of others owning property of the like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine, and accident insurance companies, formed under the laws of the various States, which advance no national purpose or public interest, and exist solely for the pecuniary profit of their members. When property is exempt from taxation the exemption, as has been justly stated, must be supported by some consideration that the public and not private interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the Legislature to exempt them. (*Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Barbour v. Board of Trade*, 82 Ky. 645, 654, 655; *Lexington v. McQuillan's heirs*, 9 Dana, 513, 516, 517, and *Sutton's heirs v. Louisville*, 5 Dana, 28, 31.)

The discriminating features of the law are shown to be:

"The income tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive an income of \$4,000 and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says, in one of his papers (the 'Constitutionist'): 'The genius of liberty repudiates everything arbitrary in taxation. It exacts that every man, by a definite and general rule, shall know what proportion of his property the State demands. Whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue.' The legislation in the discrimination it makes is class legislation. Whenever a distinction is made in the burdens a law imposes, or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the constitution which followed the late civil war had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics as a class at double the rate of Protestants, and Jews at another and separate rate. Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose, he will have a greater regard for the government and more self-respect for himself, feeling that though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune."

Justice Field also shows other considerations against the law:

"But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and State; to the invalidity of taxation by the United States on the income of the bonds and securities of the States and of their municipal bodies, and the invalidity of the taxation of the salaries of the United States judges. As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' (Loan Association v. Topeka, 20 Wall, 655, and Parkersburg v. Brown, 106 U. S. 487.) The inherent and fundamental nature and character of a tax is, that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

"This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income tax law as passed by congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others, when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon them, showing that the action of the legislative power upon them has been arbitrary and capricious, and sometimes merely fanciful."

In conclusion, in speaking of the relative rights of the United States and separate States to tax, Justice Field sums up with brevity and great force thus:

"There is no dispute about the general rules

of the law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments, which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly they may be taxed heavily; if justly, oppressively. Their operation may be impeded, and may be destroyed if any interference is permitted. Hence the beginning of such taxation is allowed on the one side and is not claimed on the other." And, again: "A municipal corporation like the city of Baltimore is a representative not only of the State, but it is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its power or destroy its existence. As a portion of the State, in the exercise of a limited portion of the power of the State, its revenues, like those of the State, are not subject to taxation."

We publish the proposed revision of the provisions relative to the writ of *habeas corpus*, completing chapter 16 of the Code of Civil Procedure in accordance with the plan proposed by J. Newton Fiero, Chairman of the Committee on Law Reform of the State Bar Association. The articles of title 2 of chapter 16, other than that relating to the writ of *habeas corpus*, have heretofore been printed in the JOURNAL, as they were submitted to the State Bar Association at its annual meeting in January,

This bill has been introduced in the Assembly by Hon. Fred. A. Robbins, Chairman of

the Committee on Codes, a lawyer greatly interested in the work of law reform, and who had to a considerable extent made a study of the question of procedure. It is understood to have the approval of a very large number of the members of the Legislature who have examined its features. The bill provides that it shall go into effect on the first day of July, the object being that a six months' trial of its provisions may be made before the convening of the next Legislature, a time sufficiently long to test its good qualities and commend it as a basis for further revision in case it is successful; and not so long but that in case it fails to accomplish the object brought about, no serious inconvenience will be suffered by members of the bar by reason of the change of practice. The point of the revision lies in its condensation of the language and simplification of the methods of the present statute. In that it is brief, vigorous and clear, it can scarcely fail to be an improvement and marked advance upon the present Code.

The *Internal Revenue Record* contains an article by Thomas Harland, who for six years was a deputy commissioner of internal revenue, commenting on the practical difficulties of collecting the income tax. In opening, Mr. Harland writes:

"A careful examination of those provisions of the act of Congress of August 25, 1894, which provide for a tax upon incomes leads to the conclusion that the machinery provided for its assessment is so inadequate that the government will be practically powerless to collect the tax unless it is willing to accept such returns as taxpayers may voluntarily make, without any attempt to verify the correctness of such returns."

The next step is to show that the deputy collectors provided for in the Income Tax law of 1893 are "not officers of the United States," and that only officers of the United States can lawfully perform the duties which that act seeks to make incumbent upon deputy collectors. The functions of assessment can only be performed by those persons "who are distinctively government officers, and if Congress can by law designate the persons by whom they are to be performed, then Congress can clearly usurp the whole power of appointment to office, which is, by the Constitution, vested elsewhere."

In the first act referred to above, that of 1862, in the disregard of the limitations of the Constitution which was so common while the government was exercising its war powers, appointment of the assistant assessors was vested in the assessor. The act of 1864, however, recognized the unconstitutionality of such an appointment, and vested the appointment in the secretary of the treasury.

The Constitution provides that the President shall nominate and, by and with the advice and consent of the Senate, shall appoint all officers of the United States whose appointment is not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The first section of the act of March 3, 1865, amended the act of 1864 so that appointments of assistant assessors were to be made by the assessors. This act having soon afterward been brought to the attention of the attorney-general, the Hon. James Speed, he rendered an opinion to the secretary of the treasury. It held that the act, so far as it attempted to vest the appointment of assistant assessors in the assessor, was unconstitutional.

The recent act, in its twenty-ninth section, attempts to authorize a deputy collector to increase the amount of any return if he has reason to believe the same is understated. It is also by the same section made the duty of the deputy collector to make the list according to the best information he can obtain in case of a failure to make return. Under the proviso to that section, if the deputy collector be satisfied of the truth of a declaration made by a taxpayer that he has been assessed elsewhere, or that he was not possessed of an income of \$4,000, the person shall be exempt. No deductions claimed in certain cases are to be made or allowed until approved by the collector or deputy collector. Any person feeling aggrieved by the decision of the deputy collector may appeal to the collector. All these provisions manifestly contemplate the performance by the deputy collector of the *quasi* judicial functions formerly devolved upon the assessor and his assistants, and which were, by the act of 1872, transferred to the commission-

ers. As the old law provided that the assistant assessors should go through the districts and make lists of the persons liable to pay any tax, the present law requires the deputy collectors to do the same thing. As the old law required the assistant assessor to make a list for any person who should consent to disclose the particulars of his business, the present law provides that the deputy collector may do the same thing. As the old law provided that when any person neglected to render any return or rendered a false return, the assistant assessor should, according to the best information which he could obtain, make the return, so the present law requires the deputy collector to do this same thing, and section 35 provides that whenever a deputy collector shall believe that a true and correct return of the income of a corporation has not been made, the deputy collector shall, if the corporation refuse to exhibit its books, make, from such information as he can obtain, an assessment of the amount of income, which said assessment shall be the lawful assessment of such income. In other words, the present law clearly attempts to vest in deputy collectors those *quasi* judicial functions which in the acts of 1862 and 1864 were vested in assistant assessors, and which by the act of 1872 were transferred to the commissioner of internal revenue.

Mr. Harland claims that the duty imposed on the taxpayer of making a return is fully discharged if he delivers the return to the officer when the latter calls at the residence or place of business of the taxpayer; he says:

"Now, what was the contemporaneous construction of the old acts? It was uniformly held that no penalty was incurred, in the case of annual taxes, unless the taxpayer failed to make the return after being served with the notice requiring him to make such return. Thus on the 26th of April, 1866, the commissioner issued instructions for the collection of the annual taxes of that year, and he says: 'Assessors should instruct their assistants to call personally upon those who have not returned their income on the first Monday in May. If any person is not at home, the notice on the back of form 24 (being the same notice as that referred to above from Boutwell's Manual) should be filled out and the blank left. This being done, it becomes the duty of the

taxpayer to seek the assistant assessor and deliver his return.'"

Mr. Harland observes that the provisions of section 34 of the present act are new, and finds that the second provision of that section is substantially identical with one in the act of 1864, amended in the year 1866 so as to provide that if any person failed to render the annual return at the time fixed by law the assistant assessor should serve a notice requiring the return to be made within ten days, and the act then proceeds as follows: "And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or if any person, without notice, as aforesaid, shall not deliver a monthly or other list or return at the time required by law," it shall be lawful for the assessor to summon such person to appear and answer interrogatories, etc.

Then, once more recalling that it is only after a person has been notified, and still neglects to render a return, that he is liable to be summoned before a collector, he proceeds to quote a statute now on the books as making this provision:

"When any person refuses or neglects to render any return required by law, the collector or deputy collector shall make the return, according to the best information which he can obtain, *including that derived from the evidence elicited by the examination of the collector*. And the section further provides that in case of neglect occasioned by sickness or absence, the collector may allow such *further time* for making or delivering such list or return as he may deem necessary, not exceeding thirty days. This further time that the collector may allow is evidently not intended to have reference to the special date fixed by law for the return, with the fixing of which the collector has nothing to do, but is intended to mean further and beyond the ten days following the collector's original notice."

It seems clear from all this that, so far as any duty is imposed upon the taxpayer by the terms of section 34, that duty is fully performed if he makes the return when called upon by the officer.

Still another consideration presented is that, under the new law, it cannot be said that any

duty is imposed upon the taxpayer of making a return. The choice is left to him whether to make a return or to disclose the facts to the officer, and allow the officer to make the return. If he chooses the latter course, he complies with the law as fully as if he prepared the return himself.

Taking the two sections, 29 and 34, together, it is plainly the duty of any court which may be called upon to construe the act, to consider the two sections together, and, if possible, to put such construction as will reconcile the two; and inasmuch as section 29 prescribed no time upon which the return shall be made, it would seem that the two sections should be construed together, and the duty imposed by section 29 should be regarded as precisely the same as that imposed by section 34.

But if the true construction of section 29 is such as to make it conflict with the provisions of section 34, it is plain, in accordance with the well-settled principles for the construction of statutes that section 34 must prevail.

In writing of the returns of corporations, Mr. Harland contends:

First. While the law calls upon the taxpayer to make a return or to consent to disclose the particulars of his business, it does not require the taxpayer in the first place to seek the officer, but does require the officer to seek the taxpayer.

Second. If the taxpayer chooses to disclose the particulars instead of making his own returns, the law makes it the duty of the officer to make his return. That duty is precisely the same as that imposed upon the officer if no return is made, except that in the one case his official action is based upon the disclosures made by the taxpayer himself, and in the other upon such information as he can otherwise obtain. In either case the making the return involves a determination of what is the amount of taxable income, and this is an official function which cannot be performed by a deputy collector. The taxpayer has, therefore, the right to require that his disclosures be made to and that the return be made by the collector himself.

Deputy collectors can lawfully perform those duties which the law imposes upon the collectors which are purely ministerial in their nature, and if a taxpayer is called upon by a deputy collector, and delivers to such deputy a return, this return may be delivered by the deputy to the collector, and an assessment based upon it will be sufficient; but if the taxpayer, when

thus called upon by a deputy, insists upon his rights to have the officer make the return, then it would be necessary for the collector himself to arrange an interview with the taxpayer. If the collector himself should call upon a taxpayer, the return must be at once made or the disclosure at once offered. If either a collector or a deputy collector calls at the residence or place of business of a taxpayer when he is absent, and leaves the ten-day notice, it would then be necessary for the taxpayer, within the ten days, to seek the collector, and either render his return or disclose the particulars of his business. This course being followed, no penalty will be incurred.

Hon. William M. Springer of Springfield, Ill., has been recently appointed judge of the United States Court for the Northern District of the Indian Territory by President Cleveland.

Judge Springer was a member of the General Assembly of Illinois of 1870-72. He has served for many years in Congress and taken a prominent part in the debates, and been an acknowledged leader of the Democratic party in that body. He was chairman of the banking and currency committee in the last Congress and of the ways and means committee in the preceding Congress. He has always kept up his legal reading, and has been counsel before the United States Supreme Court in many cases during his Congressional career.

Judge Springer was born in New Lebanon, Indiana, May 30, 1836, removing to Jacksonville, Illinois, in 1848. After being graduated from the University of Indiana in 1858, he was admitted to the bar in 1859, December 28, taking up his residence in Springfield, where he has resided ever since. He was secretary of the State Constitutional Convention in 1862, served in the Legislature in 1871-2, and entered Congress as a Democrat March 4, 1875. In 1876 Mr. Springer was a member of the Potter committee for investigation of the disputed election, and of the joint committee that reported the electoral commission bill. He has served on many important committees.

In the Fiftieth Congress, as chairman of the committee on territories, he secured favorable action on the bills for the organization of Oklahoma and for the admission of the Dakotas, Montana and Washington, as States. For several years he strongly advocated tariff reform. Standing next to Mr. Mills on the ways and means committee at the time of the introduction of the Mills bill, he was given the chairmanship of that committee in the Fifty-second Congress, after the heated fight between Crisp and Mills for the speakership had rendered the latter's appointment impossible. In the Fifty-third Congress Springer was superseded as chairman by Mr. Wilson.



PROPOSED REVISION OF PART OF TITLE  
II. CHAPTER XVI, CODE OF CIVIL PRO-  
CEDURE.

(Sections 2008-2066.)

- ART. I. *The writ of habeas corpus to inquire into the cause of detention.* (Sections 2015-2069 present Article III.) Numbered sections 1991-2021 in proposed revision.
- ART. II. *Proceedings to bring up a person to testify.* (Sections 2008-2014 present Article II.) Numbered sections 2080-2083 in proposed revision.

ARTICLE I.

Article II of Title II, Chapter XVI - Sections 2015-2066 of Present Code.)

THE WRIT OF HABEAS CORPUS TO INQUIRE INTO  
THE CAUSE OF DETENTION.

SEC. 1991. The writ of *habeas corpus*.

1992. Who may prosecute the writ.
1993. When the writ will not be granted.
1994. When writ to issue without application.
1995. Application for writ; how and to whom made.
1996. Contents of petition.
1997. When writ to be granted, and when returnable.
1998. Contents of writ.
1999. Mode of service; fees and undertaking.
2000. Mode of service other than personal.
2001. Writ to be obeyed.
2002. Prisoners to be produced and return to writ.
2008. Proceedings on disobedience of writ.
2004. Precept to bring up prisoner, and how executed.
2005. Warrant to bring up prisoner about being removed.
2006. When offender to be arrested; execution of warrant; proceedings to relieve prisoner; to punish offender.
2007. Notice to person interested in detention.
2008. Proceedings on return of *habeas corpus*.
2009. When prisoner to be discharged in civil cases.
2010. Prisoner may controvert return; proofs thereupon.
2011. Custody of prisoner pending the proceedings.
2012. Proceedings upon irregular commitment.
2018. Order substituted for writ of discharge; service and effect thereof.

- SEC. 2014. When prisoner discharged not to be reimprisoned; when he may be.
2015. When appeal may be taken under this article.
2016. Prisoner who appeals may be admitted to bail.
2017. Recognizance of prisoner.
2018. Custody of prisoner until he gives bail.
2019. When recognizance to be valid for an adjournment, etc.
2020. Penalty for refusing copy of process, etc.
2021. Contempt, in what cases.

SECTION 1991. *The writ of habeas corpus.*—The provisions of this article regulate the proceedings upon all writs of *habeas corpus*. The writ must be issued under the seal of the court by which it is granted or of the court of which the judge or justice granting it is a member, except that when returnable in the Supreme Court it must be under the seal of that court. It must be issued on behalf of the people of the State, but if issued on the application of a private person, it must show that it was issued on the relation of such person. The judge granting the writ or presiding at the term at which it was granted must indorse an allowance thereof with the date of such allowance, and it shall be tested in his name.

(§§ 1992, 1994, 1996, 2066.)

§ 1992. *Who may prosecute the writ.*—A person within the State, imprisoned or restrained of his liberty for any cause or upon any pretense, is entitled, except in one of the cases hereinafter specified, to a writ of *habeas corpus* for the purpose of inquiring into the cause of the imprisonment or restraint, and in a case prescribed by law of delivering him therefrom.

(§ 2015 in part.)

§ 1998. *When the writ will be granted.*—A person is not entitled to a writ of *habeas corpus* unless the time for which he may legally be detained has expired: (1) When he has been committed or is detained by virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court. (2) Where he has been committed, or is detained, by virtue of a final judgment, order or decree of a competent tribunal of civil or criminal jurisdiction, including the proceedings for a criminal contempt, specially and plainly charged in a commitment made by a competent court, officer of tribunal; or by virtue of an

execution or other process issued upon such a judgment, decree or final order.

(§§ 2016, 2032, 2034.)

§ 1994. *When writ to issue without application.*—Where any justice or judge, authorized to grant the writ, has evidence, in a judicial proceeding before him, that any person is illegally imprisoned or restrained in his liberty within the State, he must issue a writ of *habeas corpus* for the relief of that person, although no application therefor has been made.

(§ 2025.)

§ 1995. *Application for writ; how and to whom made.*—Application for a writ of *habeas corpus* must be made either by the person for whose relief it is intended, or some other person in his behalf, to either of the following courts or officers: 1. Any justice of the Supreme Court within the State. 2. A Special Term of the Supreme Court held within the judicial district where the prisoner is detained. 3. An officer authorized to perform the duties of a justice of the Supreme Court, at chambers, being or residing within the city or county where the prisoner is detained; or, in case there is no such officer within such city or county capable of acting, or in case those who are capable of acting have refused to grant the writ, then, upon proof being made of such facts to an officer authorized to perform those duties who resides in an adjoining county.

(§§ 2017–2018.)

§ 1996. *Contents of petition.*—The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true, and must state, in substance: (1) That the person in whose behalf the writ is applied for is imprisoned or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown. (2) That he has not been committed, and is not detained by virtue of any judgment, decree, final order or process. (3) The cause or pretense of the imprisonment or restraint, according to the best knowledge and belief of the petitioner. (4) If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition, unless the petitioner avers, either that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy should not be made; or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person having the prisoner in his custody, and that the copy was refused. (5) If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

(§ 2019.)

§ 1997. *When writ to be granted, and when returnable.*—A court or judge authorized to grant the writ of *habeas corpus* must grant it without delay whenever a proper petition therefor is presented, and the issuing of the writ is not prohibited by the provisions of this article. It may be issued and served on Sunday, but cannot be made returnable on that day.

(§ 2020, except the forfeiture, which is omitted; § 2015 in part.)

§ 1998. *Contents of writ.*—The writ shall direct the person imprisoned or confined to be brought before the judge or justice of the court granting it, or when granted by a justice or at a term outside the county where the person is imprisoned or confined, in his discretion, before any judge, justice or court in the county of such imprisonment who might have granted the writ, either forthwith or at a time fixed therein to abide the order or direction of the judge, justice or court, as the case may be.

(§§ 1998, 2021, 2023.)

§ 1999. *Mode of service; fees and undertaking.*—The writ must be personally served, in the same manner as a summons issued out of the Supreme Court, except in the case prescribed in the next section. If the prisoner is in the custody of an officer, the fees allowed by law must be tendered him, and also an undertaking, with at least one surety, in a sum specified therein, to the effect that the surety will pay all charges of carrying back the prisoner, if he shall be remanded, and that the prisoner will not escape from custody until returned to the jail or prison from which he was taken. If the prisoner is detained for a sum of money, the undertaking must be for at least twice that sum. If not, it must be one thousand dollars. In case the writ is directed to one not an officer, the applicant may, in the discretion of the judge or court, be required to pay the charges of bringing up the prisoner. In such case the fees, not exceeding those allowed by law to a sheriff for similar service must be fixed in the writ. These provisions are not applicable where the writ is allowed on the application of the attorney-general or district-attorney.

(§§ 1999, 2000, 2001, 2002.)

§ 2000. *Mode of service other than personal.*—If the person to whom the writ is directed cannot be found, with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person upon whom the writ ought to be served keeps himself concealed, or refuses admittance to the persons attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside,

either of his dwelling-house or of the place where the prisoner is confined. In that case the service is complete, without tendering the fees or charges for bringing up the prisoner.

(§ 2008.)

§ 2001. *Writ to be obeyed.*—The writ shall not be disobeyed for any defect of form or by reason of a failure to properly designate the person having the custody of the prisoner, or to designate by name the person directed to be produced in case he is sufficiently described to be identified. The person served with the writ must obey and make return thereto, whether directed to him or not. Any other person upon whom it is served, having the custody of the person for whose benefit it is issued, must obey and execute the same in like manner as if directed to him. Where the writ is returnable on a day certain, the return must be made at the time and place specified therein, if forthwith it must be made with reasonable diligence in view of the circumstances.

(§§ 2004, 2006, 2024.)

§ 2002. *Prisoner to be produced and return to writ.*—The person upon whom a writ of *habeas corpus* has been duly served must bring up the body of the prisoner in his custody, according to the command in the writ, unless he states in his return that the prisoner is so sick or infirm that the production of him would endanger his life or his health, in which case the matter may be disposed of without his attendance. He must also state plainly and unequivocally, by way of return, the following facts: (1) Whether or not, at the time the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued. (2) If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and upon the return of the writ the original must be produced and exhibited to the court or judge. (3) If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause and by what authority the transfer was made. The return must be signed by the person making it, and unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.

(§§ 2026, 2027, 2040.)

§ 2003. *Proceedings in disobedience of writ.*—Where a person who has been duly served with the writ refuses or neglects, without sufficient cause shown by him, fully to obey it, the court or judge before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant and designated therein; commanding such officer or other person forthwith to apprehend the delinquent and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail of a county other than his own, designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed until he makes return to the writ and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.

(§ 2028.)

§ 2004. *Precept to bring up prisoner, and how executed.*—The court or judge may, also, in its or his discretion, at the time when the warrant is issued, or afterwards, issue a precept to the sheriff, coroner or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the prisoner for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept; until discharged, bailed or remanded as the court or judge directs. The sheriff, coroner or other person to whom a warrant or precept is directed, as prescribed in either of the last two sections, may, in the execution thereof, call to his aid the power of the county, as the sheriff may do, in the execution of a mandate issued from a court of record.

(§§ 2029, 2030.)

§ 2005. *Warrant to bring up prisoner about being removed.*—Where it appears by proof satisfactory to a court or judge, authorized to grant the writ, that a person is held in unlawful confinement or custody, and that there is a good reason to believe that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus*, the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or judge the prisoner, to be dealt with ac-

cording to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.

(§ 2054.)

§ 2006. *When offender to be arrested; execution of warrant; proceedings to relieve prisoner; to punish offender.*—Where the proof specified in the last section is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offense committed in taking or detaining him, the warrant must also contain a direction to arrest that person for the offense. The officer or person to whom the warrant is directed and delivered must execute it by bringing the prisoner therein named, and, also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return in like manner, and the like proceedings must be taken, as if a writ of *habeas corpus* had been issued in the first instance. If the person having the prisoner in his custody is brought before the court or judge, as for a criminal offense, he is entitled to be examined, and must be committed, bailed or discharged by the court or judge, as in any criminal case of the same nature.

(§§ 2055, 2056, 2057.)

§ 2007. *Notice to person interested in detention.*—Where it appears from the return to the writ that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made until notice of time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time as the court or judge prescribes, as follows: (1) Where the mandate was issued or made in a civil action or special proceeding to the person who has an interest in continuing the imprisonment or restraint, or his attorney. (2) In every other case to the district-attorney of the county within which the prisoner was detained at the time when the writ was served.

(§ 2038.)

§ 2008. *Proceedings on return of habeas corpus.*—The court or judge before which or whom the prisoner is brought by a writ of *habeas corpus*, must, immediately after the return of the writ, examine into the facts alleged in that return, and into the cause of the imprisonment or restraint of the prisoner. In case a more full and complete return of the proceedings had under which the person is imprisoned is necessary, the court or judge may make an order to that effect, which must be obeyed by the person or tribunal to whom it was directed, and must make a final order to discharge him therefrom, if no law-

ful cause for the imprisonment, or restraint or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter or for some other cause. In case he is lawfully imprisoned or detained, he shall be remanded to the custody of the person entitled thereto and the proceeding dismissed.

(§§ 2031, 2032, 2036, 2043.)

§ 2009. *When prisoner to be discharged in civil cases.*—If it appears upon the return that the prisoner is in custody by virtue of a mandate in a civil case he can be discharged only in one of the following cases: (1) Where the jurisdiction of the court which, or of the officer who, issued the mandate has been exceeded, either as to matter, place, sum or person. (2) Where, although the original imprisonment was lawful, yet by some act, omission or event which has taken place afterwards, the prisoner has become entitled to be discharged. (3) Where the mandate is defective in a matter of substance required by law, rendering it void. (4) Where the mandate, although in proper form, was issued in a case not allowed by law. (5) Where the person having the custody of the prisoner under the mandate is not the person empowered by law to detain him. (6) Where the mandate is not authorized by a judgment, decree or order of a court or by a provision of law.

(§ 2033.)

§ 2010. *Prisoner may controvert return; proofs thereupon.*—A prisoner produced upon the return of a writ of *habeas corpus* may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon the court or judge must proceed in a summary way to hear the evidence produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.

(§ 2039.)

§ 2011. *Custody of prisoner pending the proceedings.*—Pending the proceedings, and before a final order is made upon the return, the court or judge before which or whom the prisoner is brought may either commit him to the custody of the sheriff of the county wherein the proceedings are pending or place him in such care or custody as his age and other circumstances require.

(§ 2037.)

§ 2012. *Proceedings upon irregular commitment.*—If it appears to the court or judge at any time during the proceeding that the prisoner has been legally committed for a criminal offense, or that he is guilty of such an offense, he must be remanded if the case is not bailable. If bailable, he shall be dis-

charged upon giving bail in a sum and at a term of court to be fixed by such court or judge. Bail may be given at the time or thereafter, on the production of the order before any officer authorized to take bail for the offense with which the prisoner is charged.

(§§ 2035, 2045, 2046.)

§ 2013. *Order substituted for writ of discharge; service and effect thereof.*—The writ of discharge is abolished. A final order to discharge a prisoner may be served in like manner as an injunction order, and when so served it may be enforced in the same manner as a final judgment in a civil action or by proceedings as for contempt of court. Where such an order directs a discharge upon giving bail, the service thereof is not complete until the service of the certificate, or other proof prescribed by law, showing that bail has been given as required thereby.

(§§ 2048, 2049.)

§ 2014. *When prisoner discharged not to be reimprisoned; when he may be.*—A prisoner who has been discharged by a final order, made upon a writ of *habeas corpus* or *certiorari*, issued as prescribed in this article, shall not be again imprisoned, restrained or kept in custody for the same cause. But it is not deemed to be the same cause in either of the following cases: (1) Where he has been discharged from a commitment on a criminal charge, and is afterwards committed for the same offense, by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offense. (2) Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment, and is afterwards arrested on sufficient proof and committed by a lawful mandate for the same offense. (3) Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order or other mandate, as prescribed in this article, and is afterwards imprisoned by virtue of a lawful judgment, final order or other mandate for the same cause of action. (4) Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest, and is afterwards taken in execution or other final process, in the same action or special proceeding, from imprisonment by virtue of an order of arrest, and is afterward taken in execution or other final process in the same action or special proceeding, after the first was discontinued.

(§ 2050.)

§ 2015. *When appeal may be taken under this article.*—An appeal may be taken from an order refusing to grant a writ of *habeas corpus*, or from a final

order, made upon the return of such a writ, discharging or remanding a prisoner, or dismissing the proceeding. Where a final order is made to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie from an order of the court or judge before which or whom the writ is made returnable, except as prescribed in this section. An appeal from a final order discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken, in the name of the people, by the attorney-general or the district-attorney. For the purpose of an appeal the person to whom notice of detention is required to be given becomes a party to the proceeding.

(§§ 2058, 2059, 2038.)

§ 2016. *Prisoner who appeals may be admitted to bail.*—Where a prisoner who stands charged upon a criminal accusation with a bailable offense has perfected or intends to take an appeal from a final order, the court or judge, upon his application, must, upon such notice to the district-attorney as such court or judge directs, make an order fixing the sum in which the applicant shall be admitted to bail accordingly.

(§ 2060.)

§ 2017. *Recognizance of prisoner.*—On appeal, the recognizance must be conditioned, that the prisoner will appear in the appellate court, to be held at a time and place designated in the order, and abide by and perform the judgment or order of the appellate court. It must be taken and approved by a justice of the Supreme Court, or by the court or judge from whose order the appeal is taken or by the county judge of the county in which the order was made. Where a prisoner has perfected an appeal to the Court of Appeals from a final order of the Supreme Court affirming or reversing an order granting his discharge, the court from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section; except that the recognizance must be conditioned to appear at a term of the court from which the appeal is taken, to abide by and perform its judgment or order to be made after the determination of the appeal.

(§§ 2061, 2062.)

§ 2018. *Custody of prisoner until he gives bail.*—Where the sum in which the prisoner shall be admitted to bail has been fixed, he must remain in the custody of the sheriff of the county in which he then is until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail

until the time to appeal has expired or the appeal is disposed of, and the further direction of the court made thereupon.

(§ 2063.)

§ 2019. *When recognizance to be valid for an adjournment, etc.*—When no order or other direction of the court relating to the disposition of the prisoner is made at the term specified in a recognizance given as herein prescribed, the matter is deemed adjourned, without an order to that effect, to the next term of the same court to be held in the same department; and thereafter to each successive term, until such an order or direction is made. The prisoner is bound to attend at each successive term, and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.

(§ 2064.)

§ 2020. *Penalty for refusing copy of process, etc.*—An officer or other person who detains any one by virtue of a mandate or other written authority, must, upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of *habeas corpus* in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

(§ 2065.)

§ 2021. *Contempt, in what cases.*—If any person, in the execution of a judgment, order or other mandate or otherwise, knowingly violates, causes to be violated, or assists in the violation of the provisions of this article with reference to the discharge or re-imprisonment of a prisoner; or if any one having in his custody or under his power a person entitled to a writ of *habeas corpus*, or for whose relief a writ of *habeas corpus* has been duly issued, with intent to elude the service of the writ or avoid the effect thereof, transfers the prisoner to the custody or places him under the power or control of another, or conceals him, or changes the place of his confinement, or assists therein, he may be punished as for contempt of court.

(§§ 2049, 2051, 2052, 2053.)

## ARTICLE II.

(Article II, Title II, Chapter XVI—Sections 2006-2014 of Present Code.)

### PROCEEDINGS TO BRING UP A PERSON TO TESTIFY.

SEC. 2080. Who may grant order.

2081. When order shall not be granted.

2082. Application for order, how made.

2083. Order to be obeyed and prisoner remanded.

SECTION 2083. *Who may grant order.*—A justice of the Supreme Court or a county judge in a county

where a prisoner is confined may make an order upon the application of a party to an action or special proceeding, civil or criminal, pending in any court, or before any officer or tribunal authorized to examine witnesses, directing that a prisoner detained in a jail or prison be brought before such court, officer or tribunal to testify as a witness. The writ of *habeas corpus* to bring up a prisoner to testify is abolished.

(§§ 2008, 2009, 2010.)

§ 2081. *When order shall not be granted.*—Such order shall not issue where the prisoner is under sentence of death, nor shall it issue to bring up a prisoner confined under any other sentence for a felony, except where the application is made on behalf of the people to bring him up as a witness on the trial of an indictment, and then only in the discretion of the justice or judge to whom the application is made, and upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions and under such regulations as the justice or judge may prescribe.

(§ 2011.)

§ 2082. *Application for order, how made.*—An application for an order to bring up a person to testify must be verified by affidavit, and must show: (1) The title and nature of the action or special proceeding in regard to which the testimony of the prisoner is desired, and the court, officer or tribunal where it is pending. (2) That the testimony of the prisoner is material and necessary to the applicant on the trial of the action or the hearing of the special proceedings, as he is advised by counsel and verily believes. (3) The place of confinement of the prisoner. (4) Whether the prisoner is or is not confined under a sentence for a felony. The attorney-general or district attorney need not swear to the advice of counsel.

(§ 2012.)

§ 2083. *Order to be obeyed and prisoner remanded.*—The officer to whom an order issued under this article is delivered must obey the same according to the exigency thereof. An officer refusing or neglecting to obey the order herein provided for shall be liable to punishment as for a contempt of court. The prisoner must, after having testified, be taken to the jail or prison from whence he came.

(§§ 2013, 2014.)

**LIBEL.**—The charge that a woman is a "public prostitute" is not actionable *per se* under the statutes of Idaho; neither adultery, fornication nor prostitution being punishable as such by the statutes of Idaho. (*Douglas v. Douglas* [Idaho], 88 Pac. Rep. 984.)

### Abstracts of Recent Decisions.

**BANKS—LIEN ON COLLECTIONS.**—Where, at the time of making an assignment, the insolvent was indebted to a bank which had for collection a note belonging to him, the bank is entitled to the proceeds of the note as against the assignee. (*Greene v. Jackson Bank* [R. I.], 20 S. E. Rep. 953.)

**CHATTEL MORTGAGE—SALE.**—Under a chattel mortgage, which provides that, if the mortgagee deems himself insecure, he may take possession of the property and sell the same, as on default the mortgagee may sell the property before the debt becomes due. (*Cole v. Shaw* [Mich.], 61 N. W. Rep. 869.)

**DEED OF TRUST—BONDS.**—Where deeds of trust are taken on distinct portions of the land conveyed, to secure a certain amount of the bonds given for the purchase price, the fact that the deeds fail to state which of the bonds are secured by each deed, does not render the deeds invalid, but they will all be marshaled as security for all the bonds. (*Winner v. Lippincott Inv. Co.* [Mo.], 28 S. W. Rep. 998.)

**DIVORCE—DECREE FOR CONTINUING ALIMONY.**—Where no appeal was taken from a decree of divorce granting the wife continuing alimony, an action to enforce the payment of the periodical sums cannot be defended on the ground that such a grant of alimony was authorized. (*King v. Miller* [Wash.], 38 Pac. Rep. 1020.)

**FEDERAL OFFENSE—CONSPIRACY.**—The offense of conspiracy, under the laws of the United States, is sufficiently proved if the jury is satisfied that two or more of the parties charged entered into an agreement to accomplish a common and unlawful design, which was arrived at by mutual understanding, followed by some act done by any of the parties for the purpose of carrying it into execution, and the joint assent may be proven by direct testimony, or may be inferred from facts which establish, to the satisfaction of the jury, that an unlawful combination had been formed. (*United States v. Barrett* [U. S. C. C., So. Car.], 65 Fed. Rep. 62.)

**HUSBAND AND WIFE—DOWER—SETTLEMENT IN LIEU.**—An agreement between husband and wife, made during coverture, whereby the property of the wife is settled on her to her use and under her control during her husband's life, in consideration of her relinquishment of dower, does not bar her of the right to elect to take dower in lieu of a devise. (*McCauley v. McCauley* [Dela.], 30 Atl. Rep. 735.)

**JUDICIAL SALE—VALIDITY.**—A person authorized an auctioneer, by letter containing the cash deposit required by the notice of sale, to bid in certain trust land which was about to be sold at public

auction. He had no representative at the sale, and was unknown to the trustee and auctioneer, and it did not appear that he was a responsible bidder. *Held*, that the trustees were warranted in rejecting his bid when made by the auctioneer. (*Thompson v. Ritchie* [Md.], 30 Atl. Rep. 708.)

**MONOPOLIES—SUIT BY PRIVATE INDIVIDUAL.**—The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong., July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons and the right to bring suits in equity being vested in the district attorneys of the United States. (*Pidcock v. Harrington* [U. S. C. C., N. Y.], 64 Fed. Rep. 821.)

**MORTGAGES—RELEASE OF TIMBER.**—Where assignees of mortgages consent to and receive the proceeds of a sale by the mortgagors of timber on the mortgaged land, they cannot afterward appropriate the timber on the mortgages. (*Fredonia Nat. Bank v. Borden* [Penn.], 20 S. E. Rep. 975.)

**MUNICIPAL CORPORATION—CONTROL BY LEGISLATURE—WATER WORKS.**—A municipal corporation does not hold property acquired by it for the purpose of furnishing its inhabitants with water, as a private corporation, so as to prevent the Legislature from modifying the management thereof at will. (*Coyle v. Gray* [Dela.], 30 Atl. Rep. 728.)

**RAILROAD CROSSING—ACCIDENT—NEGLIGENCE.**—An engineer who sees that the driver of a team rapidly approaching the crossing does not observe the approaching train, and that there will be a collision unless the team stops, is not negligent in giving signals when both are near the crossing, though the horses are frightened thereby. (*Pepper v. Southern Pac. Co.* [Cal.], 38 Pac. Rep. 974.)

**RELEASE—CONSIDERATION.**—Where a woman's husband and her only son were killed in the same accident, and she was in such poverty that she had to give away her remaining child, a release of damages, made by her in ignorance of her rights, in consideration of \$70 and a ticket worth \$3.25, is of no effect. (*Byers v. Nashville, C. & St. L. Ry. Co.* [Tenn.], 29 S. E. Rep. 128.)

**WATERS—RIPARIAN RIGHTS—OWNERSHIP OF SAND BAR.**—Where islands in a river are submerged during the greater part of the year, the fact that the owner of land on one side of the river, opposite the islands, hauls sand from them at intervals for over twenty years, does not constitute possession adverse to a riparian owner, whose deed includes the islands, although such possession was as complete as the character of the land would allow. (*Strange v. Spaulding* [Ky.], 29 S. W. Rep. 137.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

**I**NSANITY has been so frequently pleaded that it is very seldom a successful defense for murder; but hypnotism seems to be the coming plea of weak-minded imbeciles, who many times place human life at a smaller value than a few paltry dollars. It is not to be presumed from this that the theory that the world would be better off without feeble-minded individuals is advanced, though the Spartan eradication of feeble-minded, ill-formed offspring had its beneficial results on the race, and it is certain that restrictions by the State on marriages of those who are more or less tainted with insanity, would in the end work much good for American society. Nevertheless, in the eyes of the law, such persons have a right to plead insanity or hypnotism, but in respect to the latter, it is certain that the hypnotizer is morally and legally responsible for the commission of the crime. The first case on record in which a person who used the hypnotic influence on another to cause him to commit a crime, and in which conviction has followed, is the case of Anderson Gray, of Topeka, Kansas, who was found guilty by a jury, whose finding was confirmed by the Supreme Court of the State. The defendant, it was shown, desired to retain certain money and property which had come into his possession. This he was prevented from doing by the assistance of a witness to the transaction. Anderson Gray, the defendant, a wealthy farmer of Kansas, hired one Thomas McDonald to work on his farm, and found that he could exercise the hypnotic influence over him, and by means of this power he directed McDonald to shoot the only person who stood between him and the retention of the money and property, though he was a considerable distance away from the scene of the murder, and there retained his hypnotic influence over the unfortunate victim of his

power. McDonald acknowledged having committed the deed, and after describing the hypnotism which the defendant exercised over him, and the way in which the deed was committed, was found guiltless by the jury. One of the most remarkable features of the proof of this influence and one which does not seem to accord with the authorities on the subject, was, that McDonald, while in a normal state, related the story of the crime in the same manner as he did while under hypnotic influence of certain persons who were called in to demonstrate the existence of this mysterious power. The conviction of Gray, his employer, is the first case in which a hypnotizer has been convicted by a jury, though many cases have arisen where pleas of this nature have been entered, especially in Holland and France, and in this country, in Eau Claire, Wisconsin, and in the Meyer case in New York. The difficult part of the proof, when one person exercises such an influence over another, is that the hypnotized, when free from the influence, should not have mental volition to describe what he did, though some eminent writers contend that thoughts of his act remain in the mind of the hypnotized. In any event, the legal profession will be interested, undoubtedly, in the development of the theories in relation to hypnotism and the application of certain rules to the various cases which will without doubt arise from time to time. H. Merriman Steele, Esq., in the April number of the *North American Review*, very clearly states his theories on this subject, and is, to say the least, a little skeptical of the theory that the hypnotized can relate his actions when in a normal condition. He says:

"As is now generally acknowledged, suggestion plays the most important role in hypnotism, and as the phenomenon of suggestion forms the basis for the following argument in this particular case, it may be well to review briefly what the word may exactly mean, by a short description of the mental attitude of the hypnotized immediately before and after the suggestion is given him by the hypnotizer. Ignoring for the present the particular case in point, the Minnesota murder, and omitting, also, the various manipulations for inducing the hypnotic sleep, we will begin by a consideration of the subject as he sits before us in the



state generally described as the somnambulistic. Picture him, then, as immobile, deaf, dumb and blind to all except the words and acts of the operator. No voluntary act or word is ever manifest, and until suggestion is supplied by the operator he remains perfectly passive and seemingly incapable of any movement or activity whatsoever. He is absolutely without volition, being in a state ready for the fulfillment of any suggestion, and upon the nature of this suggestion will depend his subsequent act and speech. For illustration, let us imagine his brain extirpated while the cut ends of both sensory and motor nerve fibres are in connection with the nerve cells in the brain of the operator. Thus, we may explain his utter lack of volition and increased power of receiving suggestion.

"Suggestion consists in giving thought to the subject for action or speech, and will power for its accomplishment. It may be communicated by word, or by gesture capable of interpretation by the subject into manifold activities. As the verbal suggestion alone concerns us, it only will be described. The subject is commanded by the operator to perform certain acts—to sing, to dance, etc.,—all of which he readily obeys. He is told he is an animal, and immediately he drops on all fours; he is handed a hot iron with the assurance it will not burn him; he grasps it without sensation; he is misinformed as to the name of his most intimate friend, and so tenaciously does he cling to the new name that his friend cannot deceive him. And so on, through the long list familiar to all who have witnessed the hypnotized *séance*. But let us dwell a moment upon the spirit in which the subject performs these various acts. By the most superficial observer the intentness with which the subject responds to suggestion is noticeable. And well it may be, for nowhere out of hypnotism or disease is such concentration obvious. It is a concentration so absolute and entire that it almost passes the boundaries of our conception. While acting under hypnotic suggestion, it seems as though every atom of mental energy is used in the fulfilling of that suggestion, whether it be sensory or motor. For how else may we explain the common phenomenon of insensibility to pain, etc.? It would seem scarcely possible that the integral parts of the nerve fibres are disturbed,

or that it is a material alteration in them which causes their inhibition, for upon subsequent waking their normal functions are immediately restored. Every explanation based upon physiological ground is insufficient or erroneous. We have in the subject a simple, entire concentration of mental power, either for act or sensation, or for the cessation of one or both. So strong and undivided is this concentration that, beyond the carrying out of the suggestion itself, there is absolutely nothing else—no sensory nor motor impulses, no thought nor will, no question as to the fitness of the suggestion nor attempt to do other than obey it. Moreover, in a good subject the obedience is complete and perfect.

"Let me now recall briefly the entire lack of volition before suggestion, while the subject is in the somnambulistic state; also, be it understood, no matter how often the subject may be hypnotized, upon each succeeding sleep, just as soon as the somnambulistic state appears, all volition will certainly disappear. Without suggestion, the subject will remain absolutely passive, for, in short, he is robbed of his will, and incapable of any sign whatsoever of either physical or psychical power. His subsequent acts depend entirely upon suggestion and particular acts upon the nature of the particular suggestion."

In reference to a case in Minnesota, Mr. Steele says:

"With this brief *résumé*, I think we may turn to the case in point, the Minnesota experiment. At the very outset, however, we are confronted by a phenomenon so utterly unprecedented that I think it wise to notice it, although it does not enter into the argument of this paper, for the reason that it is ignored by the experts in Minnesota. We learn from the article in the newspaper that the accused tells a *waking story* of the murder committed while under hypnotic influence. In my own experience, and that of an associate, I have never met with a subject who, upon waking, could remember or relate any of the numerous actions performed while under hypnotic influence, nor can I find record of such a case in a tolerably wide reading in the literature of hypnotism. But as the above fact is seemingly unnoticed by the experts in Minnesota, we will, for the sake of my argu-

ment, consider the waking story of the murderer true—that he has committed the murder under hypnotic influence, and remembers the deed, with its detail.

"The question now rises, If his story told under the second hypnosis agrees with his waking story, will that circumstance prove his waking story to be true? I do not think it will. Another conclusion might seem very reasonable, I admit, but in this second hypnosis are we to forget the immense power of suggestion?

"Let us remember, upon the culmination of the second somnambulistic state we have a *new* subject in so far as volition goes. He is immobile, deaf, dumb and blind as the type quoted above. From the hypnotizer he must receive the impulse to talk, to tell his story, as would any new subject. He will *volunteer* nothing in word or act. Consequently we recognize he will not repeat the desired story, his waking story. Indeed, he will but sit passive, waiting the impulse his own mind cannot supply. Suggestion must now be given him by the experts to draw out his story, which may convict or acquit him. His whole mind will respond to that suggestion with the utter concentration I have above attempted to describe. This suggestion will govern and rule his thought, his speech, his story. If the suggestion from the experts bid him repeat the story of the crime, he will obey; if it bid him deny the deed, he will do so vehemently; if, in the progress of his denial, a new and contradictory suggestion is given, he will accept it and heartily accuse himself."

On the principle that wicked men first practice law, and later go to the Legislature, it may be interesting to notice an article in the *Law Times* on "The Honest Lawyer; A Seventeenth Century Character Sketch." Abuse and contumely often bring proper sympathy, while too often we hear ill-advised and untrue criticism of a profession who, as a body, devote their lives to the development of the laws and regulations of society. No one, however, could take this sketch except in the nature of a farce, which, as such, is quite clever. The article is:

"There is, I suppose, nothing so persistent as popular prejudice. The British public would probably find life unbearable without some na-

tional scape-goat to exercise their somewhat dull wit upon; and so we find that down through the ages lawyers have been abused as knaves, blood-suckers, cheats, rogues, rascals. Certainly the vituperative expressiveness of the English language owes much to this ancient feud between the people and the law. The attitude of lawyers amid this storm of detraction has, as a rule, been one of Christian submissiveness. The *mens conscia recti* has been their reward and consolation; not but that the material emoluments of the profession have also had their consoling power. Occasionally, however, one of the craft, more fiery than his brethren, girds himself up to repel the popular attack. I came across a curious pamphlet the other day by such an one, published in the year 1676, and entitled "The Character of an Honest Lawyer," in which he defends, in the quaint but vigorous style of his day, his profession against the unjust aspersions which were as common then as now. That amidst the legal flock wolves were to be found here and there he candidly admits; and, by way of providing men with some common standard by which to distinguish between good and bad, between the true lawyer and the traitor to his profession, he sets forth the following leading characteristics of honorableness in the profession of the law. "An honest lawyer," says our anonymous pamphleteer, "is the lifeguard of our fortunes, the best collateral security for an estate, a trusted pilot to steer one through the dangerous and oftentimes inevitable ocean of contention. He is an invaluable anatomist of *meum* and *tuum*, that will presently search a cause to the quick, and find out the peccant humor, the little lurking cheat, though masked in never so fair pretenses; one that practices law so as not to forget the gospel, but always wears a conscience as well as a gown. He weighs the cause more than the gold, and if that will not bear the touch, in a generous scorn puts back the fee. Though he knows all the criticisms of his faculty, and the nice *snapperados* of practice, yet he never uses them unless in a defensive way, to countermine the plots of knavery; for he affects not the devilish skill of outbaffling rights, nor aims at the shameful glory of making a bad case good, but with equal contempt hates the wolf's study and the dog's elequence, and disdains to grow

great by crimes, or build himself into fortune on the spoil of the oppressed or the ruins of widows and orphans. He has more reverence for his profession than to debauch it to unrighteous purposes, and had rather be dumb than suffer his tongue to pimp for injustice or club his parts to bolster up a cheat with the legerdmain of law craft."

"When he undertakes a business he espouses it in earnest, and does not follow the cause, but maintains it. A mollifying letter from the adversary's potent friend, a noble treat, or the *remora* of a lusty present to his wife, have no influence to make him slacken his proceedings, for he is so zealous for his client's interest that you may sooner divorce the sun from the ecliptick than warp him from his integrity. \* \* \* As his profession is honorable, so his education has been liberal and ingenious, far different from that of some jilting pettifoggers and purse-milking law-drivers, whose breeding, like a cuckoo's, is in the nest of another trade, where they learn wrangling and knavery enough in their own causes to spoil those of other men, and with sweetened ingredients of mechanical fraud appoint themselves (though simple enough) fit instruments for any villainy. But his greener years were seasoned with literature, and he can give better proof of his university learning than reckoning up the colleges and boasting his name in the buttery book. He is skilled in other languages besides declaration-Latin and Norman gibberish; he read Plato and Tully before he saw either Littleton or the statute book; grounded in the principles of nature and customs of nations, came (*lotis manibus*) to the study of our own municipal law, which he found to be *multorum annorum opus*, and therefore employed his time better at the Inns of Court than in hunting after new fashions, starting fresh mistresses, haunting the play-house or acquiring the other little town accomplishments which render their admirers fine men in the opinion of fools, but egregious fops in the judgment of the wise." \* \* \* "In his studies he traffics not only with the inventory of abridgments and diminutive collectors in Decimo Sexto, but draws his knowledge from the original springs, digests the capital body of the law in a laborious and regular method, he especially aims to be well versed in the practice of every court, and rightly to

understand the art of good pleadings; he pursues the Year Books and the Responsa Prudentium with a heedful and reverent eye, delights to tread in the steps of the ancient sages, and thinks it is best sailing by known and experienced landmarks, and therefore uses precedents, not as refuges of ignorance, but as safeguards of wisdom."

"He never goes about to baulk any evidence with a multitude of sudden interrogatories, nor maintains any correspondence with the Knights of Alsatia or Ram-ally-Vouchers; he can prosecute a suit in equity without seeking to create a whirlpool, whether one order shall beget another, and the poor client be swung round (like a cat before execution), from decree to re-hearing, from report to exceptions, and *vice versa*, till his fortunes are shipwrecked and himself drowned for want of white or yellow earth to wade through on."

"Whilst he lives he is the delight of the court, the glory of his profession, the patron of innocency, the upholder of rights, the scourge of oppression, the terror of deceit and the oracle of his country; and when death calls him to the bar of Heaven by a *habeas corpus cum causis*, he finds his judge, his advocate, non-suits the devil, obtains deliverance from his infirmities, and continues still one of the long robe in glory."

Such is the honest lawyer as he appeared to a contemporary observer two centuries ago. Since those days great changes have taken place in the form and practice of the law, and the types of legal character have undergone a corresponding change. But human nature is always interesting, and in this dull age one may find both interest and profit in looking back upon this caustic and vigorous character-sketch of the seventeenth century.

The address of Judge Jesse Holdom, of Chicago, before the Law Club, on "Should the Costs of Litigation be Increased?" has many valuable suggestions, besides suggesting that legal services are more valuable than at present recognized by the rules of practice. In speaking of the English rule, Judge Holdom said:

"In England, law suits are conducted on the theory that he who suffers defeat pays the ex-

penses of his adversary, his solicitor's and barrister's fees included, as well as all costs of the cause, upon a scale fixed by law, and taxed, if not agreed upon between the parties, by the taxing master. This latter official is, therefore a very important *attache* to every court, and commands alike the respect of suitor's counsel and their attendants. His power to trim down bills of costs makes him a veritable autocrat. A law suit is a very serious matter with our English brethren. They hesitate before inviting a legal contest, the adversaries' formidable bill of costs, consequent upon eminent legal talent, being in opposition, puzzles the will and bids a pause, at least, sufficient to cool the superheated blood, and restore equanimity of disposition, so that the process of reasoning may not be obstructed or turned away by passion. Being cast in a law suit to many a man of more than moderate means has resulted in financial ruin.

"There are many advantages to the legal profession growing out of the system of taxing costs. Disputes as to the amount all occur before the taxing master, and are there settled, and the amount included as part of the judgment, upon which execution is issued. The items of charges are comparatively small, but the profession in England do not work and take no steps, either in a law suit or in office practice, without making some charge therefor; consequently the bills of costs are always composed of many items, the last of which is a charge, at so much per folio, for making out the bill of costs, and the taxing master's fee is also taxed as part of the costs. A writ of summons in England is prepared in the lawyer's office, stamped at the central office, and served by a clerk, service proved by his affidavit. Return day of the writ is eight days from the day of service. An action can be stayed by the defendant paying the amount of the claim and costs, which are set forth in the writ, to the plaintiff or his solicitor within four days of service. If the defendant does not put in his appearance before the return day, judgment is entered by default. A full and plain statement of plaintiff's claim is made upon the writ, which stands as the basis of his declaration, and the defendant pleads by stating concisely, and without any of the formalities of common-

law pleading, his defense, to which the plaintiff joins issue by a terse reply, and the cause stands for trial by the court unless a jury is specially demanded.

"In a Queen's Bench cause against a Chicago citizen, involving about \$970, had the claim been paid within the four-day limit after the service of the summons, it could have been settled by the payment of \$12.50 and costs. A defense was interposed and a trial had before the court in London, without a jury, and a judgment for the amount of the claim and \$166 costs obtained, and this judgment and costs was sent to me for collection, and is now evidenced by a judgment in our Circuit Court against the defendant."

Comparing the costs in the English suit with another in New York, Judge Holdom said:

"In a case that came under my observation, involving a recovery of \$2,600 for breach of contract, the costs were taxed against the defendant at \$386.41. Litigation in New York city, taking into consideration its population and the vast ramifications of its commerce, trade and finance, as the great port of entry in this country, and the financial center of this great continent, is not as great — no, not near so great — as litigation in Chicago; and why is this so? In my humble opinion, because ten dollars to the clerk and seventy-five cents to the sheriff does not constitute all the financial resource necessary to instigate a legal proceeding. There must be financial responsibility for costs, guaranteed by a bond, if plaintiff's responsibility for costs is challenged.

"In Illinois, a few dollars and an easy-going lawyer is all that is necessary to set in motion the machinery of the law in behalf of the most frivolous and unfounded claim. I know of a litigation over a valuable piece of unimproved real estate, which was started by a set of as unprincipled and worthless fellows as ever came into this jurisdiction, totally irresponsible, morally and financially, and whose claim of title was a pure and unadulterated fabrication. The most eminent real estate lawyers at this bar were at one time and another in this case; some of them have since adorned the bench of our local courts. In one way and another this suit, or rather series of suits, lasted upwards of twenty years, during all of which time the

property was tied up, and no one would take the title with the litigation pending. The guarantee companies would not issue a guarantee policy, and the owners, some of whom were lawyers, had to clear their title through a purifying process of twenty years' litigation, which was finally attained after all these years of delay, and a large outlay for costs and lawyers' fees, not one dime could be recovered from the worthless prosecutors. Did you ever try to get security for costs from any of those worthless claimants? If you did, I venture to say you never succeeded. Without exception, the defendant who asks for security for costs from a worthless plaintiff, no matter how unfounded his claim, is at once regarded by the court as an avaricious persecutor, and the request as an attempt to throttle litigation and cheat an honest man of his constitutional right to law it with you at your own expense. I have known the filing of a bill on a trumped-up claim to practically operate as an injunction restraining the transfer of valuable real estate for years, the final decree demonstrating the claim to have been unfounded. I know of a bill pending to-day, which is simply an attempt to cast a cloud upon the title of a very valuable down-town corner, in which perjury already has been freely indulged in an attempt to extort a money settlement rather than suffer the delays and uncertainties of a trial, and the indefinite tying up of the property, as it was thought that a ninety-nine year lease on advantageous terms was about to be made. An attempt to do more than place the case upon the trial calendar of a learned chancellor, who but infrequently tries cases from his calendar, has met with the usual judicial frown of disapproval. I think that a system which admits of such injustice and oppression needs reforming."

In re Commissioners of Circuit Court, decided in the United States Circuit Court, district of North Carolina, it was held that while commissioners of the Circuit Court have no fixed tenure of office, and the appointing court has power to remove them at pleasure, the exercise of this power should be governed by a sound legal discretion, and if there are charges against a commissioner, full opportunity should be given him for a hearing.

#### LEGISLATIVE INTERFERENCE WITH THE FREEDOM OF RAILROAD CORPORATION CONTRACTS.

WHEN England was mainly a pastoral and agricultural country, with her trade and commerce in their infancy, all sorts of burdensome restrictions were imposed upon the individual by a paternal theory of government for the supposed benefit of trade; but in the latter part of the eighteenth century there was a general awakening to the falsity of the theories which had permitted these impositions. In England, Adam Smith's great work was followed by many repeals of vicious regulations and cessation of new restraints. In France, the edict of Louis XVI liberated trade from corresponding restrictions. In America, the Declaration of Independence set forth the inalienable right of all men to life, liberty and the pursuit of happiness. Our whole commercial history shows that our Constitution fixes a great and wide gulf between the old and the new, between mediæval darkness, which permitted every detail of one's life to be regulated, the modern freedom of action.

But a distinction has always been made between private property of individuals and that put to public use. The distinctions between public and private carriers were known of old. The railroad, in fact, existed in the minds of the legislators of both England and the United States, as improved turnpikes, all persons should have a right of transportation for themselves or their goods, in their own or the company's carriages, and supplying, if need be, their own motive power, upon their compliance with certain rules and regulations. And from this early legislation to the present time, it has been held that the property of railroad corporations which have been invested with the right of eminent domain, and are common carriers of persons or merchandise, is property "devoted to a public use," and subject to legislative control.

But as to how far State legislation may interfere in the control of these corporations is a controverted question. There are those who stand up boldly for individual liberty to the greatest possible extent consistent with good government, while there are others who also believe in individual liberty, but declare that our danger lies in too much rather than in too little freedom.

The great landmarks of reason, legislation and adjudication, by which one must be guided in a discussion of this subject are:

1. The object of the Legislature.
2. The inherent powers of the State, especially the power of public police.
3. The constitutional limitations upon the power of the State.

### THE OBJECT OF THE LEGISLATURE.

The object of the Legislature and of civil government we assert to be the protection of the general good and the prosperity, peace and happiness of the greatest number as against the few, when that law respects the rights of the few, according to those principles of justice and right characterized by the comprehensive term, equity. Any other theory of government must, from the nature of the case, be false in principle and false to the interest of the people, in whom, according to the theory of American politics, the supreme sovereignty resides.

### THE INHERENT POWERS OF THE STATE.

Then, there is inherent in the people, represented in their State Legislature, sufficient power and authority to control any and all corporations subject to the jurisdiction of their laws. Especially is this the case when such regulative legislation looks to the correction of abuses of such corporate franchises as exist by authority of the laws of the State. The presumption of railroads that they are beyond the reach of the Legislature, would prove that the States can divest themselves of sovereignty, a proposition which, if allowed, would reduce government to an absurdity.

### LIMITATION OF STATE POWER.

The States, under our system of government, are said to be sovereign, to have sovereign rights resting in the people; and this is true, except as they have parted with their sovereignty as evidenced by the Constitution of the United States or by their own State Constitutions.

If the question of control or regulation of corporations is not by implication or by express prohibition of the Constitution of the State or Federal government, excluded from the inherent powers of the State the right to control a railroad corporation is a power of its prerogative.<sup>1</sup> To each State Constitution, therefore, subject to the provisions of the Federal Constitution, the inquirer must go in order to determine the extent of the legislative power of control or regulation.

It is my purpose in this inquiry to discuss but one question regarding this control—that of the extent of the legislative authority to interfere with the freedom of contract by these corporations.

### CONTRACT WITH THE STATE.

First, let us consider the contract of a railroad corporation with the State to which it owes its existence. As early as 1806 the Supreme Court of Massachusetts made the declaration "that the rights legally vested in all corporations cannot be

controlled or destroyed by any subsequent statute, unless a power for that be reserved to the Legislature in the act of incorporation."<sup>2</sup>

In the case of *Dartmouth College v. Woodward*,<sup>3</sup> decided in 1819, the Supreme Court of the United States announced principles on the subject of protection that the charters of private corporations were entitled to claim under the clause of the Federal Constitution against impairing the obligation of contracts. The opinion of this case carried the protection of the constitutional provision somewhat in advance of what had been decided in the preceding cases, and held that it applied not only to contracts between individuals and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private, as distinguished from public, corporations, by the legislative acts under which their existence was authorized, and a right to exercise the functions conferred upon them by the statute were, when accepted by the corporation, contracts which the State could not impair.

It became obvious at once that the effect of this decision was to make it impossible for a legislative body to amend or repeal any prior rights conferred upon a corporation without the consent of the corporate body. Mr. Justice Story, in his concurring opinion, however, suggested that, when a Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislature the right to amend or repeal it, must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation.

In order to avoid the consequences laid down in the *Dartmouth College* case, many States have availed themselves of Judge Story's suggestion. In Massachusetts all acts of incorporation passed since March 11, 1831, are, by statute law of the State, subject to amendment, alteration or repeal, at the pleasure of the Legislature. Mr. Justice Gray, in delivering the opinion of the court in *Commissioner in Inland Fisheries v. Holyoke Water Power Co.*,<sup>4</sup> a case arising in that State, says: "Railroad corporations may be compelled, by general or special laws, to make changes in the levee, grade the surface of the roadbed, erect new structures at crossings of other railroads, or of highways or stations at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated by the original charter or the

<sup>1</sup> *Wales v. Stetson*, 2 Mass. 143.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518.  
*Com. of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 451.

<sup>1</sup> *Thorpe v. Rutland & Burlington R. Co.*, 37 Vt. 142.

general laws in force when that charter was granted." And in the *Sinking Fund Cases*<sup>1</sup> the question was whether Congress had the constitutional right or power to enact a law compelling the Union Pacific Railroad Companies to set aside a portion of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to Congress.

Thus, it is seen, that although the Dartmouth College case has not been expressly overruled, its doctrine has been greatly weakened. The courts have evidently labored to overthrow its effects, and in my opinion, justly. There is good reason, I think, for saying that, although right of amendment or repeal be not reserved in the charter, the Legislature should have such right of appeal or amendment notwithstanding the omission. If not, it seems that corporations have a vested right in any and all advantages they may obtain by omissions on the part of the Legislature. But this right they cannot have. Can the Legislature, by a mere omission on its part, so bind up legislation as to disable it or its successor from correcting abuses of corporate franchises? The Legislature could not, if it were to try, divest itself of the right and duty to pass laws regulating and controlling the rights of individuals, so that in the use and enjoyment of their own they shall not injure that of others. If, therefore, in the judgment of the law-making department of the government, the public good will be subserved by statute regulating or controlling corporations, when such regulations will not conflict with the Constitution of the Federal government or of the State Constitutions, such regulations must be sustained by the courts as the law of the land.

#### CONTRACTS WITH INDIVIDUALS.

Let us look now to its contract rights with individuals. There are always two controlling considerations in the granting by the State of corporate franchises, and of the acceptance of such franchises by the corporators. First. The public good is to be considered the leading and controlling motive with the Legislature, for the public good is what the Legislatures are instituted for by the people. Second. The benefit of the individuals composing such corporations. This privilege, given to the corporation, gives to it the right to contract with individuals privately, to engage employees, and to contract with them in regard to their wages, to fix rates for

the carriage of passengers and freight, and, in substance, to make all necessary contracts in conducting and managing their business. And it cannot be said that the Legislature can, by way of amendment, fix or limit this right so as to operate unjustly to the corporation. An amendment to that extent would violate the Constitution, which, while it grants the right to amend them when, in the opinion of the Legislature, the charter is injurious to the citizens, it limits the rights to do so to amendments that are just to the corporators. But what are just and what are unjust to such corporators is a question upon which the courts widely differ.

The first section of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The rights to acquire and possess property necessarily include the right to contract, for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire it by his own exertion. Of all the "rights of persons" it is the most essential to human happiness.

But the right to contract is not unlimited. The conflicting interests of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the government are imposed upon every individual. To conserve and enforce these rights and duties, the government can impose such restrictions upon the actions of the individual as may be appropriate for that purpose. It is upon these principles that the Legislature can control, to some extent the rights of a railroad corporation to contract in reference to its property, which is said to be "devoted to a public use." By devoting its property to a use in which the public has an interest, it, in effect, grants to the public an interest in the use, and subjects itself to the control of the Legislature, for the common good, to the extent of the interest it has thus created.

Upon this principle, it has been held that the Legislature can fix the maximum of charges for the carriage of freight and passengers.<sup>2</sup> If otherwise, the corporations of the country could levy such exorbitant rates as to tend to the stagnation of business and travel, and thereby cripple the prosperity of the State. But this regulation must be reason-

<sup>1</sup> *Sinking Fund Cases*, 99 U. S. 706.

<sup>2</sup> *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & Northwestern R. Co.*, id. 180.

able. It is not to be inferred that this power of limitation or regulation is itself without limit. Under pretense of regulating fares or freights the State cannot require a railroad corporation to carry passengers without reward; neither can it do that which in law amounts to a taking of private property for public use without compensation or without due process of law.<sup>1</sup>

Whether it is for the courts or for the Legislature to decide upon the reasonableness of certain acts is somewhat doubtful. In the case of *Chicago, etc., R. Co. v. Minnesota*,<sup>2</sup> it was held that the Legislature's power to control does not empower a commission established by the Legislature to fix rates finally, without opportunity for a judicial hearing on the question of their reasonableness, which, in effect, makes the question one for the court, and not for the Legislature. This, in my opinion, is the better view, because if otherwise, it would be giving to the Legislature the authority of deciding the constitutionality of their own acts, a right clearly beyond its power.

It is this same principle from which comes the power of the Legislature to regulate millers, bakers, hackmen, ferriers, wharfingers, innkeepers and the like, "and in so doing fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."<sup>3</sup>

In all of these cases the legislation is based upon some reasonable condition, and not on the absolute right to control. It is obvious that the right to contract cannot be limited by arbitrary legislation which rests upon no reason on which it can be defended. The question as to whether the regulation is just or unjust to the corporation depends upon the question whether or not the limitation or restriction upon its right to contract, is reasonable. In other words, the corporation should always be allowed the privilege of making reasonable contracts for the purpose of carrying out the object of its incorporation.

But if the results of the contract of a railroad corporation interfere with the interests of the public at large and with the police power of the State, then the Legislature may intervene. It was upon this principle that the legislative act in New York which declares that no railroad shall permit or require trainmen who have worked twenty-four hours to again go on duty until they have had at least eight hours' rest, was held constitutional.<sup>4</sup> In view

of the great dangers, and even the destruction of life and property which might result from the attempt of men, who have become enfeebled by prolonged and exhausting effort, to control engines and cars when in motion, it seems reasonable to claim that the passing of such an act is within the province of the Legislature.

Another limitation to the right to contract by railroad corporations is that of their being unable by contract to limit their liability for negligence. By the common law of both England and America, the common carrier was an insurer for the safety of all goods placed in its hands for transportation; the fundamental principle upon which this law was based being to secure the utmost care and diligence in the performance of its duties. But the later American rule is that the common carrier may by special contract with the shipper exempt itself from responsibility for losses happening from accident and from dangers that no human skill or diligence can guard against. This, however, is as far as the rule goes, and it does not allow the carrier to secure absolute exemption from liability.

This rule is followed in the United States and in a majority of the State courts;<sup>5</sup> but the New York courts ignore this rule, and hold that a common carrier may, by an express contract with the shipper, exempt itself from liability for loss or damage occasioned by the negligence of its servants.<sup>6</sup>

The New York rule appears to me the more feasible; it is only by express contract with the shipper that the company can thus exempt itself, and if the shipper does not wish to make such a contract, the company is bound to carry the property under the full common-carrier liability. As long as the shipper can insist that the carrier shall carry his property under the common-carrier responsibility, I can see no reason why he may not voluntarily enter into a contract founded upon a sufficient consideration exempting the carrier from all responsibility for any degree of negligence.

A most interesting case upon this question of the freedom of contract of railroad corporations is the "*Mileage Case*," recently decided by the Supreme Court of Massachusetts,<sup>7</sup> wherein the court dismissed an information brought by the attorney-general against the Old Colony Railroad Company to compel it to sell mileage tickets to all who apply for them, and to redeem all such tickets presented by any other railroad corporation.

<sup>1</sup> *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307.

<sup>2</sup> *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418.

<sup>3</sup> *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 id. 517.

<sup>4</sup> *People v. Phye*, 33 N. E. Rep. N. Y.) 978.

<sup>5</sup> *Liverpool & G. W. Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Railroad Co. v. Lockwood*, 17 Wall. 357.

<sup>6</sup> *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61; *Pearsall v. W. U. Tel. Co.*, 124 N. Y. 268.

<sup>7</sup> *Attorney-General v. Old Colony R. Co.*, 160 Mass. 62.



By statute of 1892, chapter 889, it was the duty of a railroad company to issue mileage tickets, which must be accepted as fare by all other railroad companies in the State; and, conversely, it was the duty of all railroad companies to accept mileage books issued by all other railroads.

The grounds upon which the majority of the court hold the statute unconstitutional are, first, that it seeks to compel the transportation of passengers by one railroad on the credit of another, to which money for the payment of the fare has been advanced by the purchaser of a mileage ticket; and, secondly, that a mileage ticket is to be "accepted and received for fare and passage" upon other railroads, "under like conditions as upon the line or lines of the corporation issuing such ticket." Thus, requiring one railroad company to transport a passenger on the credit of another, and authorizing one railroad company to determine the conditions on which another company must carry passengers.

To this opinion there were two dissenting judges — Judge Knowlton, who writes the dissenting opinion, and in which Judge Holmes concurs. The questions involved in the arguments of the learned judges are very near the dividing line, and to distinguish whether the legislative interference is valid or not is, to say the least, difficult.

The first question which we have is: Can a State Legislature require one railroad to carry passengers on the credit of another railroad? This I would answer in the negative, because it seems to me an interference with the rights of a railroad corporation to make reasonable and proper contracts in carrying on their business, and so interferes with their right of property.

At common law a common carrier of passengers could demand prepayment of the fare before he could be compelled to receive and transport passengers. The fare, we have seen, must be reasonable; if it is reasonable, and as the carrier can have no lien upon the passenger to secure the payment of the fare, it is no more than just that the company be allowed to collect the fare in advance, and not be obliged to trust to the credit of the passenger or of some other person.

In the statute in question there was no fund provided for the redemption of the ticket, and no tangible property on which there was a lien. It is a known and conceded fact that some of the railroads of the State are not on the best financial basis, and as the statute did not prohibit a railroad from selling the mileage books for less than \$20 each, although it must redeem them at that price, there is no reason for not believing that a railroad in low financial standing would resort to enormous sales of such tickets as a mode of raising money, and when

presented for use on another railroad be unable to redeem them. This, in effect, is the taking of property which is consumed in the use, with only a right of action as compensation, with the risk of never obtaining satisfaction; and it appears to me a very inadequate security.

The railroad is "devoted to a public use," and the Legislature has power to make reasonable acts regarding the companies' dealings with the public; but is it reasonable to say that this extends into the internal arrangements of different companies as between themselves, simply because it will be the more convenient for a small part of the public? If this is not true, it is as reasonable to say that statutes to be extended, not only to the internal arrangements of railroad corporations, but all the corporations of the State could be thus controlled and made to accept paper of third parties for the payment of their goods. This would, if allowed, not only be unjust to the corporators, but it would injure the trade and industry of the country, and be thus detrimental to both producer and consumer alike.

The second argument upon which the question is made to turn is, to my mind, a very strong one, and sufficient alone to decide the case. The inquiry is this: Can a State Legislature authorize one railroad to determine the conditions on which another railroad must carry passengers?

This is, in effect, allowing one railroad the authority of making the contracts of another, which is clearly unjust. In my opinion, it is legally impossible to legislate a contract into existence. The founders of this government incorporated into the Federal Constitution a provision that no State should pass any law impairing the obligation of contracts. Had they a full conception of the problems which have arisen since, they would have undoubtedly added to that constitutional limitation a further provision that no State should pass a law which created a contract that had not been entered into. But, be that as it may, if it is a part of the duty of a common carrier to carry goods or passengers, for whose carriage he has not been paid, unless he has specifically waived such payment, then the law can be upheld as a proper regulation of the duty of a carrier. But before any of the liabilities of a common carrier attach, the duty of the specific case must be imposed upon him by compliance with the law which applies to this peculiar business. The first requisite of this is, that the price which is either agreed upon or that which is a reasonable price demanded by the carrier shall be paid. Until that is done, the legal duties of the carrier do not arise, and no amount of legislation can impose upon the carrier any of his duties or liabilities. It is the first principle of contract that there must be assent

between the parties to it, and it has often been held that the Legislature cannot make a contract between two or more persons, which they do not choose to make. Hence, I should say that this statute is unconstitutional under the Federal Constitution, because it infringes the constitutional provision against impairing the obligation of contracts, since the State, by the charter which it granted to the corporation, contracts to give it the same rights which are given natural persons in carrying on the same business for which the corporation is chartered to carry on.

One might argue against this that the Legislature, although it has not the power to make contracts for the corporation, might impose duties which can be enforced as if they arose from contract. Even though we may concede this to be true, it cannot be denied but that these duties must be imposed by the Legislature itself, and not by a third person; which, by this statute, would be any other railroad within the State. It is one of the first principles of constitutional law that a Legislature cannot delegate its authority to any other body or to any person.<sup>1</sup> This body, in whom has been entrusted the power of judgment and discretion, cannot relieve itself of the responsibility of this power by choosing other agencies to execute its power; nor can it substitute the judgment, wisdom and discretion of any other body for those to which alone the people have seen fit to confide this sovereign trust.

#### RECAPITULATION.

To conclude, it may be said that unless the Constitution of the United States or of the State expressly prohibits the passage of regulative laws, general in character, as applicable to these railroad corporations, the power is necessarily vested in the Legislatures of the several States.

All contract rights are subject to State regulation, as are property rights, and although a railroad corporation has a charter not subject to amendment or repeal by the Legislature, it takes it, nevertheless, subject to such changes as may be made in the general laws and Constitution, unless as to the subject-matter involved, the charter constitutes a contract exempting the corporation from the operation of such legislation.

The company, in conducting its business under the charter, must conform to such rules and regulations as the State may establish for the safety and protection of those being carried by or having transactions with it. These regulations must have reference to the comfort, safety or welfare of society, and they must not injure the property rights of the corporation, lawfully obtained from or while acting under the charter. The most essential of

these rights of a railroad corporation, owing to the nature of its business, is the right to make reasonable contracts; and in interfering with this right, the Legislature must act within the limits of its police power, respect all constitutional modifications, and ever keep in view the object of civil government as represented by that body.

HENRY L. HARRINGTON.

### THE BUILDERS OF OUR LAW DURING QUEEN VICTORIA'S REIGN.

CHIEF JUSTICE ERLE.

THE night that Burns was born the cottage which sheltered him and his mother was nearly blown down by a storm. "No wonder," said the poet afterwards, "that one ushered into the world amidst such a tempest should be the victim of stormy passions." Erle — the future chief justice of the common pleas — was ushered into the world amid a mightier tempest, the storm of the Great French Revolution:

When France in wrath her giant limbs upreared,  
And with an oath that shook earth, sky, and sea,  
Stamped her strong foot and said, "I will be free."

But the lurid star of Erle's nativity exercised no malign influence over his life or nature. His life was gentle, and the elements in him most happily and graciously mixed. All the red star of revolution did was to make Erle a mild but consistent liberal, a liberal who sat through one session of parliament silent like Gibbon, and voted steadily with his party. Gibbon used to explain his silence as a senator by saying that "the bad speakers in the house filled him with terror, the good ones with despair."

Perhaps Erle had the same feeling. He was not gifted with eloquence — indeed, he had a slight impediment in his speech — nor did he, though a distinguished scholar at Winchester and New College, show any particular brilliancy when he first joined the Western Circuit. He attended, it is said, several assizes and sessions without picking up a stray brief. But he had what was better than brilliancy, thoroughness. He was painstaking, he was tenacious, never declamatory, but strikingly argumentative, plain and homely in his style, thinking, like old Fuller, that "the plainest words are the profitablest oratory in weightiest matters."

Self-reverence, self-knowledge, self-control,  
These three alone lead life to sovereign power

And these Erle had. He conquered the impediment in his speech by a self-imposed habit of distinct enunciation, and the only trace of the defect remaining in after life was a certain deliberateness of delivery, a "measured emphasis of utterance." He schooled his temper, too, as well as his tongue.

<sup>1</sup> Cooley's Const. Lim. 137.

"Pray, Mr. Kenyon, keep your temper," said Lord Mansfield. "Your Lordship," said Mr. Cowper, who sat by, "had better recommend Mr. Kenyon to part with it altogether." Erle parted with his. It is no secret that naturally his feelings were strong, but he for a long course of years kept them under stern restraint, and so effectually that no one can remember any outbreak. He rightly considered that nothing could be more unforensic or more unjudicial than ill-temper. The result of all was that he became a very acute and able advocate; indeed, the late Lord Chief Justice once stated that, in his opinion, the finest advocate of his time was Sir William Erle. Serjeant Davy used to say that the more he went the Western Circuit the more he understood how the wise men came from the East, but in Erle's time this jibe would have fallen flat, for Follett and Crowder and Wilde were among the leaders of the circuit, and among these, able and brilliant as they were, Erle gradually came to the front, though his rise was anything but meteoric.

He was sixteen years before he obtained a silk gown from Lord Brougham, and it was ten years more before he was appointed a judge of the Common Pleas. It is significant how entirely he owed his advancement to his professional merits, and not to his political pretensions, that he received his appointment from a Tory Chancellor, Lord Lyndhurst. It was one of those excellent appointments which Campbell jestingly told Lord Lyndhurst at a dinner at Mr. Justice Patterson's would "cover the multitude of his sins."

By the unanimous suffrage of the whole legal profession a better judge than Sir William Erle never sat on the bench — combining in the highest degree learning, diligence, patience, and courtesy. His impartiality and his single-eyed desire for justice inspired in the bar and in the public a confidence which many judges of more striking and original talents have failed to secure. A writer in one of the quarterlies described Erle, J., as the best of our judges on the common law bench "bating a little obstinacy." This so-called obstinacy was the one flaw in Erle's judicial character; it generally is, of a strong judge like Erle — it goes along with masculine sense and decision. Such men are not given to nicely balancing opposite views like philosophers or casuists, nor was Chief Justice Erle. He was eminently practical. He never delivered a judgment or charge in which he did not allude to practical experience or rest on practical views. Serjeant Balfour says that he put too much faith in outside respectability, and was almost as weak as some juries in cases where injuries were alleged to have been inflicted upon women. If he did it was a failing which leaned to virtue's side. "I was counsel," says the serjeant, "in the last cause he tried,

and his dealing with it illustrated what I have said about his want of knowledge of the ways of the world. It was an action arising out of the sale of a horse for which my client had given 800 guineas. It was a magnificent-looking animal, and had been shown off by a very pretty girl before it was purchased. The horse was a screw, and the whole affair a plant. The chief justice was indignant at my defense. He could see nothing to justify the imputations I had made, and so he summed up. The jury, however, with very little hesitation found in favor of my client. I met Erle leaving the court. He was greatly vexed at the verdict, and could not understand it. I told him that the parties probably were known to the jury, but I cannot help thinking that he felt his power and influence were waning. His predecessor, Sir John Jervis, would have seen through the whole fraud in a moment."

He had a quiet sense of humor, and much relished a joke. Once a counsel apologized for a sally of wit which set the court laughing. Erle did not have the laughter "instantly suppressed," or the court cleared. On the contrary, he said: "The court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity." A scene once occurred in court which must have been not a little conducive to hilarity, but whether it was hilarity which the chief justice shared may be doubted. It was in a case tried at Bodmin, in 1855. There was a deaf jurymen. He said nothing about his infirmity, and it was only when the judge had finished his summing up that it was discovered that the jurymen had not heard a word of the recapitulation of the evidence. The result was that Erle had to repeat the whole of his summing up for the benefit of the exasperating jurymen. Needless to say he was then discharged. *Apropos* of juries, some of his opinions given before a parliamentary committee on our jury system are worth noting. *Inprimis*, he thought that jurors ought to be paid by the day, on a scale which would at least pay their expenses, and afford some indemnity for loss of time. He also thought that nine or seven jurors should be sworn instead of twelve. Hear him on the "hardships" of jurymen: "When I have heard great complaints by jurors I have said: 'If it is so repulsive to you I will discharge you at once, and tell the sheriff never to allow you to serve again on a jury as long as you live,' but I have never found anyone ready to accept that condition." Would that formula answer now? Alas! for the degeneracy of public spirit, we much fear the condition would be promptly closed with. On the proposal for a property qualification for jurors, he remarked epigrammatically: "The bounty of Providence in giving a man sound judgment does

not depend on the soundness of the roof over his head."

The chief justice was one of those who "do good by stealth and blush to find it fame." "He was," says Ballantine, "a man of great benevolence, and I have heard many anecdotes illustrative of his kindness of heart, and one example happened to come within my own knowledge. He was presiding in the civil court at Northampton, and was obliged to direct a jury against some poor people who had been scandalously but legally swindled. To them the result was absolute ruin. On the following morning an elderly gentleman on horseback made his appearance in the alley where the sufferers resided. This was Sir William Erle. He gave them some very good advice, and with it a sum of money that replaced them in their old position."

Sergeant Robinson adds his testimony: "When I applied," he says, "to the Chief Justice Erle to recommend me to the chancellor he wrote me a very kind letter, stating that his relations with the chancellor were so strained, that he had come to the resolution not to make any further applications to him of any kind. He said he was very sorry to refuse me, but he could not submit to the rebuffs he had received from Lord Westbury on more than one occasion. However, in less than a fortnight, I received from him another note saying that he had thought over my application, and did not think I ought to suffer on account of any private grievances of his own, and that he would, at all events, make an exception in my favor. Anyone acquainted with the chief justice would recognize this plea as thoroughly illustrative of his character. The recommendation was given, and I shortly afterwards obtained the coif."

No finer tribute could be paid to any judge than that which was paid to the chief justice, on his retirement in 1866, by Sir John Rolt, the then attorney-general: "My Lord," he said, "we all feel and desire to acknowledge that under your presidency in this court the great judicial duty of reconciling, as far as may be, positive law with moral justice has been satisfied. The letter of the law which kills, and the mere discretion of the judge, which has been well said to be the law of the tyrant, have been alike kept in proper and due respect. Learning, great experience of affairs, wise administration, have been so combined that, with the assistance of the eminent judges associated with you on that bench, the laws of England have been exhibited in their true aspect as the exponents of the rights and duties of our citizens and the guardians of their liberties. The Court of Common Pleas, under your presidency, my lord, has obtained the highest confidence of the suitor, the public, and the

profession. Our homage," he went on to say, "is due, and is paid not only to the dignity of the judge, but the worth of the man," his simplicity and elevation of character, his private and social virtues, his kindness and his courtesy. It was, indeed—to use the words of one who was present on the occasion—a touching scope to see the hero of a hundred forensic pitched battles, the tried and tested athlete of the legal arena, the judge who had presided over so many a well-fought contest, who had so gently, yet so strictly, kept counsel, witnesses and public in order for twenty years; who had known so well how to maintain judicial dignity, yet who had ever been ready to enliven the tedium of protracted inquiries and long-drawn disputations with the sallies of a dry and quiet humor, now when he came to bid farewell to his colleagues and to those who had practised before him, as nervous and almost as overcome as if he were a junior holding a maiden brief before a court of quarter sessions.

Cincinnatus laid aside the fasces to till his farm. From and after his retirement, Sir William Erle passed his time chiefly in the country, following the life of a country gentleman, fond of his tenantry, his horses, his dogs and his cattle, and dispensing with a peculiar charm the hospitalities and charities of a Hampshire squire, at Bramshott, near Liphook and Haslemere. "Senesco non segnesco" was his motto, and, like Dyer, he would say:

Be full, ye courts, be great who will,  
Search for peace with all your skill;  
Open wide the lofty door,  
Seek her on the marble floor.  
In vain you search, she is not there.  
In vain ye search the domes of care.  
Grass and flowers quiet tread  
On the meads and mountain heads.

He might often be seen in the lanes about his neighborhood, dressed in a loose country coat, knee breeches and gaiters, fondling his dogs, and caressing his cart horses, who, on their part, seemed quite at home with him. He was not a sportsman — indeed, it is said that he would not allow either birds or beasts on his estate to be killed — but he was a thorough typical English gentleman, with a fine, honest nature and fine, manly tastes and pursuits. All this you could read in his open and genial countenance, so full at once of good sense and good humor, of shrewdness and kindness. In fact, few men were ever more truly beloved than Chief Justice Erle, either in their homes or in general.

He sometimes, however, attended the sittings of the Privy Council. Westbury, says Serjeant Robinson, once remarked to Chief Justice Erle, after the latter's retirement, "I wish, Erle, you would sometimes come into the Privy Council and relieve me from my onerous duties there, for we can't get on

without three, and there is no one else I can apply to."

Erle said he would willingly come, but he was getting a little deaf, and was afraid that might interfere with his power of doing full justice.

"Not at all, my dear fellow," said Westbury. "Of my two usual colleagues, — is as deaf as a post and hears nothing. — is so stupid that he can understand nothing he hears, and yet we three together make an admirable court."

"Human life," he says, in his admirable little treatise on Trade Unions, "is a progress between two sets of physical and moral agencies perpetually striving against each other; one on the side of falsehood, malice, and destruction; the other on the side of truth, kindness, and health; and the law, if wisely made and properly administered, maintains truth and kindness and health." Erle's own life was all on the side of truth, kindness and health.

His decisions will be found reported in the later volumes of Adolphus and Ellis, in Ellis and Blackburn, Common Bench Reports, Cox Criminal Reports and Law Reports Common Pleas, vols. 1 and 2.

It is very old law that adultery does not bar a wife's right to dower. *Needham v. Bremner* (14 L. T. Rep. 437; L. Rep. 1 C. P. 583) is based on the same principle. It decides that a verdict finding a wife guilty of adultery does not constitute a defense to an action against the husband for necessities supplied to the wife. It does not, like a decree for dissolution, alter the status of the parties. The woman still continues the wife of the defendant. The verdict is binding as between the parties to the suit, but not as against other parties who came to litigate the same question. Our law has always rigorously enforced the safety of the King's highway to his liege subjects. *Hadley v. Taylor* (13 L. T. Rep. 368; L. Rep. 1 C. P. 53) decides that occupiers of premises, warehousemen for instance, who leave a hoist hole unfenced, say a cellar flap, within a foot of the highway, are liable if a man fall down it. A hole in such close proximity to the highway is a public nuisance, because, though you cannot recover if you wander into danger from the highway, you ought to be able to step a foot off the highway without danger.

The ravages of rats at sea have much exercised the minds of our judges. *Kay v. Wheeler* (16 L. T. Rep. 66; L. Rep. 2 C. P. 302) is one of the earlier cases, and it decided that the shipowner is liable for injury done by these "busy mischievous vermin" letting in sea water to the goods, though shipped under a bill of lading containing exceptions of "the act of God, the Queen's enemies, fire, and all other dangers and accidents of the sea, rivers, and navigation, of what kind and nature soever."

Innkeepers are rather hardly pressed by the com-

mon law of England, but there is such a thing as contributory negligence on the part of the guest which will exonerate the innkeeper from liability. *Armstead v. Wilde* (17 Ad. & Ell. 261) is an instance. There a traveler for a firm ostentatiously showed a large sum of money in the presence of several persons, and then openly put it in an ill-secured box, which he left in the travellers' room, and the innkeeper was held not responsible for a loss. It is not even necessary, *semble*, that the negligence should be gross. *Ex parte Death* (18 Ad. & Ell. 647) decided an important point of University discipline, viz., that the governing body of a university may lawfully issue a decree that every tradesman with whom a person *in statu pupillari* within the university contracts a debt of £5 shall make the same known to the tutor of such person's college on pain of being discommuned if he omits doing so; and in case of disobedience they may enforce such decree by ordering that no person *in statu pupillari* shall deal with the tradesman for a given period. The law would indeed have been deplorably meddlesome if it had interfered with this wholesome provision against undergraduate extravagance in Cambridge. Only why does not Oxford follow her sister university's example? Other decisions of Erle's are: That the servant of a horsedealer has an implied authority to bind his master by a warranty (*Howard v. Sheward*, 15 L. T. Rep. 183); that a landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent (*Brown v. Glenn*, 16 Ad. & Ell. 254); that the solicitor of a vendor receiving the deposit on a sale is not a stakeholder (*Edgell v. Day*, 13 L. T. Rep. 328; L. Rep. 1 C. P. 80; cf. *Ellis v. Gaulton*, 68 L. T. Rep. 144; (1893) 1 Q. B. 853); that it is not competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange (*Bateman v. Mid Wales Railway Company*, L. Rep. 1 C. P. 499); that a pew in a parish church does not entitle the owner to a county vote as a 40s. freeholder (*Hinde v. Chorleton*, 15 L. T. Rep. 472; L. Rep. 2 C. P. 104); and that a ballot divertissement is not an "entertainment of the stage" (*Wigan v. Strange*, 13 L. T. Rep. 371).

The notorious Jackson case stirred society to its depths. It was stigmatized as subversive of marriage and domestic life, and the press poured forth "cataracts of nonsense," but in truth all that the Jackson case laid down had already been laid down long before in *Reg. v. Legget* (18 Ad. & Ell. 781), one of Erle decisions, viz., that where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a *habeas corpus* on the application of the husband for

the purpose of restoring her to his custody. The only difference is, that in the time of *Reg. v. Leggatt*, the ecclesiastical court had still the right to compel a rebellious wife to return to her allegiance. But really we have lately progressed so fast under the influence of the "new woman" that Jackson's case, if decided to-day, would hardly startle us. In all probability it would be meekly accepted by the deposed lords of creation without a single murmur.—*Law Times*.

### Abstracts of Recent Decisions.

**ADMINISTRATION—ACCOUNTING BY ADMINISTRATOR.**—Where an intestate had pledged in New York collaterals largely exceeding in value the obligation for which they were pledged, the administrator in Pennsylvania, who paid off the obligations out of the general fund, and lifted the collaterals, and sold them, and swelled the general fund, will not be surcharged with the amount so paid. (*In re Shinn's Estate* [Penn.], 30 Atl. Rep. 1026.)

**ADMIRALTY—MARITIME SERVICE—WATCHMAN.**—The service rendered by a watchman, employed to care for and clean the machinery and maintain a general care and supervision of a vessel lying at her home port, out of commission, and with no voyage in contemplation, is not maritime. (*Williams v. The Sirius* [U. S. D. C., Cal.], 65 Fed. Rep. 226.)

**CARRIERS—INJURIES TO GOODS AFTER REACHING DESTINATION.**—Where the seller contracts to deliver goods "f. o. b." at the place to which they are to be shipped, and pays the freight to such place, on the arrival of the boat by which the goods are transported at such place the carrier ceases to be the agent of the seller, and becomes the agent of the purchaser, and the seller cannot maintain an action against the carrier for injuries to the goods after such arrival, and before they were unloaded. (*Capehart v. Furman Farm Imp. Co.* [Ala.], 16 South. Rep. 627.)

**CONTRACT—ACTION—THIRD PERSONS.**—Where a contract for sale of land recites that part of the price "is going to" one not a party to the contract, and for whose benefit the contract is not entered into, he has no right to sue for a breach of such contract. (*Crandall v. Payne* [Ill.], 39 N. E. Rep. 601.)

**CONTRACT WITH PARTNERSHIP—DISSOLUTION.**—The fact that, upon the dissolution of a partnership, one member assigns to the other his interest in a partnership contract, does not release the other party to the contract from the performance thereof. (*Campbellsville Lumber Co. v. Bradlee* [Ky.], 29 S. W. Rep. 313.)

**CORPORATION—TREASURER OF CORPORATION.**—The treasurer of a manufacturing corporation has no implied authority to bind a company as an accommodation indorser. (*Usher v. Raymond Skate Co.* [Mass.], 39 N. E. Rep. 416.)

**CUSTOM—EFFECT ON CONTRACT.**—A guarantor of the payment of freight bills which may become due to a railroad company from a certain shipper is not relieved from any part of his liability because the company failed to enforce against such shipper its custom of collecting its bills weekly. (*Philadelphia & R. R. Co. v. Snowden* [Penn.], 30 Atl. Rep. 1129.)

**DEED—RESERVATION—RIGHT OF WAY.**—A deed of land which reserves to the grantor a right of way over part of the land described, conveys to the grantee the fee to the whole of the land, including that part over which the right of way is reserved, subject to the use of such part for the purpose for which it was reserved. (*Moffitt v. Lytle* [Penn.], 30 Atl. Rep. 922.)

**EASEMENT—CONVEYANCE OF DWELLING.**—A water pipe leading from a driven well in a yard to a sink in the kitchen of a dwelling, there ending in a pump, by which water can be and is habitually drawn from the well to the kitchen for domestic purposes, the well and the water pipe being completely hidden from view, form an apparent and continuous easement, which will pass with a conveyance of the dwelling alone by the owner of both yard and house, the owner retaining the yard. (*Larsen v. Peterson* [N. J.], 30 Atl. Rep. 1095.)

**EVIDENCE—DECLARATIONS AS TO OWNERSHIP.**—Declarations of a deceased person, claiming ownership of specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. (*Crothers' Adm'rs v. Crothers* [W. Va.], 20 S. E. Rep. 927.)

**FIXTURES—BONA FIDE PURCHASERS.**—An innocent purchaser of a building in which machinery had been placed so as to become a part of the realty, is not affected by an agreement between his vendor and the seller of the machinery, by the terms of which the latter was to retain the title to the machinery until it was paid for. (*Wentworth v. S. A. Woods Machine Co.* [Mass.], 39 N. E. Rep. 414.)

**GARNISHMENT—MONEY DEPOSITED.**—A treasurer of a school district deposited in a bank a draft and enough cash to make the amount he owed the district, stating he left it for the treasurer of the school district, his successor. The draft was in part the proceeds of stock of a third person, re-

cently sold by him. *Held*, that, in an action brought against the treasurer to recover the price for which such stock was sold, plaintiff could not maintain garnishment against the bank for the amount of such deposit. (*Klocow v. Patten* [Iowa], 61 N. W. Rep. 926.)

**INSURANCE—CONDITION OF POLICY.**—A condition in a fire policy on buildings, that, "if the hazard be increased by any means within the control or knowledge of the insured," it shall be void, is intended to protect the property during the life of the policy from fire by change in its structure, methods of heating, addition of out-buildings, etc., and does not relate to a subsequent sale under a pre-existing judgment or incumbrance. (*Collins v. London Assur. Corp.* [Penn.], 30 Atl. Rep. 924.)

**JUDGMENT ON NOTE.**—The entry of judgment on a note executed on Sunday, in pursuance of a power of attorney therein granted, does not render the contract to pay an executed contract, so as to prevent the maker, after the judgment has been set aside, from defending by showing that it was made on Sunday. (*Whitmire v. Montgomery* [Penn.], 30 Atl. Rep. 1016.)

**LANDLORD AND TENANT—OIL AND GAS LEASE.**—A lease for the sole purpose of mining for petroleum and gas, and piping the same, of "all of that certain tract of land described as follows, containing forty acres, excepting reserved therefrom ten acres," specifically described, "upon which no wells shall be drilled without consent of the party of the first part," is a grant of oil and gas-well right for the whole forty acres, with merely a limitation as to drilling wells on the ten acres. (*Brown v. Spilman* [U. S. S. C.], 15 S. C. Rep. 245.)

**MALICIOUS PROSECUTION—PLEADING.**—In an action for malicious prosecution, an offer of testimony showing that, after a statement to a magistrate of the facts on which a charge of larceny was based, that officer took the information and issued the warrant, was properly refused, as it did not show that the prosecution was instituted by the advice of a magistrate after a full disclosure of all the facts. (*Mentel v. Hippely* [Penn.], 30 Atl. Rep. 1021.)

**MASTER AND SERVANT—NEGLIGENCE.**—Where a servant sues for injuries received through the negligence of an employe whom the master claims is a fellow-servant, it is error to charge to find for the defendant if the injury was the result of such negligence, instead of giving the rule for determining who are fellow-servants, and leaving the jury to determine whether such employe was or was not the plaintiff's fellow-servant. (*Mobile & O. R. Co. v. Godfrey* [Ill.])

**MUNICIPAL CORPORATION—OBSTRUCTION OF SIDEWALK.**—A city is not relieved from liability for injuries

to plaintiff, caused by an obstruction extending over part of the sidewalk, by the fact that there was sufficient space remaining to allow plaintiff to pass in safety. (Mayor, etc., of Birmingham v. Tayloe [Ala.], 16 South. Rep. 575.)

**RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS.**—It cannot be said as a matter of law that it is not negligence for a railroad company to run an extra train rapidly over a private crossing without ringing the bell or giving other warning, when the approach of the train is concealed by bushes. (*Chicago & A. R. Co. v. Sanders* [Ill.], 39 N. E. Rep. 481.)

**HOSPITAL—MALPRACTICE**—A railway company voluntarily furnishing a hospital for the treatment of its employes in case of injury is not liable, provided it employ competent surgeons, for their malpractice. (*Eighmy v. Union Pac. Ry. Co.* [Iowa], 61 N. W. Rep. 1056.)

**REMOVAL OF CAUSES—LOCAL PREJUDICE.**—The record presented upon an application for removal of a cause from a State to a United States court, on the ground of local prejudice, in order to authorize the latter court to assume jurisdiction, must show that the amount in controversy exceeds \$2,000. (*Todd v. Cleveland & M. V. Ry. Co.* [U. S. C. C. of App.], 65 Fed. Rep. 145.)

**SALE—FRAUD—REPORT TO COMMERCIAL AGENCY.**—A seller of goods has no right to rely on a statement made by the purchaser to a commercial agency more than two years before the sale, and the falsity of that statement does not justify a rescission of the sale on the ground of fraud. (*Sharpless v. Gumme* [Penn.], 30 Atl. Rep. 1127.)

**TAXATION—ASSESSMENT—SUIT TO ENFORCE.**—A complaint in an action to enforce an assessment for street improvements is demurrable, unless a copy of so much of the assessment roll as affects defendant's property is attached as an exhibit. (*Sloan v. Faurot* [Ind.], 39 N. E. Rep. 539.)

**UNITED STATES COMMISSIONERS—REMOVAL.**—While commissioners of the Circuit Court have no fixed tenure of office, and the appointing court has power to remove them at pleasure, the exercise of this power should be governed by a sound legal discretion, and if there are charges against a commissioner, full opportunity should be given him for a hearing. (*In re Commissioners of Circuit Court* [U. S. C. C., N. Car.], 65 Fed. Rep. 314.)

**WATERS—SURFACE WATER—RIGHT TO DIVERT.**—A land-owner cannot collect surface water so as to cause it to flow on the land of an adjoining owner in a manner different from its natural flow. (*Stinson v. Fishel* [Iowa], 61 N. W. Rep. 1063.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE Supreme Court of the United States has ordered a rehearing of the arguments by two counsel on each side of the Income Tax on May 6th next, and it is more than probable that a full bench will hear and finally determine a question which has undoubtedly aroused more interest than any legal problem which has been presented to that court in many years. It is not possible to change the decision as to the unconstitutionality of the law in respect to the tax upon real property and municipal bonds, but it will be a general relief to those interested in the measure to have a decision final and complete in all other particulars. As a matter of policy it should be urged that the Income Tax of 1894 is too expensive a method of raising the revenues for the support of the government, and it is obvious that the operation of the law increases to a large extent the necessary expenditures of this country. It is to be hoped that Congress will be able to decide upon some method of taxation, if one is necessary, in addition to the tariff, which can be easily collected and will not become so large a factor in the annual supply bill. The regularity with which we have seized every opportunity to write against this law has been considered, perhaps, by many to exceed the iniquity of the very law which we railed against, but we have appreciated the interest of the lawyers, in and view of the ability of those retained in the case, we think we can afford to devote considerable space to the discussion.

We publish in this issue the opinion of Judge Stephen J. Field, which we think will be read with that pleasure which its excellence deserves in the legal and business world. The additional brief which was filed by the opponents of the law in the case of Hyde v. Continental Trust Co., of New York, et al., in which the Hon. Joseph H. Choate is one of the counsel, contains an argument which we think

will prove of more than passing interest to our readers. After stating the principle that a tax upon the owners of property, whether real or personal, is a direct tax and is unconstitutional in the manner in which it is levied in the Income Tax law, the counsel state that the two measures of taxation in the Constitution are radically foreign in their application to the individual taxpayer in respect to the amount required of him, and that the coincidence of the ration of population to wealth in each and all of the States of the Union, as that a tax imposed after one measure would likewise conform to the other, would be almost miraculous. The learned counsel then say:

1. The capital or *corpus* of real estate.
2. The rents or income of real estate.
3. The capital of bonds or other personal estate held for the purposes of income, or ordinarily yielding income.
4. The interest or other income of such bonds or other personal estate.

As to the first we have no dispute, nor room for dispute. It is and always has been conceded that a tax upon real estate, *eo nomine*, or upon its owners, as such owners, is a direct tax within the meaning of the constitution. This concession was inevitable, the claim being that no other tax than that (excepting capitation or poll-taxes) is a direct tax within the provisions of the Constitution, and but for such concession, those who make it would have found themselves obliged to contend that the words "or other direct tax," in the provision that no capitation or other direct tax shall be laid otherwise than in proportion to population, do not refer to *anything*.

In considering the second question we have the *conceded starting point* that a tax avowedly upon real estate as such, or upon its owners as such — upon the capital or *corpus* — falls within the class of direct taxes which the Constitution requires to be apportioned among the States in proportion to their population and representation.

Whereupon we assert, that the claim, that although the real estate itself cannot be taxed *eo nomine*, without conformity to the prescribed rule of apportionment, its rent or income can be taxed to its owner with entire disregard of that rule, is an attempt to establish a distinction without a difference; that,



whichever of the two great classes of measure for taxation (*i. e.*, direct or indirect), the real estate belongs, the rent or income which it yields as a natural and ordinary incident of its ownership, belongs also.

For support of this proposition we assign the following grounds or reasons, and we submit that *any one of several* of them would, if standing alone, be sufficient of itself to sustain our position :

1. Considering the question as one between a nation and its real estate owners as a body, subjected to taxation, a general tax imposed by the nation upon them for, or in respect of their real estate, or its rents or income, *by whatsoever name the tax may be called*, whether land tax, property tax, income tax or any other name that may be chosen, is in substance and effect, *an enforced subtraction from the rent or income of the real estate, of so much as the tax amounts to, which amount, thus subtracted, is required to be handed over by the tax payer to the tax gatherer.*

The rent or income constitute the only fund out of which, in the general, and regarding such taxpayers *en masse* or as a body of men, the tax, by whatever name it may be called, practically, is or can be paid. The real estate owner cannot sever a part of the land or a part of the house and deliver it over to the tax gatherer. And the government is under a practical necessity of so limiting the amount of the tax, as that it shall not in the general exceed some surplus of the rent or income of the lands or real estate, remaining after some allowance for the living of the landholders.

No people with any tolerable measure of freedom would submit to any such yearly or ordinary taxation of their lands or real estate, as would absorb all the rent or income and trench upon the capital, and if, in a despotic government, such extraordinary measure of taxation were attempted and submitted to, it might safely be pronounced that that nation was on the high road to decay and extinction.

If, in case of war or other extraordinary emergency, the government has imperative necessity for greater supply of funds than taxation, limited as necessity requires it to be, can furnish, the well-known practice is, to supply the deficiency by means of loans.

Upon examining the legal regulations of the

so-called land tax of England, it will be seen that they are imposed upon the basis of so much per cent. upon the estimated rental or assessed rental value.

The land tax of 1693, shortly after the accession of William and Mary, was fixed at the rate of four shillings on the pound, or twenty per cent. of the assessed rental value. That was in a time of extraordinary expenditure. Afterwards it was customary to levy a land tax yearly, varying the rate from time to time according to circumstances, ranging between one shilling and four shillings on the pound, and so until 1798, when there was established, as permanent, a land tax of four shillings on the pound.

All these land taxes were, of course, based upon percentages of the assessed rent or rental value. Any assessment of such a percentage upon capital would have been impossible of collection.

2. Wherever the law has occasion to take cognizance of the question, the principle above stated is applied, that an ordinary (say, yearly or otherwise periodic) tax upon real estate, though assessed in form upon the capital or *corpus* of the estate, is in substance and effect a charge upon and subtraction from, the rent or income, and must be borne and paid accordingly.

It is a familiar rule of law, for which we need not cite authorities, that as between tenant for life and remainderman, the ordinary annual taxes must be borne and paid by the tenant for life, although they are in form assessed upon the land itself, which belongs to the remainderman.

This is because of the principle above referred to, that the ordinary yearly or periodical taxes, whether they be in form taxes upon the land or taxes upon its rent or income, are in substance and effect taxes upon or subtraction from the income, and must be paid by him who is entitled to the income. The tenant for life is not permitted to throw any portion whatever of such taxes upon the owner of the inheritance.

3. If there be an estate of rented houses and lands of the value of \$100,000, yielding an annual rent of \$10,000, held either by a tenant for life or an owner in fee simple absolute, it is manifestly a matter of entire indifference to him, whether the annual exaction from him in the shape of taxes be a sum of \$500, assessed

as being one-half of one per cent. upon the capital, or the same sum (\$500) assessed as being five per cent. upon the rent. We submit that any claim, that the tax thus imposed was any the more or any the less a direct tax, because of its being imposed in either one of these two forms than if imposed in the other of them, must necessarily be without even the slightest ground in sense or reason or in law.

All the circumstances relating to any matter of substance would be precisely alike in the two cases. In each case there would be the same amount required to be paid by the same person, for the same subject matter; in each case there would be the same circumstances, not merely of obligation to pay presently, but of necessity of bearing ultimately, because of impossibility of shifting the burthen upon any one else. In each case there would be the same circumstance of inevitableness or absence of choice whether to do or not to do something creating subjection to the tax; it being imposed merely because of ownership and its natural ordinary incidents, with no possible means of escape from the tax unless by abandoning the property or property right involved; and surely a suggestion of *that*, as a practical opportunity for choice, would not be worthy of serious notice.

The substantial operation is, the imposition of *an annual tax* upon the *annual value or annual user*. The subject matter taxed is not two things, but that one thing; and whether the government choose to call its annual imposition upon the land-owner, a tax upon the land *eo nomine*, or a tax upon the rent or user *eo nomine*, or to split it up and call part of it by one name and part by the other, is a mere matter of form, in respect of which it is entirely immaterial to the owner of the real estate which of the forms the government may choose to adopt.

However that may be, the substance of the matter to the owner is, that the whole amount taxed, whether formally imposed, wholly in the one name, or wholly in the other, or split up and called by different names, is *his annual land tax or real estate tax*, which he is compelled to pay, as the owner of the property, because of his ownership.

4. If the language of the constitutional pro-

vision had been, that no tax should be imposed upon real estate, otherwise than in accordance with the prescribed rule of apportionment, and our claim had been (as we think would have been clearly sound) that such provision clearly precluded the taxation of the rent otherwise than by that prescribed measure; for that to hold otherwise would be merely a quibble upon words in disregard of substance and meaning; and if, to that, it had been answered by our adversaries, that a tax upon the rent, though issuing out of the land, was not a tax upon the land itself, and if the court had held that to be, technically, a real distinction in substance, resort to which was justifiable, and that we showed no sufficient evidence of contrary intent, and had thereupon decided the question against us, that decision would not avail our adversaries in such a case as the one now actually before the court

The actual provision is, *not* that real estate shall not be taxed otherwise than by the prescribed measure, but — that no direct tax shall be laid otherwise than by the prescribed measure. Then the case is, that it has been long ago decided, and is conceded, that real estate cannot be taxed otherwise than by the prescribed measure, *because a tax upon it is a direct tax*; when our adversaries assert a distinction in this respect, between a tax upon the land and a tax upon the rent issuing out of the land, they have no basis whatever for reference to any such verbal niceties or rigid technical distinctions as asserted in the first supposed case; but the burthen necessarily incumbent upon them is to establish that a tax upon the rent issuing out of the land is (*not* with reference to some supposed or alleged, or, as we should say, imaginary, rule of real estate law, but *in its actual nature and substance*) a thing *so wholly differing* from a tax upon the land itself, as that it belongs to an entirely different class, and is properly to be ranked as an indirect tax, although a tax upon the land itself is confessedly to be ranked as a direct tax; and we think we may safely challenge them to show any just ground for such difference of classification.

5. "If a man seized of lands in fee, by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*.

the whole land itself doth pass. *For what is the land but the profits thereof?*" (Coke upon Littleton, Lib. I., Cap. I., Sec. I., p. 4 b.)

"A devise of the interest or of the rents or profits is a devise of the thing itself, out of which that interest or those rents and profits may issue." (Patterson v. Ellis, 11 Wend., 259, 298.)

6. Suppose that in the constitutional adjustment, between the States and the Federal Government, of the power of taxation, it had been provided that the United States should never impose a tax upon any real estate of any inhabitant of any State, and that, in the face of that provision, the Congress of the United States should undertake to impose an annual tax, say of forty or fifty per cent, upon the rents or income of all the real estate of the inhabitants of the States, the amount of which tax might probably exceed the amount of any annual tax on land *eo nomine* that had ever been imposed.

That enforced submission to such a tax, would make the constitutional prohibition of taxation of real estate by the Federal Government, illusory and practically worthless, is clear enough. Can there be a doubt that such an act of Congress would *therefore* be unconstitutional and void? If it be conceded or held to be so, we submit that all possible doubt as to the unconstitutionality of the Act of 1894, in so far as it purports to tax the rent of real estate, must be thereby put at rest.

If a constitutional prohibition of *any* taxation of real estate would invalidate *any* taxation of the rent or income of such real estate, a constitutional prohibition of taxation of real estate otherwise than in conformity with a prescribed measure for such taxation, must likewise invalidate any taxation of the rent or income of such real estate, according to a measure radically differing from the one prescribed, and producing the result of imposing upon the taxpayers in some particular States a burthen of taxation very much greater than if the prescribed measure had been adhered to; as would be the case under this law if it were sustained.

There are other considerations applicable to this particular point which we conceive to be of great force, but as they are likewise applicable to the questions relating to the taxation

of the income of personal estate, we reserve the presentation of them until after the particular discussion of that question.

We come now to the consideration of the question, whether Congress has the constitutional power to tax the capital of bonds or other personal estate held for the purpose of income, or yielding income, otherwise than in conformity with the prescribed rule of apportionment among the States — in other words, whether the taxation of the capital of such personalty would be a direct tax within the meaning of the Constitution. Although the law in question does not purport to impose such a tax upon capital of personalty *eo nomine*, the question of the power to do so is practically involved in determination of the question of the legality of the tax purporting to be imposed upon the income of such personalty.

Our primary difficulty, in undertaking to discuss this question, lies in our inability to perceive any ground whatever, in good sense or reason, for supporting an assertion that *general taxation of such capital in personalty* held by the inhabitants of a State of the Union, is intrinsically, or in anywise, any the less a direct tax than like general taxation of the capital or *corpus* of real estate; which is conceded to be a direct tax.

It being admitted that if a man owns, to-day, a house and lot or a farm, Congress cannot tax him for it, unless in accordance with the prescribed rule of apportionment, because such a tax would be direct, a claim that if, to-morrow, he sells it and takes a bond and mortgage in payment, Congress can tax him under a general assessment for the bond and mortgage, and that it can also tax him for his other bonds and other personal estate yielding income, in entire disregard of that prescribed measure, upon the ground of such a tax being indirect, appears to us to be destitute of even the slightest foundation.

Probably no one man contributed more to the adoption of the Constitution after the long struggle which took place in regard to it, than did Alexander Hamilton by his influence and his exertions.

In 1796, Hamilton, then late Secretary of the Treasury, argued, *as counsel for the government*, the carriage tax case of *Hylton v. United States*, 3 Dallas, 171.

We have a record of his opinion upon the particular question now under consideration in a copy of his brief or points in that case found in Hamilton's Works, vol p. 7, 332, in which he asserts that the only direct taxes are: "Capitation taxes, on land and buildings, and general assessments, whether on the whole property of individuals or on their whole real or *personal* estate; all else must, of necessity, be considered as indirect taxes."

As to the suggestion that in the case stated, perhaps, the rule of apportionment would be the most proper, it is clear that if the tax might lawfully be levied upon the basis of apportionment it must be so levied. As before observed, Congress has no option, but must follow the prescribed measure, inasmuch as the two measures lead to widely different results to the individual taxpayer.

Upon the question whether, upon the assumption that a tax upon the capital of bonds and other personal estate held for the purpose of income or ordinarily yielding income, would be a direct tax within the meaning of the Constitution, a tax imposed by general assessment upon the interest or other income of such bonds or other personal estate must likewise be regarded as such a direct tax, not much need be specifically said here; inasmuch as we conceive that nearly all the considerations which we have above urged, for showing that a tax upon the rent or income of real estate differs not in respect of directness or indirectness from a tax upon the real estate *eo nomine*, establish with like effect, and substantially upon like grounds and reason, the proposition, that a tax upon the interest or other income of such bonds or other personal estate differs not, in respect of directness or indirectness, from a tax upon such bonds or other personal estate *eo nomine*; except that we desire to say *in addition*, that, as we conceive, in respect of bonds of ordinary character, such as railroad bonds, State or municipal bonds, bonds and mortgages, United States bonds, such as the so-called currency sixes, and all other bonds of such general nature, it is even more certain and free from doubt (if that be possible) that a tax upon the interest is, for all purposes here involved, of like character and effect as a tax upon the principal would be, than it is that a tax upon

the rent or income is of like character and effect as a tax upon the capital or *corpus* of the real estate from which it accrues; *because the interest is as much and as clearly a part of the bond itself as is the principal.*

Upon reading one of such bonds, say an ordinary thousand dollar, thirty-year, six per cent. bond, we shall of course find that it is an obligation to pay the thousand dollars at the end of the thirty years, and in the meantime to pay thirty dollars on each of the specified semi annual interest days; and so in legal effect is it with ordinary bonds and mortgages made by individuals, during the time they have to run.

There is a steady and increasing desire on the part of the legal profession and citizens living abroad to have a codification of private international law, and on this subject the *Law Times* says:

"A theory held by certain English writers of the Austinian school, and described by some continental writers as the Anglo-American theory, denies that private international law has any relation to the law of nations. The municipal laws of various States resemble each other in those chapters which deal with the interterritorial application of private law, and that is all. One obvious objection to this deduction from the Austinian theory of law and sovereignty has been pointed out by various continental writers. Is it not open to States to frame international treaties on the interterritorial application of foreign law to private persons? And, if those treaties are entered into, would they not constitute a part of the conventional law of nations? And cannot that be done by custom and implied assent which it is possible to do by treaty? Whatever answer might be given by the Austinian jurist to the last question, no negative reply can be given to the preceding. It is obviously within the power of States to frame treaties on private international law; and those treaties will undoubtedly form part of the law of nations. The matter no longer rests in the domain of possibilities; more than one international agreement on certain heads of private international law has been formulated; and once again facts, with their proverbial perverseness, have proved recalcitrant to theory.

"The Conference of the Hague of September, 1893, united delegates of the governments of Austria-Hungary, Belgium, Denmark, France, Germany, Holland, Italy, Luxemburg, Portugal, Roumania, Russia and Switzerland. The conference assembled at the invitation of the Dutch government addressed to the various governments of European States, for the purpose of arriving at an international understanding on various points of private international law. Sweden and Norway, in addition to the powers enumerated above, accepted the invitation to the conference, but the British government refrained from sending a delegate, on the ground, it was stated, of the difference between the nature of English law, so largely customary, and the codified laws of the other States of Europe. This conference was the result of a long series of steps in the direction of creating an international agreement on private international law, commenced by the government of Holland as far back as 1874. The next power to make an effort in the same direction was Italy. In 1881, Mancini, the founder of the new Italian school of international law, was minister of justice in Italy. From 1881 to 1884 negotiations were carried on by the Italian government with a view to the adoption of a treaty on the whole subject of private international law, and not merely on one of its chapters. These negotiations were unsuccessful. Their having been undertaken, however, marked a distinct step in advance. The next step was taken on the other side of the Atlantic. In 1889, on the invitation of the Argentine Republic and of Uruguay, the Congress of Montevideo assembled. As the result of the labors of the congress a series of treaties was concluded, laying down uniform rules on the conflict of laws for all the principal South American States. Here, then, the rules of private international law emerged beyond question into the sphere of the conventional law of nations.

"But this international recognition of the rules of private international law only applied to a minor division of the States of the civilized world. The South American Republics are distinguished by the theoretical perfection of their codes, and by the theoretical supremacy of the rule of law; but they can only add a contributing voice in the concert of the civilized world.

The living fountain of the law of nations is to be found in Europe, its historic place of origin. Hence the importance of the conferences of the Hague of September, 1893, and of June and July, 1894.

"In 1892 the Dutch government issued invitations to the powers of the civilized world, accompanied by an official statement of the views of the government on the necessity of the utility of the conference. The government also submitted a drafted programme of topics to be considered. In this programme (the work of M. Asser) those topics were selected for consideration on which opinion is most formed, and which consequently gave most promise of unanimous agreement. In the first place, general principles on the extraterritorial application of foreign law were indicated, on which the conference were invited to express an opinion. In the next place, it was submitted, rules should be adopted in the interterritorial recognition of family rights. Lastly, the government submitted the necessity of framing an international agreement on the extraterritorial recognition and enforcement of foreign judgments. In the result the delegates unanimously agreed to submit to their governments for adoption rules on several heads of private international law. Apart from the merits of the subject-matter of these recommendations, it is to be noted that it can no longer be said that private international law has no relation to the law of nations. Nearly all the great powers have by their accredited representatives formally expressed their adhesion to the contrary theory, and it can only be a question of time when the assent of the whole civilized world will be secured to this needed extension of the acknowledged rule of law."

One of the provisions of the income tax, the operation of which will be watched with considerable interest by lawyers and laymen alike, and which, so far as we know, has never been raised before, is, as to the power to collect an income tax from a foreigner. It must be remembered that the income tax acts during the war did not include foreigners, and the internal revenue officers held on several occasions that the act could not include them, because they were beyond the jurisdiction of the taxing power. There is undoubtedly a distinction be-

tween a tax levied *in rem* against property within our jurisdiction and on the total income or a foreigner derived from the property which he possesses in this country. It must be apparent that, as corporations are taxed directly on their net profits under the law, the income derived by foreigners from such property is decreased by the amount of such taxation. There seems to be no doubt but that the United States or any State can impose such a tax, which, though in reality it is paid by the foreigner, yet, so far as actual payment is concerned, such payment is made by the corporation in which he is interested. The imposition of taxes on corporations within the State of New York compels those who are not residents of this country to pay some part toward the support of the government. In the case of real property it is undoubtedly subject to the burden of taxation, otherwise it would be taken by the State for non-payment of the same. In the income tax, however, the foreigner, as the law contemplates, must make a return to the collector of the district in which it is presumed he resides, or in which it is presumed his property is situated. Should he fail to do so, or should he make a false return, he is subject to the same penalties that the American citizen must submit to. This is only another example of the lack of common sense in the framing of this much-talked-of law, and reveals most clearly that its advocates, as well as those persons directly interested in preparing it, had but little knowledge of the subject of taxation, and possessed much less real affection for the ultimate welfare of American institutions.

The Dodge inheritance-tax law of Ohio was recently decided to be unconstitutional by the Circuit Court. The contention on the part of the opponents of the measure, and on which the decision was based was that the provision of the Constitution requires taxation should be uniform. There could be no question here of State uniformity as in the case of the Federal Constitution, which has practically the same provision. The court held in substance that the provision of the Constitution must mean that there should be no discrimination between various owners of property, that one rate and method of taxation should be applied to all.

The Dodge bill exempted estates of \$20,000 from the operation of the tax and thus made a distinction which was clearly unconstitutional. Any person succeeding to an estate of \$20,000 could reduce it to possession without the payment of a single penny for taxation, but one inheriting an estate in excess of the amount would have to pay the tax, similar in many respects to the collateral inheritance tax of the State of New York. This process of taxation, the court held, was contrary to the constitutional requirement of uniformity, and hence it very properly decided that the law was invalid, as it violated this requirement. It is most pleasing to notice that if the Supreme Court of Ohio were determining the constitutionality of the Income Tax Act of 1894, that their decision would be entirely and overwhelmingly against the legality of the law, for which they have no place on the statute books of their State.

#### THE INCOME TAX—THE OPINION OF JUSTICE FIELD.

UNITED STATES SUPREME COURT, APRIL 8, 1896.

CHARLES POLLOCK, Appellant, v. THE FARMERS' LOAN AND TRUST COMPANY AND OTHERS, Appellees.

LEWIS H. HYDE, Appellant, v. THE CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Appellees.

**A** PPEALS from the Circuit Court of the United States for the Southern District of New York.

FIELD, J. I also desire to place my opinion on record upon some of the important questions discussed in relation to the direct and indirect taxes proposed by the income tax law of 1894.

Several suits have been instituted in State and Federal courts, both at law and in equity, to test the validity of the provisions of the law, the determination of which will necessitate careful and extended consideration.

The subject of taxation in the new government which was to be established created great interest in the convention which framed the Constitution, and was the cause of much difference of opinion among its members and earnest contention between the States. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it was obliged to make requisitions upon the States, which were respected or disregarded at their pleasure. Great embarrassments followed the

consequent inability to obtain the necessary funds to carry on the government. One of the principal objects of the proposed new government was to obviate this defect of the confederacy by conferring authority upon the new government by which taxes could be directly laid whenever desired. Great difficulty in accomplishing this object was found to exist. The States bordering on the ocean were unwilling to give up their right to lay duties upon imports which were their chief source of revenue. The other States, on the other hand, were unwilling to make any agreement for the levying of taxes directly upon real and personal property, the smaller States fearing that they would be overborne by unequal burdens forced upon them by the action of the larger States. In this condition of things great embarrassment was felt by the members of the convention. It was feared at times that the effort to form a new government would fail. But, happily, a compromise was effected by an agreement that direct taxes should be laid by Congress by *apportioning them among the States according to their representation*. In return for this concession by some of the States, the other States bordering on navigable waters consented to relinquish to the new government the control of duties, imposts and excises and the regulation of commerce, with the condition that the duties, imposts and excises should be *uniform throughout the United States*. So that, on the one hand, anything like oppression or undue advantage of any one State over the others would be prevented by the apportionment of the direct taxes among the States according to their representation, and, on the other hand, anything like oppression or hardship in the levying of duties, imposts and excises would be avoided by the provision that they should be uniform throughout the United States.

The Constitution, accordingly, when completed, divided the taxes which might be levied under the authority of Congress into those which were direct and those which were indirect. Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom. Such taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the States of the Union according to their respective numbers. The second section of article I of the Constitution declares that representatives and direct taxes shall be thus apportioned. It had been a favorite doctrine in England and in the colonies, before the adoption of the Constitution, that taxation and representation should go together.

The Constitution prescribes such apportionment among the several States according to their respective numbers, to be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

Some decisions of this court have qualified or thrown doubts upon the exact meaning of the words "direct taxes." Thus in *Springer v. United States* (102 U. S. 586), it was held that a tax upon gains, profits and income was an excise or duty, and not a direct tax withing the meaning of the Constitution, and that its imposition was not, therefore unconstitutional. And in *Pacific Ins. Co. v. Soule* (7 Wall. 483) it was held that an income tax or duty upon the amounts insured, renewed or continued by insurance companies upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax, but a duty or excise.

In the discussions on the subject of direct taxes in the British Parliament an income tax has been generally designated as a direct tax, differing in that respect from the decision of this court in *Springer v. United States*. But whether the latter can be accepted as correct or otherwise, it does not affect the tax upon real property and its rents and income as a direct tax. Such a tax is by universal consent recognized to be a direct tax.

As stated, the rents and income of real property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should at this day question a doctrine which has always been thus accepted by common-law lawyers. It is so declared in approved treatises on real property and in accepted authorities on particular branches of real estate law, and has been so announced in decisions in the English courts and in our own courts without number. Thus, in *Washburn on Real Property* it is said that "a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise." (Vol. 2, p. 695, § 80.)

In *Jarman on Wills* it is laid down that "a devise of the rents and profits, or of the income of land, passes the land itself both of law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act of 1 Vict., ch. 26, such a devise carries the fee simple; but before that act it carried no more than an estate for life, unless

words of inheritance were added." Mr. Jarman cites numerous authorities in support of his statement. (*South v. Alleine*, 1 Salk. 228; *Doe d. Goldin v. Lakeman*, 2 B. & Ad. 42; *Johnson v. Arnold*, 1 Ves. 171; *Baines v. Dixon*, id. 43; *Mannox v. Greener*, L. R., 14 Eq. 456; *Bland v. Bell*, 2 D. M. & G. 781; *Plenty v. West*, 6 C. B. 201.)

Coke upon Littleton says: "If a man seized of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itself, doth passe; for what is the land but the profits thereof?" (Lib. 1, cap. 1, § 1, p. 4b.)

In *Doe d. Goldin v. Lakeman*, Lord Tenterden, chief justice of the Court of King's Bench, to the same effect said: "It is an established rule that a devise of the rents and profits is a devise of the land." And in *Johnson v. Arnold*, Lord Chancellor Hardwicke reiterated the doctrine "that a devise of the profits of lands is a devise of the lands themselves."

The same rule is announced in this country, the Court of Errors of New York, in *Patterson v. Ellis* (11 Wend. 259, 278), holding that the "devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue;" and the Supreme Court of Massachusetts, in *Reed v. Reed* (9 Mass. 372, 378) that "a devise of the income of lands is the same in its effect as a devise of the lands." The same view of the law was expressed in *Anderson v. Greble* (1 Ashmead's Rep. 186, 138), King, the president of the court, stating: "I take it to be a well settled rule of law that by a devise of the rent, profits and income of land, the land itself passes." Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision, or even a dictum of their judges, in conflict with them. And what answer do we receive to these adjudications? Those rejecting them furnish no proof that the framers of the Constitution did not follow them, as the great body of the people of the country then did. An incident which occurred in this court and room twenty years ago may have been a precedent. To a powerful argument then being made by a distinguished counsel on a public question, one of the judges exclaimed that there was a conclusive answer to his position, and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a conclusive answer to them in the fact that they also are of a different opinion. I do not think so. The law, as expounded for centuries, cannot be set aside or disregarded because

some of the judges are now of a different opinion from those who, a century ago, followed it in framing our Constitution.

Hamilton, speaking on the subject, asks: "What is property but a fiction without the beneficial use of it?" And adds: "In many cases the income or annuity is the property itself."

It must be conceded that whatever affects any element that gives an article its value, in the eye of the law affects the article itself.

In *Brown v. Maryland* (12 Wheat. 419) it was held that a tax on the occupation of an importer is the same as a tax on imports, and as such was invalid. It was contended that the State might tax occupations, and that this was nothing more, but the court said, by Chief Justice Marshall (p. 444): "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In *Weston v. Charleston* (2 Pet. 449) it was held that a tax upon stock issued for loans to the United States, was a tax upon the loans themselves, and equally invalid. In *Dobbins v. Commissioners* (16 Pet. 435) it was held that the salary of an officer of the United States could not be taxed if the office was itself exempt. In *Almy v. California* (24 How. 169) it was held that a duty on a bill of lading was the same thing as a duty on the article transported. In *Cook v. Pennsylvania* (97 U. S. 566) it was held that a tax upon the amount of sales of goods made by an auctioneer was a tax on the goods sold. In *Philadelphia Steamship Co. v. Pennsylvania* (122 U. S. 326) and *Leloup v. Mobile* (127 id. 640, 648), it was held that a tax upon the income received from interstate commerce was a tax upon the commerce itself, and equally unauthorized. The same doctrine was held in *People v. Commissioners* (90 N. Y. 63), *State Freight Tax* (15 Wall. 232, 274), *Welton v. Missouri* (91 U. S. 275, 278), and in *Fargo v. Michigan* (121 id. 230).

The law, so far as it imposes a tax upon land by taxation of the rents and income thereof, must, therefore, fail, as it does not follow the rule of apportionment. The Constitution is imperative in its directions on this subject, and admits of no departure from them.

But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and an equally cogent objection to it. In taxing incomes other than rents and profits of real estate it disregards the rule of uniformity which is prescribed in such cases by the Constitution. The eighth section of the first arti-



cle of the Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States.*" Excises are a species of tax consisting generally of duties laid upon the manufacture, sale or consumption of commodities within the country, or upon certain callings or occupations, after taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration, as applied to savings banks, insurance companies, whether of fire, life or marine, to building or other associations, or to the conduct of any other kind of business, are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The uniformity thus required is the uniformity throughout the United States of the duty, impost and excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done. If, for instance, one kind of wine or grain produce has a certain duty laid upon it proportioned to its quantity in New York, it must have a like duty proportioned to its quantity when imported at Charleston or San Francisco, or if a tax be laid upon a certain kind of business, proportioned to its extent at one place, it must be a like tax on the same kind of business proportioned to its extent at another place. In that sense the duty must be uniform throughout the United States.

It is contended by the government that the Constitution only requires an uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the States, however variant it might be in different places of the same State. But it could not be sustained in the latter case without defeating the equality, which is an essential element of the uniformity required, so far as the same is practicable.

In *United States v. Singer* (15 Wall. 111, 121) a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said: "The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that it shall be

'uniform throughout the United States.' The tax here is uniform in its operation; *that is, it is assessed equally upon all manufacturers of spirits wherever they are.* The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In the *Head Money Cases* (112 U. S. 580, 594) a tax was imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, and it was objected that the tax was not levied by any rule of uniformity, but the court, by Justice Miller, replied: "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed." In the decision in that case, in the Circuit Court (18 Fed. Rep. 135, 139), Mr. Justice Blatchford, in addition to pointing out that "the act was not passed in the exercise of the power of laying taxes," but was a regulation of commerce, used the following language: "Aside from this, the tax applies uniformly to all steam and sail vessels coming to all ports in the United States, from all foreign ports, with all alien passengers. The tax, being a license tax on the business, *the rule of uniformity is sufficiently observed if the tax extends to all persons of the class selected by Congress; that is, to all owners of such vessels.* Congress has the exclusive power of selecting the class. It has regulated that particular branch of commerce which concerns the bringing of alien passengers, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies."

Mr. Justice Miller, in his lectures on the Constitution, 1889-1890 (pp. 240, 241), said of taxes levied by Congress: "The tax must be uniform on the *particular article*; and it is uniform if it is made to bear the *same percentage* over all the United States. That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the *articles* which it should tax." In discussing generally the requirement of uniformity found in State Constitutions, he said: "The difficulties in the way of this construction have,

however, been very largely obviated by the meaning of the word 'uniform,' which has been adopted, holding that the uniformity must refer to articles of the same class; that is, different articles may be taxed at different amounts provided the rate is uniform on the same class everywhere, with all people and at all times."

One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts and excises to be "uniform throughout the United States" is, that the law imposing them should "have an equal and uniform application in every part of the Union."

If there were any doubt as to the intention of the States to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt, as said by counsel, should be resolved in the interest of justice, in favor of the taxpayer.

Exemptions from the operation of a tax always create inequalities. Those not exempted must, in the end, bear an additional burden or pay more than their share. A law containing arbitrary exemptions can in no sense be termed uniform. In my judgment, Congress has rightfully no power, at the expense of others, owning property of the like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine and accident insurance companies, formed under the laws of the various States, which advance no national purpose or public interest, and exist solely for the pecuniary profit of their members.

Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the Legislature to exempt them. (*Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Barbour v. Board of Trade*, 83 Ky. 645, 654, 655; *Lexington v. McQuillan's Heirs*, 9 Dana, 518, 516, 517; and *Sutton's Heirs v. Louisville*, 5 id. 28-31.)

Cooley, in his treatise on Taxation (2d ed. 215), justly observes that: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the substance of legitimate tax legislation."

The income tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive

an income of \$4,000 and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says in one of his papers (the *Continentalist*): "The genius of liberty repudiates everything arbitrary in taxation. It exacts that every man, by a definite and general rule, shall know what proportion of his property the State demands. Whatever liberty we may boast of in theory, it cannot exist in fact while [arbitrary] assessments continue." (1 *Hamilton's Works*, ed. 1885, 270.) The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the Constitution which followed the late civil war had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate. Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose he will have a greater regard for the government and more self-respect for himself, feeling that though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune.

There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature. They differ in no essential characteristic in their business from "all other corporations, companies or associations doing business for profit in the United States." (§ 32, *Laws of 1894*.)

A few words as to some of them, the extent of their capital and business, and of the exceptions made to their taxation:

1. *As to mutual savings banks.*—Under income tax laws prior to 1870 these institutions were specifically taxed. Under the new law, certain institutions of this class are exempt, provided the share-

holders do not participate in the profits, and interest and dividends are only paid to the depositors. No limit is fixed to the property and income thus exempted—it may be \$100,000 or \$100,000,000. One of the counsel engaged in this case read to us during the argument from the report of the comptroller of the currency, sent by the President to Congress, December 3, 1894, a statement to the effect that the total number of mutual savings banks exempted were 646, and the total number of stock savings banks were 378, and showed that they did the same character of business and took in the money of depositors for the purpose of making it bear interest, with profit upon it in the same way; and yet the 646 are exempt and the 378 are taxed. He also showed that the total deposits in savings banks were \$1,748,000,000.

2. *As to mutual insurance corporations.*—These companies were taxed under the previous income tax laws. They do business somewhat differently from other companies, but they conduct a strictly private business, in which the public has no interest, and have been often held not to be benevolent or charitable organizations.

The sole condition for exempting them under the present law is declared to be that they make loans to or divide their profits among their members, or depositors or policy-holders. Every corporation is carried on, however, for the benefit of its members, whether stockholders, or depositors, or policy-holders. If it is carried on for the benefit of its shareholders, every dollar of income is taxed; if it is carried on for the benefit of its policy-holders or depositors, who are but another class of shareholders, it is wholly exempted. In the State of New York the act exempts the income from over \$1,000,000,000 of property of these companies. The leading mutual life insurance company has property exceeding \$204,000,000 in value, the income of which is wholly exempted. The insertion of the exemption is stated by counsel to have saved that institution fully \$200,000 a year over other insurance companies and associations, having similar property and carrying on the same business, simply because such other companies or associations divide their profits among their shareholders instead of their policy-holders.

3. *As to building and loan associations.*—The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. One in Dayton, O., has a capital of \$10,000,000, and Pennsylvania has \$65,000,000 invested in these associations. The census report submitted to Congress by the Presi-

dent, May 1, 1894, shows that their property in the United States amounts to over \$628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress and be freed from their just, equal and proportionate share of taxation when others engaged under different names, in similar business, are subjected to taxation by this law? The aggregate amount of the saving to these associations, by reason of their exemption, is over \$600,000 a year.

If this statement of the exemptions of corporations under the law of Congress, taken from the carefully prepared briefs of counsel and from reports to Congress, will not satisfy parties interested in this case that the act in question disregards, in almost every line and provision, the rule of uniformity required by the Constitution, then “neither will they be persuaded, though one rose from the dead.” That there should be any question or any doubt on the subject surpasses my comprehension. Take the case of mutual savings banks and stock savings banks. They do the same character of business, and in the same way use the money of depositors, loaning it at interest for profit, yet 646 of them, under the law before us, are exempt from taxation on their income and 378 are taxed upon it. How the tax on the income of one kind of these banks can be said to be laid upon any principle of uniformity, when the other is exempt from all taxation, I repeat, surpasses my comprehension.

But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and State; to the invalidity of taxation by the United States of the income of the bonds and securities of the States and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.

As stated by counsel: “There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.” (*Loan Association v. Topeka*, 20 Wall. 655, and *Parkersburg v. Brown*, 106 U. S. 497.)

The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

This inherent limitation upon the taxing power

forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious, and sometimes merely fanciful.

There was another position taken in this case which is not the least surprising to me of the many advanced by the upholders of the law, and that is, that if this court shall declare that the exemptions and exceptions from taxation extended to the various corporations mentioned, fire, life and marine insurance companies, and to mutual savings banks, building and loan associations, violate the requirement of uniformity, and are therefore void, the tax as to such corporations can be enforced, and that the law will stand as though the exemptions had never been inserted. This position does not, in my judgment, rest upon any solid foundation of law or principle. The abrogation or repeal of an unconstitutional or illegal provision does not operate to create and give force to any enactment, or part of an enactment, which Congress has not sanctioned and promulgated. Seeming support of this singular position is attributed to the decision of this court in *Huntington v. Worthen* (120 U. S. 67). But the examination of that case will show that it does not give the slightest sanction to such a doctrine. There the Constitution of Arkansas had provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the General Assembly should direct, making the same equal and uniform throughout the State, and certain public property was declared by statute to be exempt from taxation, which statute was subsequently held to be unconstitutional. The court decided that the unconstitutional part of the enactment, which was separable from the remainder, could be omitted and the remainder enforced; a doctrine undoubtedly sound, and which has never, that I am aware of, been questioned. But that is entirely different from the position here taken, that exempted things can be taxed by striking out their exemption.

The law of 1894 says there shall be assessed, levied and collected, "*except as herein otherwise provided*," two per centum of the amount, etc. If the exceptions are stricken out, there is nothing to be assessed and collected except what Congress has otherwise affirmatively ordered. Nothing less can have the force of law. This court is impotent to pass any law on the subject. It has no legislative power. I am unable, therefore, to see how we can, by declaring an exemption or exception invalid, thereby give effect to provisions as though they were never exempted. The court, by declaring the exemptions invalid, cannot by any conceivable ingenuity give operative force as enacting clauses to the exempting provisions. That result is not within the power of man.

The law is also invalid in its provisions authorizing the taxation of the bonds and securities of the States and of their municipal bodies. It is objected that the cases pending before us do not allege any threatened attempt to tax the bonds or securities of the States, but only of municipal bodies of the States. The law applies to both kinds of bonds and securities, those of the States as well as those of municipal bodies, and the law of Congress we are examining, being of a public nature, affecting the whole community, having been brought before us and assailed as unconstitutional in some of its provisions, we are at liberty, and I think it is our duty, to refer to other unconstitutional features brought to our notice in examining the law, though the particular points of their objection may not have been mentioned by counsel. These bonds and securities are as important to the performance of the duties of the State as like bonds and securities of the United States are important to the performance of their duties, and are as exempt from the taxation of the United States as the former are exempt from the taxation of the States. As stated by Judge Cooley in his work on the Principles of Constitutional Law: "The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the Federal government does not therefore extend to the means or agencies through or by the employment of which the States perform their essential functions, since, if these were within its reach, they might be embarrassed, and perhaps wholly paralyzed, by the burdens it should impose. 'That the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the

constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.' It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment, and possible annihilation. The Constitution contemplates no such shackles upon State powers, and by implication forbids them."

The Internal Revenue Act of June 30, 1864, in section 123, provided that railroad and certain other companies specified, indebted for money for which bonds had been issued, upon which interest was stipulated to be paid, should be subject to pay a tax of five per cent on the amount of all such interest, to be paid by the corporations and by them deducted from the interest payable to the holders of such bonds; and the question arose in *United States v. Railroad Co.* (17 Wall. 322) whether the tax imposed could be thus collected from the revenues of a city owning such bonds. This court answered the question as follows: "There is no dispute about the general rules of the law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption from those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded, and may be destroyed if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, and is not claimed on the other."

And again: "A municipal corporation like the city of Baltimore is a representative not only of the State, but it is a portion of its governmental power. It is one of its creatures made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its

existence. As a portion of the State, in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Collector v. Day* (11 Wall. 113, 124) the court, speaking by Mr. Justice Nelson, said: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government, within its sphere, is independent of the States."

According to the census reports, the bonds and securities of the States amount to the sum of \$1,243,268,000, on which the income or interest exceeds the sum of \$65,000,000 per annum, and the annual tax on two per cent upon this income or interest would be \$1,300,000.

The law of Congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the Constitution that their compensation shall not be diminished during their continuance in office. The law declares that a tax of two per cent shall be assessed, levied and collected and paid annually upon the gains, profits and income received in the preceding calendar year, by every citizen of the United States, whether said gains, profits or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation, carried on within the United States or elsewhere, or from any source whatever. The annual salary of a justice of the Supreme Court of the United States is \$10,000, and this act levies a tax of two per cent on \$6,000 of this amount, and imposes a penalty upon those who do not make the payment or return the amount for taxation.

The same objection, as presented to a consideration of the objection to the taxation of the bonds and securities of the States, as not being specially taken in the cases before us, is urged here to a consideration of the objection to the taxation by the law of the salaries of the judges of the courts of the United States. The answer given to that objection may be also given to the present one. The law of Congress, being of a public nature, affecting the interests of the whole community, and attacked for its unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of

counsel, that the Constitution may not be violated from the carelessness or oversight of counsel in any particular. (See *O'Neil v. Vermont*, 144 U. S. 359.)

Besides, there is a duty which this court owes to the one hundred other United States judges who have small salaries, and who, having their compensation reduced by the tax, may be seriously affected by the law.

The Constitution of the United States provides in the first section of article II that: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, *which shall not be diminished during their continuance in office.*" The act of Congress under discussion imposes, as said, a tax on \$6,000 of this compensation, and therefore diminishes each year the compensation provided for every justice. How a similar law of Congress was regarded thirty years ago may be shown by the following incident, in which the justices of the court were assessed at three per cent upon their salaries. Against this Chief Justice Taney protested in a letter to Mr. Chase, then secretary of the treasury, appealing to the above article in the Constitution, and adding: "If it [his salary] can be diminished to that extent by the means of a tax, it may, in the same way, be reduced from time to time at the pleasure of the Legislature." He explained in his letter the object of the constitutional inhibition, thus:

"The judiciary is one of the three great departments of the government created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that require it to be perfectly independent of the other departments. And in order to place it beyond the reach, and above even the suspicion, of any such influence, the power to reduce their compensation is expressly withheld from Congress *and excepted from their powers of legislation.*

"Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them which was free from every influence, direct or indirect, that might by possibility, in times of political excitement, warp their judgment.

"Upon these grounds I regard an act of Congress

retaining in the treasury a portion of the compensation of the judges as unconstitutional and void."

This letter of Chief Justice Taney was addressed to Mr. Chase, then secretary of the treasury, and afterwards the successor of Mr. Taney as chief justice. It was dated February 16, 1868, but as no notice was taken of it, on the 10th of March following, at the request of the chief justice, the court ordered that his letter to the secretary of the treasury be entered on the records of the court, and it was so entered. And in the Memoir of the chief justice it is stated that the letter was, by this order, preserved "to testify to future ages that in war, no less than in peace, Chief Justice Taney strove to protect the Constitution from violation.

Subsequently, in 1869, and during the administration of President Grant, when Mr. Boutwell was secretary of the treasury, and Mr. Hoar, of Massachusetts, was attorney-general, there were in several of the statutes of the United States, for the assessment and collection of internal revenue, provisions for taxing the salaries of all civil officers of the United States, which included, in their literal application, the salaries of the President and the judges of the United States. The question arose whether the law which imposed such a tax upon them was constitutional. The opinion of the attorney-general thereon was requested by the secretary of the treasury. The attorney-general, in reply, gave an elaborate opinion advising the secretary of the treasury that no income tax could be lawfully assessed and collected upon the salaries of those officers who were in office at the time the statute imposing the tax was passed, holding on this subject the views expressed by Chief Justice Taney. His opinion is published in volume XIII of the *Opinions of the Attorney-General*, at page 161. I am informed that it has been followed ever since without question by the department supervising or directing the collection of the public revenue.

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. If the provisions of the Constitution can be set aside by an act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. "If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present government will commence." If the purely arbitrary limitation of \$4,000 in the present

law can be sustained, none having less than that amount of property being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five, or ten, or twenty thousand dollars, parties possessing that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of "walking delegates" may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution which require its taxation, if imposed by direct taxes, to be apportioned among the States according to their representation, and if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

I am of opinion that the whole law of 1894 should be declared void and without any binding force—that part which relates to the tax on the rents, profits or income from real estate, that is, so much as constitutes part of the direct tax, because not imposed by the rule of apportionment according to the representation of the States, as prescribed by the Constitution—and that part which imposes a tax upon the bonds and securities of the several States, and upon the bonds and securities of their municipal bodies, and upon the salaries of judges of the courts of the United States, as being beyond the power of Congress; and that part which lays duties, imposts and excises as void in not providing for the uniformity required by the Constitution in such cases.

### Abstracts of Recent Decisions.

**ADVERSE POSSESSION—RAILROAD COMPANIES.**—Part of a city lot was fenced in by one claiming title to the whole, and the rest of it was covered by a railroad embankment, though the tracks only occupied a small part of the embankment. *Held*, that the railroad company had actual possession of all said lot outside the fence. (St. Louis, A. & T. H. R. Co. v. Nugent [Ill.], 39 N. E. Rep. 263.)

**CHATTEL MORTGAGE.**—A contract for the sale of personal property, which provides that title shall remain in the vendor until the price is paid, and that, in case of default in and of the several payments provided for, all payments shall, at the option of the vendor, become due, and the property may be retaken by him, constitutes a mortgage for the payment of the price. (Perkins v. Loan & Exchange Bank of South Carolina [So. Car.], 20 S. E. Rep. 759.)

**CONTRACT—CONSTRUCTION.**—Where the terms of a verbal contract, which was admittedly made, are disputed by the contracting parties, and the evidence is evenly balanced, the terms that are most just should prevail. (Smiley v. Gallagher [Penn.], 30 Atl. Rep. 713.)

**CRIMINAL LAW—EVIDENCE—OTHER CRIMES.**—If circumstances attending the commission of an offense convey to the accused knowledge necessary to render his subsequent conduct criminal, the fact that an indictment is pending for the earlier offense will not prevent the circumstances from being shown on his trial for the subsequent conduct. (Bodee v. State [N. J.], 30 Atl. Rep. 681.)

**CRIMINAL TRIAL.**—A defendant, represented by counsel, who refuses to be sworn, cannot make a statement to the jury giving his side of the case. (Commonwealth v. Burrough [Mass.], 39 N. E. Rep. 184.)

**DEED—EASEMENT IN STREET.**—A grantee acquires by estoppel an easement of way in a street on which the land conveyed is described as situated only when the street is owned by the grantor. (Cole v. Hadley [Mass.], 39 N. E. Rep. 279.)

**EQUITY—RESCISSION OF DEED—CONSIDERATION.**—Where land has been conveyed in consideration of the grantee's agreement to support the grantor during the latter's life, and the grantee refuses to perform the agreement, a court of equity will set aside the deed. (Cooper v. Gum [Ill.], 39 N. E. Rep. 267.)

**FEDERAL COURTS—JURISDICTION—STATE JUDGE.**—A Circuit Court of the United States has no authority to review the judgments of the State courts, and hold their judges responsible for failure to discharge their judicial duties. (Siddall v. Brigg [U. S. C. C. [Penn.], 64 Fed. Rep. 610.)

**HABEAS CORPUS—ORDER AT CHAMBERS.**—An order of a State judge, at chambers, remanding a prisoner in a *habeas corpus* proceeding is not an order of a "court," within Rev. St., § 707, allowing a writ of error from the Supreme Court of the United States only to the final judgment of the highest court of the State in which a decision in the suit can be had. (McKnight v. James [U. S. S. C.], 15 S. C. Rep. 248.)

**LIBEL—LANGUAGE.**—An article in a newspaper, consisting of a letter in which it is said of and concerning the plaintiff: "You cannot get P. down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg"—is grossly libelous *per se*, even without innuendoes to explain the meaning of the language used, and no allegation of special damage is necessary. (Pfitzinger v. Dubs [U. S. C. C. of App.], 64 Fed. Rep. 696.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in the LAW JOURNAL of this week the dissenting opinion of Mr. Justice Harlan, and in this connection it is most proper to discuss the opinion of Mr. Justice White, in which Justice Harlan practically concurs. There seems to be no good reason why any judge should support such an outrageous and unfortunate statute, on the grounds that what a court has formerly decided must forever stand as true. It is perfectly in accord with and parallel to the thought that if the former judges of the court were incapable of construing the law, their successors in office should also simulate their mental incapacity. There is just about as much sense in saying that when a body has formerly decided a matter in one way, that they are right, and must never be controverted, as to assert that because the earth was once considered flat, that subsequent theorists should respect the memory of those who were unfortunate enough to be limited in their knowledge, and declare that this world of ours is not round. One quotation from the opinion would cover the allegations which are made on this subject, and is as follows:

"Under the income tax laws which prevailed in the past for many years, and which covered every conceivable source of income, rentals from real estate, and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim in equity and good conscience against the government for an enormous amount of money."

"Thus, from the change of view by this court, it happens that an act of Congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time, and in accordance with the oft-repeated decisions of this

court, furnishes the occasion of creating a claim against the government for hundreds of millions of dollars; I say, 'creating a claim,' because if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the Constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen, to his grievous injury, the equity endures, and will present itself to the conscience of the government. *This consequence shows how necessary it is that the court should not overthrow its past decisions.*"

The decisions of the judges above referred to simply support the income tax upon the theory that it is necessary to preserve consistency and continuity of Federal decisions. That is to say, the doctrine of *stare decisis* is always to prevail, and to be superior to the truth; and solely upon the grounds that the Supreme Court of the United States has made such a declaration in times past. It is difficult for us to see how such opinions can receive the careful consideration and respect of the members of the bar, or how such illogical conclusions can influence the masses of society. It is hardly necessary to say that the doctrine of *stare decisis* has been repeatedly rejected by the courts of Federal and State jurisdiction, and by the common assent of the legal fraternity, when the light of clearer reasoning threw the proper intention of the framers of a statute on the law; while the judicial history of this country, and in fact of all countries where principles of law control, show that judges are mortals, and as such must err at times; that they are not infallible, and may be mistaken; that they are weak, and may be influenced by personal and local interests. Under these circumstances, there appears to be no weight of authority, in fact there is none, which to-day gives the doctrine of *stare decisis* any peculiar weight, when it is clearly shown that the former determinations of the court were absolutely wrong. On this question of "direct taxes" it is obviously true that the principle of *stare decisis* should not prevail, because in the "carriage case," in the year 1796, there was an assertion that direct taxes simply and exclusively meant a land tax, while the constitutional provision was that "no capitation or other direct tax should be laid," etc.,



demonstrating that more than one direct tax was in the minds of the framers of the Constitution when they drew up the document which has been so long the peculiar and particular protection of the American citizens from the invention of such socialistic statutes as the income tax. In the face of the quotations which were made by the learned counsel against the constitutionality of the act, showing that in the Philadelphia convention direct taxes were not included in the capitation tax and the tax on land, how lacking in all soundness of reasoning is it to say that the intention of the delegates to the convention was different from what is clearly proven, simply because of a subsequent determination of the court. Clarence A. Seward, Esq., made an exhaustive examination and argument of the State statutes and of the legislation of the several States during the interval between the Declaration of Independence and the adoption of our Federal organic law. The result of this is to show that, prior to the adoption of the Constitution, the States of Massachusetts, Pennsylvania, Connecticut, Delaware, Vermont, South Carolina, New Jersey and Virginia assessed their citizens upon the profits of their profession, trade or employment, and collected the taxes for the joint benefit of the State and of the general government. Mr. Seward's argument is not based upon the former interpretation by the Supreme Court of the United States of what direct taxes were, but he goes to the root of the question, and takes the very words of the framers of this fundamental law. Mr. Seward shows that in the reports of the conventions, as given by Elliott, that the people, subsequent to the Philadelphia convention, adopted the Constitutions at State conventions, and that their intent was not to limit the phrase "direct taxes" to a tax upon land only. It is proved beyond doubt that the delegates to the State conventions understood that by the direct taxes which the Constitution gave Congress the power to levy and collect was not meant a tax on land only, but all such taxes as the States were then levying and collecting under the name of direct taxes, exclusive of duties, imposts, etc. Mr. Seward also most clearly brings out the point that when the words "direct taxes" were used in the Constitution, they were put there with their usual mean-

ing, and were not given any peculiar sense. In addition, it is easy to perceive that the framers of the Constitution adopted such words to express their intention as were used in common parlance throughout the country to express a clear and simple thought. In such a sense there can be no doubt but that direct taxes were intended to include more than capitation taxes and taxes upon land, and that the framers of the Constitution never desired to have the principal of *stare decisis* prevent citizens of this country from acquiring their rightful interests under the protection of the Constitution.

If legislators were paid what the majority of the intelligent people think their services are worth in framing and enacting good laws, it is barely possible that they would receive very small compensation, and might be induced to allow the statutes to remain unamended long enough to give lawyers a chance to become better acquainted with the law of the State. The annual rush of bills in the New York State Legislature has been greater this year than ever before, and already nearly four hundred new laws have been enacted. In relation to the compensation of legislators, the *Law Times* publishes a letter giving the history of the pay of members of Parliament, which is worthy of special attention at this time, as a motion has recently passed the House of Commons providing for the payment of members. The letter is:

Hallam, in the third volume of his *Middle Ages*, pp. 170-1, says: "The wages of the knights were 4s. a day levied on all freeholders, or at least on all holding, by knight service, within the county. Those of the burgesses were half that sum; but even this pittance was raised with reluctance and difficulty from miserable burghers, little solicitous about political franchises." In a note of great interest to this passage, the historian adds: "The latest entries of writs for expenses on the close rolls are of 2 Hen. 5; but they may be proved to have been issued much longer, and Prynne traces them to the end of Henry VIII's reign, p. 495, *Fourth Register*. Without the formality of this writ a very few instances of towns remunerating their burgesses for attendance in Parliament are known to have occurred in later times. An-

drew Marvell is commonly said to have been the last who received this honorable salary. A modern book asserts that wages were paid in some Cornish boroughs as late as the eighteenth century. (Lyson's Cornwall, Preface, p. 32.) But the passage quoted in proof of this is not precise enough to support so unlikely a fact. (Willis's Notitia Parliamentaria; and Prynne's fourth part of a Brief Register, pp. 53 and 495 seq.)"

Prynne, in the fourth part of a Brief Register (p. 53), gives the earliest known specimen of the writ *De levandis burgensium expensis*, bearing date 16 Ed. 2. The marginal note is "Claus. 16 Ed. 2, m. 19, dorso de *Expensis Militum*." The writ runs: "*Rex Vic. Ebor Salutem. Præcipimus tibi quod de communitate Com. tui tam infra libertates quam extra habere fac dilectis et fidelibus nostri Gregorie de Thornton et Hen. de Malton Militibus Com. illius nuper de mandato nostro pro Communitate Com. prædicti nS B Eborum ad Nos venientibus ad tractand ibidem super diversis et arduis negotiis. Nos et statum Regni nostri tangentibus, Novem Marcos pro expensis suis, idibem morando par quindecim dies, uterque eorum capiente per diem quattuor solidos. T. R. apud Ebor 29 die Novembris.*" Prynne, in a note, adds: "That the Parliament being held at Yorke, the knights of Yorkshire had no expenses allowed them so much as for one day in going and coming to the Parliament, being held in their own county, as all knights, citizens, burgesses had, coming from other counties, but only for the days they sat, and sometimes sittings in Parliament being but fifteen days, and no more, when, no doubt, their privilege from arrest and actions ended, as well as their several expenses." Prynne relies for the legal authority as to the right of members to wages principally on the petition of the Commons with the answer of the Crown (Rot. Parl. Hen. 6, num. 46. Countee de Cantobrig—Fourth Register, p. 517), and also on the statute of 34 and 35 Hen. 8, ch. 24. Prynne summarizes the inference to be collected from the petition of the Commons in Hen. 6 in the following words: "By this memorable petition and answer it is apparent: (1) That the wages and expenses of knights of the shires were then duly levied by the knights' writs, and paid to the knights of Cambridge and other counties,

notwithstanding the writs were not entered upon the Clause Rolls, nor extant at this day upon record, that I can yet discover. (2) That their expenses and wages was a just, ancient and legal charge, debt, duty, wherewith all counties then were, and ought of common right to be charged in perpetuity, when and as often as Parliaments have been held or shall be, and knights of shires elected and sent unto them by the commonalties of counties. (3) That no persons, liberties or lands anciently and legally chargeable to contribute to the expenses and wages of knights can be exempted from this publike charge, duty in perpetuity, but by a special act of Parliament (cf. 34 and 35 Hen. 8, ch. 24), and by mutual consent or agreement of the inhabitants of the whole county chargeable therewith, and that upon a satisfactory compensation or valuable lasting satisfaction paid by the parties exempted equivalent to the summs wherewith they were chargeable. (4) That these expenses or wages ought to be equally assessed and levied on the lands tenements, goods and chattels, or those who by law or custom are contributors towards them, and not one part of the county or liberty charged with the whole, but only with its due proportion. (5) That there were many and long-lasting controversies between the inhabitants of the county of Cambridge and Isle of Ely concerning what summes and proportions the islanders should pay toward the expenses of the knights elected for the county, very prejudicial to the knights and contributors which were perpetually decided and settled by this memorable act, and the statute of 34 and 35 Hen. 8, ch. 24." The act of Hen. 8, to which Prynne attributed so much importance, and which, it is submitted, was the ground of Lord Nottingham's famous decisions in Thomas Kings's case, mentioned below, was intituled, "A Bill for the Assurance of certain land to John Hinde, Serjeant-at-Law, and to his heirs, paying therefore yearly ten pounds towards the charges of the knights of the shire of Cambridge for the time being. The sheriff and two knights of this Parliament for the county of Cambridge, incorporated by the name of the Wardens of the Wages, who shall have the x. li. rent payable out of the shire manor. The remedy to recover the rent of x. li. if it be behind. A remedy for the rent if the land comes

to the King's hands. A remedy for the Wardens of the land recovered by covin. A saving of the rights of others. The inhabitants of the county of Cambridge discharged of knight's wages." It is of interest to observe that members thought themselves entitled to payment even when nothing was done at Parliament, or when, to use the modern expression, they had only been engaged in ploughing the sands. This appears from petitions of the Commons, with their answers, in Prynne's Abridgment of the Records in the Tower of London. In 1 Hen. 5, "The knights and burgesses being summoned to a Parliament, the Commons pray for costs, because nothing was done at the Parliament 14 Hen. 4, which, as it seems, took no effect, require allowance." The answer was: "If, upon view of the King's Records, any of the like precedents may be found, allowance of their fees shall be made." Whatever may be the result of the modern experiment of "ploughing the sands," the mediæval process seems to have been profitable.

The latest, and, it is submitted, decisive authority for members of Parliament being entitled to wages is the decision of Lord Chancellor Nottingham (the true framer of the statute of frauds) in the case of Thomas King, member for Harwich, decided in 1681. It may fairly be claimed that this decision is the last and most authoritative declaration of the law on this subject, since Lord Campbell says that this was "probably the most important decision" of Lord Nottingham while he held the Great Seal. In the opinion of Lord Campbell, the writ may still be claimed, and "no new law is required. Since the question of the payment of members has so repeatedly engaged the attention of the Commons, where it has been maintained by successive majorities that members ought to be paid, and a member of the ministry in the columns of the *Daily News* has formulated a scheme for carrying into effect the proposal, by suggesting that all members who are entitled to a total or partial exemption from income tax shall receive an annual salary, I venture to transcribe the following passage, from "Lord Campbell's Lives of the Chancellors:" "His (Lord Nottingham's) most important decision while he held the Great Seal probably was that the obligation on constituencies to pay wages to their representatives in the

House of Commons still continues. After the dissolution of Parliament in 1681, Thomas King, Esq., late member for Harwich, presented a petition, stating 'that he had served as burgess in Parliament for the said borough several yeares, and did give his constant attendance therein; but that the borough had not paid him wages, though often requested so to do.' Notice being given to the corporation of Harwich, and the facts being verified, the lord chancellor ordered the writ to issue *De expensis burgensium levandis*." (Lord Campbell's Lives of the Chancellors, vol. 3. ch. xciii, p. 410.) In a note to the above passage, Lord Campbell adds: "I believe this is the last order made for payment. Some say that Andrew Marvell was regularly paid his wages as long as he served for Hull, but I believe that he only received from his constituents a complimentary cask of herrings. I know no reason in point of law why any member may not insist on payment of wages, or, if he never meant to stand again for the same or any other place, why, in point of prudence, he may not insist on his rights. In most cases the proceeding would be what, in the law of Scotland, is called an action of repetition to recover back money wrongfully received. For this point of the People's Charter no new law is required."

It is needless to comment on so significant an expression of opinion in favor of the right of members to be paid for their services. But it may be observed that, even if the more modern authorities for the payment of members be disregarded, there is a tendency in recent legislation to revert to the principles of the mediæval constitution, even to a period anterior to that at which the practice of paying members is known to have obtained. In 1868, when the trial of controverted elections was transferred to judges of the superior courts of law (31 and 32 Vict., ch. 125), a Conservative ministry acted so far in defiance of Bacon's maxim, "that to ramble back into antiquity is often the same thing as to innovate," that they actually recurred to the method adopted more than 450 years previously in the Election Statute of 11 Hen. 4. It is, perhaps, significant to observe that the earliest possible date that can be assigned for the cessation of the writs *De expensis* — 2 Hen. 5 — is subsequent to this.

A case which has been decided in the Supreme Court of Texas (*Kampmann v. Tarver*, 29 S. W. Rep. 768) presents the proposition that creditors of a corporation, before extending their credit, must at their peril take notice of its powers and limitations. The first question in the case was as to whether the act of a corporation in attempting to increase its stock was *ultra vires*; secondly, if *ultra vires*, was a subscription to such increased stock void, even as to the creditors of the corporation; and, thirdly, whether such stock was void as to the whole issue, or whether the stockholders should be held liable for such proportion of the issue of stock as the corporation was authorized to make. Tarver was receiver of the Laredo Improvement Co., and brought an action against Kampmann to enforce the payment of an assessment of stock owned by the defendant. The stock held by Kampmann was part of an issue of \$1,000,000, although the laws of Texas provided that a corporation might only increase its capital stock to an amount not exceeding double its authorized capital. The court held that the issue of stock in excess of the capital stock was illegal and *ultra vires*, and that a subscriber to the unauthorized stock cannot be made to pay the assessment upon said stock so subscribed for, even at the suit of a receiver. This was decided on the strength of *Scovill v. Thayer*, 105 U. S. 143, and *Insurance Co. v. Kamper*, 73 Ala. 325. The question as to whether the stockholders of the unauthorized amount were partly or wholly liable for the debts of the corporation was decided most properly. The court said:

"If the corporation had lawfully provided for an increased issue of shares to the amount of \$100,000, and at the same time directed an additional issue to the amount of \$1,000,000, and if the appellant had subscribed for both, it may be that he would be bound to pay for the valid shares. But in this case the good and the bad are blended, and we know of no rule by which they are to be separated. In *Merrill v. Gamble*, 46 Iowa, 615, the defendant, having been sued on a note, pleaded that it was given for stock in a railroad corporation, to be issued to him upon the payment of the debt; that at the time the note was executed the authorized capital of the company was \$500,000, which

might be increased to \$1,000,000 by a vote of the stockholders; that subsequently the stock was illegally increased to the amount of \$2,195,000, and the stock issued; and that the legal shares could not be distinguished from the illegal. The court held that, because the shares were not distinguishable, the defense was good. See, also, *Merrill v. Reaver*, 50 Iowa, 404. We conclude that the whole issue for increase in stock in this case should be held invalid. We are also of the opinion that the third question certified for our consideration should be answered in the negative. The practical effect of holding that a contract or subscription to an illegal issue of stock would be binding as between the corporation and its stockholders would be to enable a corporation to override the policy of the law, and to increase its stock at will. The creditors have the right to look to the stock subscriptions as a fund for the payment of their debts. Where the corporation has the power to increase its stock, cases may exist in which subscribers to an increase of stock may so act as to estop themselves from denying as to creditors the validity of such increase. This occurs when the power exists, but has been exercised in a manner not authorized by law. We are not aware that it has ever been held that persons dealing with a corporation are bound to take notice of the manner in which it has attempted to exercise its powers. But it is well settled that they must take notice of its powers. *Fitzhugh v. Land Co.*, 81 Tex. 306, 16 S. W. 1078, and cases there cited; *Scovill v. Thayer*, *supra*; *Zabriskie v. Railroad Co.*, 23 How. 381. The act of subscribing to additional shares of stock in a corporation, which are not authorized by law, may be equivalent to assertion that the proposed issue is legal. But, since a creditor is affected with notice of the powers of the corporation, how can it be said that he has been by such action misled to his prejudice? In *Scovill v. Thayer*, *supra*, Mr. Justice Woods, who delivered the opinion of the court, says: 'The laws secured to the creditors and the public an infallible mode of ascertaining the real capital of the company. They were bound to know the law permitted no such increase of the capital stock as the company had attempted to make, and that any representation that it had been made was false.' It is accordingly

held in that case that the holders of stock issued *ultra vires* 'are not estopped to set up its invalidity as a defense to an action in the interest of creditors, brought against them to recover the balance unpaid thereon, by the fact that they attended the meeting at which it was voted to issue the same, or that they received and held certificates therefor, or that its agents and officers represented its capital to be equal to the amount of both its authorized and unauthorized stock.' If the rule announced and acted upon in that case be the law—as we think it is—it follows that the conduct of appellant in this case did not estop him to deny the invalidity of the increase of stock. Indeed, we fail to see how his participation in the proceedings of the stockholders' meeting at which the debts were created is to be deemed a repudiation as to the validity of the new issue of stock. Being a holder of 100 of the original shares of the stock of the corporation, his participation as a shareholder was not inconsistent with the theory that the new shares were void."

In an article published in the *Herald* is a very clear and pertinent definition of the principles involved in the Monroe doctrine written by John B. McMaster, Esq., who divides the subject into seven parts, and sums up the meaning of this most important and now, it is feared, deserted principle of international law in the following way:

"1. It must be remembered, in the first place, that the declaration on which Monroe in 1823 consulted his cabinet and his two predecessors, Jefferson and Madison, related to the meddling of the powers of Europe in the affairs of American States.

"2. That the kind of meddling then declared against was such as tended to control the political affairs of American powers, or was designed to extend to the New World the political system and institutions of the old.

"3. That the declaration did not mark out any course of conduct to be pursued, but merely asserted that interposition of the kind mentioned would be considered as dangerous to our peace and safety, and a manifestation of an unfriendly disposition toward the United States.

"4. That this doctrine has never been in-

dorsed by any resolution or act of congress, but still remains the declaration of a president and his cabinet.

"5. Nevertheless, it was and is an eminently proper and patriotic doctrine, and as such has been indorsed by the people of the United States, and needs no other sanction. The people, not congress, rule this country. It is not of the smallest consequence, therefore, whether congress ever has or ever does indorse the doctrine, which very fittingly bears the name of the first president to announce it.

"6. The Monroe doctrine is a simple and plain statement that the people of the United States oppose the creation of European dominion on American soil; that they oppose the transfer of the political sovereignty of American soil to European powers, and that any attempt to do these things will be regarded as 'dangerous to our peace and safety.' What the remedy should be for such interposition by European powers the doctrine does not pretend to state; but this much is certain, that when the people of the United States consider anything 'dangerous to their peace and safety' they will do as other nations do, and, if necessary, defend their peace and safety with force of arms.

"7. The doctrine does not contemplate forcible intervention by the United States in any legitimate contest, but it will not permit any such contest to result in the increase of European power or influence on this continent, nor in the overthrow of an existing government, nor in the establishment of a protectorate over them, nor in the exercise of any direct control over their policy or institutions. Further than this the doctrine does not go. It does not commit us to take part in wars between a South American republic and a European sovereign when the object of the latter is not the founding of a monarchy under a European prince in place of an overthrown republic. In the present instance, therefore, the doctrine does not apply so long as England does not hold the ports of Nicaragua longer than is necessary to secure the payment of the sum she is determined to extort. Should she attempt to hold Nicaragua forever, the Monroe doctrine would apply, and our duty and policy would be resistance."

# THE INCOME TAX—DISSENTING OPINION OF JUSTICE HARLAN.

UNITED STATES SUPREME COURT, APRIL 8, 1895.

CHARLES POLLOCK, Appellant, v. THE FARMERS' LOAN AND TRUST COMPANY AND OTHERS, Appellees.

LEWIS H. HYDE, Appellant, v. THE CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Appellees.

**A**PPEALS from the Circuit Court of the United States for the Southern District of New York.

HARLAN, J. (dissenting.) I concur so entirely in the general views expressed by Mr. Justice White in reference to the questions disposed of by the opinion and judgment of the majority, that I will do no more than indicate, without argument, the conclusions reached by me after much consideration. Those conclusions are:

1. Giving due effect to the statutory provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" (R. S., § 3224), the decree below dismissing the bill should be affirmed. As the Farmers' Loan and Trust Company could not itself maintain a suit to restrain either the assessment or collection of the tax imposed by the act of Congress, the maintenance of a suit by a stockholder to restrain that corporation and its directors from voluntarily paying such tax would tend to defeat the manifest object of the statute, and be an evasion of its provisions. Congress intended to forbid the issuing of any process that would interfere in anywise with the prompt collection of the taxes imposed. The present suits are mere devices to strike down a general revenue law by decrees, to which neither the government nor any officer of the United States could be rightfully made parties of record.

2. Upon principle, and under the doctrines announced by this court in numerous cases, a duty upon the gains, profits and income derived from the rents of land is not a "direct" tax on such land within the meaning of the constitutional provisions requiring capitation or other direct taxes to be apportioned among the several States, according to their respective numbers, determined in the mode prescribed by that instrument. Such a duty may be imposed by Congress without apportioning the same among the States according to population.

3. While property, and the gains, profits and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defense and the general welfare of the United States, the instrumentalities employed by the States in execution of their powers

are not subjects of taxation by the general government, any more than the instrumentalities of the United States, are the subjects of taxation by the States; and any tax imposed directly upon interest derived from bonds issued by a municipal corporation for public purposes, under the authority of the State whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the State creating it may impose. In such a case it is immaterial to inquire whether the tax is, in its nature or by its operation, a direct or an indirect tax; for the instrumentalities of the States—among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public—are not subjects of national taxation, in any form or for any purpose, while the property of private corporations and of individuals is subject to taxation by the general government for national purposes. So it has been frequently adjudged, and the question is no longer an open one in this court.

Upon the several questions about which the members of this court are equally divided in opinion, I deem it appropriate to withhold any expression of my views, because the opinion of the chief justice is silent in regard to those questions.

## MANDAMUS—CIVIL SERVICE—VETERANS.

NEW YORK SUPREME COURT, SPECIAL TERM.

IN THE MATTER OF THE APPLICATION OF GEORGE SWEeley FOR A WRIT OF MANDAMUS.

*James W. Eaton*, for application.

*William P. Rudd*, Corporation Counsel, in opposition.

HERRICK, J. In 1883, the Legislature of the State of New York, by an act entitled "An act to regulate and improve the civil service of the State of New York" (chap. 354), provided for the appointment by the governor of a commission, designated "civil service commission," consisting of three persons, whose duty it should be, amongst other things, to aid the governor in preparing suitable rules to carry into effect the purposes of the act; which rules, amongst other things, should provide "for open, competitive examinations for testing the fitness of applicants for the public service, now classified or to be classified hereunder."

By section 8 of said act, the mayor of each city of the State having a population of over 50,000 inhabitants, was authorized "to prescribe such regulations for the admission of persons in the civil service of such city as may promote the efficiency thereof, and ascertain the fitness of candidates in

respect to character, knowledge and ability, for the branch of the service into which they seek to enter."

Pursuant to such act of the Legislature, the mayor of the city of Albany, a city of over 50,000 inhabitants, prepared rules and regulations for the admission of persons into the civil service of said city. And in and by such rules it was provided that patrolmen in the police force of said city should be appointed "by selection from those persons graded highest as the result of open, competitive examinations." The regulations so made by the mayor of the city of Albany were approved by the civil service commission of the State.

The collection, or roll, of names of the persons passing the required examinations under the rules adopted by the governor and civil service commission of the State, and the mayors of the several cities, and from which collection, or roll, appointments, to the civil service of the State, or of such cities, were to be made, came to be known as the "eligible list," and upon it were entered the names of persons so qualified by such examinations, in the order of excellence by which they had passed the examinations to which they had been subjected.

By chapter 410 of the Laws of 1884, chapter 354 of the Laws of 1883 was amended and added to, and section 4 of said amendatory act, being a new and additional section, provided "that persons who served in the army or navy of the United States in the late war, and have been honorably discharged therefrom \* \* \* shall be preferred for appointment to positions in the civil service of the State, and of the cities affected by this act, over other persons (of equal standing), as ascertained under this act and the acts hereby amended."

In 1886, this law was further amended by chapter 29, which provided that persons who have served in the army or navy of the United States in the late war, who have been honorably discharged therefrom, shall be preferred for appointment to positions in the civil service of the State and of the cities affected by said act, "over all other persons though graded lower than others so examined and reported, provided their qualifications and fitness shall have been ascertained as provided under this act and the several acts hereby amended."

In 1894, by chap. 717, the law was further amended so as to read, that "the civil service rules and laws of this State shall not apply to such persons residents of this State, who have served in the army or the navy of the United States, and who have been honorably discharged therefrom, for any position or employment, compensation for which does not exceed four dollars per day, in the public departments, and upon all public works of the State of New York, and of the several cities, counties, towns and villages thereof."

This was the condition of the civil service laws of the State and of the city of Albany, so far as they affect the present application, when the new Constitution was adopted in the fall of 1894, and the policy of the State of ascertaining the merit and fitness of persons applying for appointments in the civil service of the State and the cities and villages thereof, by examination, was made part of the organic law, by section 9, article 5 of the Constitution, reading as follows: "Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States, in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing, on any list from which such appointments or promotion may be made. Laws shall be made to provide for the enforcement of this section."

After this section of the Constitution had become part of the fundamental law of the State, and on the 26th day of February, 1895, the applicant, George Sweeley, applied to the board of police commissioners of the city of Albany for appointment as a patrolman. It appears that Sweeley is a person who served in the army of the United States in the late civil war, and was honorably discharged therefrom; it also appears that he has passed a satisfactory physical examination, and is competent to act as a patrolman of the city police force, but he has passed no civil service examination, as prescribed by the rules and regulations made by the mayor, and approved by the State civil service commission, as hereinbefore set forth, and it is conceded that his name does not appear upon any list of persons eligible to appointment upon the police force of the city of Albany. The compensation of a patrolman on the police force of the city of Albany is less than four dollars per day.

The police board, upon the certificate of its examining surgeon, as to his physical fitness and competency to discharge the duties of a patrolman, appointed Sweeley to such position.

The civil service examiners of the city of Albany, appointed under the civil service regulations of said city, thereafter called the attention of the police board to the provision of the Constitution I have quoted. Objections were made by certain citizens of the city to the appointment of Sweeley, and upon his presenting himself before such board of police commissioners, and asking to be sworn in as such patrolman, and his warrant of office issued to

him, and to be assigned to duty, such board of police commissioners refused his request and adopted the following resolutions: "The appointment of George Sweeley having been declared illegal by the corporation counsel, for the reason that he was not certified by the civil service commission, it is hereby resolved that his services be declined, and the chief, the captains and sergeants of this department are hereby instructed to refuse his services, and each member of the board hereby refuses to administer the oath of office for the above-mentioned reason."

Whereupon, the said Sweeley makes this application for a peremptory writ of *mandamus*, to be directed to the police commissioners, and each of them, commanding and directing them to administer to him the legal oath of office as a patrolman on the police force of the city of Albany, and to issue to him his warrant of appointment as such patrolman, and assign him to duty.

It is conceded by counsel that the remedy by *mandamus*, is proper, if the applicant is entitled to the office in question.

The only question raised and argued before me, and the only one I understand that it is desired to have considered, is, as to the effect of the amendment to the Constitution, I have quoted, upon the civil service laws of the State and city, in so far as they relate to honorably discharged veterans of the late civil war, and in particular its effect upon chapter 717 of the Laws of 1894.

It is contended that the amendment to the Constitution referred to does not affect the question, because, it is argued, such amendment is not self-executing. A constitutional provision is self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. (Cooley on Const. Lim. [6th. ed.] 99, 100.)

And it is asserted that the amendment in question simply lays down principles for future legislation; that it does not prescribe the rules by which it may be enforced, and it is said that the amendment itself recognizes that fact in the last clause, which reads, "Laws shall be made to provide for the enforcement of this section."

I apprehend that this argument is correct as far as it goes. So far as any affirmative effect is to be given to the amendment in question, it will be assumed that it needs legislation to give it life.

But I cannot assent to the argument, that until the Legislature passes laws to enforce it, it is absolutely a dead letter, and is as if it had never been adopted.

It is possible that if there were no laws upon the subject in existence, at the time of its adoption, upon which it could have a negative or nullifying effect, and none being passed after its adoption to enforce it, that practically it would be as if it had never been adopted, except that no theretofore existing right could be affirmatively enforced in opposition to it. But I cannot agree to the proposition that where there are laws upon the statute book upon a given subject, that a constitutional enactment upon that same subject, subsequently adopted, in direct conflict with it, does not affect it, unless such constitutional enactment contains within its provisions the necessary machinery to affirmatively enforce it, and that if it does not, the pre-existing law, although in terms and principle in direct hostility to the constitutional enactment, continues in force until the Legislature provides the necessary machinery for enforcing, in an affirmative way, such provision of the Constitution.

Because the Legislature, through neglect, or because of the lack of time, after the adoption of the Constitution, has not provided the necessary means to enforce it, I cannot concede that a citizen has any rights which he can enforce contrary to its provisions.

I can conceive of a statute constituting an act which was theretofore lawful, and which people had a right to do, a crime, and yet, when through omission or neglect, no punishment had been prescribed, and none prescribed by any general statute, that a person doing the act so defined to be a crime, could not be punished because no penalty had been decreed, and, therefore, no means provided to enforce the law; nevertheless, the person committing such act would be violating the law; and I do not think that any one would, for a moment, contend that the courts would by their process enforce his claim to do that which was formerly his right to do, but which the statute defined to be a crime.

So that such statute, although no means had been provided to enforce it, would not be a dead letter, but have a negative and prohibitive force and effect. So while a provision of the Constitution may need legislation to enforce its principles, and give them affirmative effect, yet without any legislation such provision may have a negative force, in prohibiting acts in violation of its terms, and nullifying statutes repugnant to its principles, and thus while from lack of legislation its principles cannot be affirmatively enforced, neither on the other hand can those principles be lawfully violated, or any statute violating them be enforced.

I will not discuss what negative effect the amendment in question, standing alone, may have in nullifying or repealing laws in existence at the time of its adoption, which are repugnant to it.



All parts of the Constitution are to be construed together, and in connection with each other.

Section 16 of article 1, of the Constitution provides, amongst other things, as follows: "Such acts of the Legislature of this State as are now in force, shall be continued the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated."

And in judging of the effect of the amendment under consideration, upon theretofore existing laws, such amendment must be read in connection with section 16 of article 1.

The Civil Service law of the State as it was prior to the adoption of the new Constitution, is, with the exception of the acts that have been passed relative to soldiers, in harmony with the Constitution; the acts relative to soldiers are additions to the Civil Service law, and their repeal, or the repeal of such of them as are repugnant to the Constitution, will not destroy the whole law, but will leave it a harmonious and complete law.

The law under which the applicant claims his appointment to the police force, is a law which entirely relieves honorably discharged soldiers of the late civil war from subjection to the Civil Service laws of the State, in cases where the pay of the position sought does not exceed four dollars a day. And the question that arises, therefore, is, whether such a law is repugnant to the amendment of the Constitution in question.

That leads us to an examination of the meaning and intent of such amendment.

"It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity or contradiction." (Bl. Const. Law, 65.)

It was the evident intention, by this amendment, to engraft into the organic law of the State the principle of ascertaining the merit and fitness of applicants for appointment in the civil service of the State by examination, and also to provide for the extension of such principle, beyond what was provided for in then existing laws, or permitted by the old Constitution.

And it is apparent that, while it was intended to give veterans the preference, it was not intended that they should be relieved from demonstrating their fitness for official positions by submitting to an examination, but simply to give them a prefer-

ence over those not soldiers, who had also had their fitness tested by examination.

It is to be presumed that the framers of the section were acquainted with the existing Civil Service laws of the State and knew that, under them, appointments were made from a so-called "list;" that applicants for appointments were placed upon such list after an examination, and that the relative position or standing that they occupied on such list depended upon the manner in which they passed such examination. And it is to be presumed that, in making use of the language that they did, they had in view such existing laws. (People v. Rathbone, 145 N. Y. 435-38.)

And, therefore, it is plainly to be inferred from the language used, "Shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointments or promotions may be made," that they had in contemplation a list, made up after an examination of the applicants, from which appointments should be made, upon which list the soldier-applicant should secure a standing by examination.

In aiding us to determine what the framers of this section meant by the language used, the proceedings of the Convention are of great assistance. As originally proposed, the section in question read as follows: "Appointments and promotions in the Civil Service of the State, and of the cities, shall be made, so far as practicable, according to merit and fitness, to be ascertained by examinations, which, so far as practicable, shall be competitive. Laws shall be made to provide for the enforcement of this section." (Records of New York Const. Con., page 2438.)

I will not refer to the various proceedings by which this section was afterwards altered, excepting as such alterations refer to the soldiers or sailors of the late civil war.

Under this proposed section, it will be observed that the veteran soldier was not mentioned; that it applied to all citizens of the State alike.

Subsequently, the following amendment was proposed, to be added to the end of the section: "Honorably discharged Union soldiers and sailors, who are not otherwise disqualified from appointment or promotion, shall be exempt from the provisions of this section."

This amendment was voted down (same 2444), and then the following substitute was offered: "That honorably discharged Union soldiers and sailors of the late war shall be exempt from civil service examinations, and that all that shall be required of them, shall be capacity to perform the service for which they are applicable." This, also, was negatived. (Same 2444).

Thereafter the following amendment was pro-

posed: "Honorably discharged Union soldiers and sailors shall be exempt from such examinations, and shall have preference to such appointments and promotions." (Same 2546.)

Another amendment was offered in the following words: "Honorably discharged soldiers and sailors who served in the late war, who are not otherwise disqualified for promotion, shall be exempt from the provisions of said competitive examinations." (Same 2547.)

Still another amendment, reading as follows, was offered: "Honorably discharged Union soldiers and sailors of the late civil war, shall be exempt from the examinations required by this section." (Same 2549.)

This section, with the various amendments, was the cause of much debate, which, of course, it is impracticable to reproduce here, showing the desire and intention of those offering the several amendments to exempt soldiers and sailors of the late war from the operation of the civil service laws of the State, and of the proposed section of the Constitution. In the course of the debate, chapter 717 of the Laws of 1894 was referred to, and the lines were sharply drawn between those who desired to entirely exempt soldiers of the late war from the operations of the civil service law, and the principle of ascertaining the fitness of candidates seeking appointment to public office by examination, and those who were willing to give them a preference after they had demonstrated their fitness by being subjected to such examination, over others not soldiers and sailors, whose fitness had also been tested by examination.

This contest eventuated in the offering and adoption of the following provision: "Provided, however, that honorably discharged soldiers and sailors of the United States in the late civil war shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which appointments or promotions shall be made." (Same 2554.)

This amendment being adopted, the president of the convention stated that that disposed of the necessity of taking a vote upon any of the other proposed amendments, and after amending it by inserting the words "army and navy of the" and the words "citizens and residents of this State," making it read as it now is in the Constitution, it was formally adopted by the convention. (Same 2645.)

It will be seen by this review of the various steps taken in perfecting the section under consideration, and from the defeat of every amendment that proposed to exempt them from the operations of the civil service law, or from examination to test their fitness for office, that it was the evident intention of the framers of the Constitution to subject the

soldiers and sailors of the late war to the operations of the civil service law, simply giving them a preference over others whose qualifications had been tested by examination; and the language by which they evidenced that intent, while perhaps not so clear as it might be, still sufficiently expresses it, and we must presume that the people who voted for and adopted it, had the same intention in so doing as the Convention which framed it. Such being the intention of the people and the meaning of the Constitution, if, after the first of January, 1895, the Legislature had passed a law relieving all applicants for positions in the civil service of the State, or of any of the cities thereof, who are honorably discharged soldiers and sailors of the late civil war, from the operations of the civil service laws of the State, I think no one would contend but that such law was in conflict with the Constitution, and, therefore, null and void. If a law passed after the Constitution went into effect is unconstitutional and void because in conflict with the Constitution, the same law passed prior to the adoption of the Constitution is "repugnant" to it, and under section 16 of article 1, as hereinbefore set forth, is abrogated.

It follows from this that chapter 717 of the Laws of 1894, being a law which exempts honorably discharged soldiers and sailors from the operations of the civil service law of the State, and from being examined to test their fitness, in cases where they are applicants for positions, the pay of which does not exceed four dollars per day, is in conflict with the provisions of the section of the Constitution in question, and "repugnant" to its principles, and is, therefore, abrogated.

Section 4 of chapter 410 of the Laws of 1884, as amended by chapter 29 of the Laws of 1886, being in harmony with the Constitution, is not abrogated by it, and the law by which it is amended, and by implication repealed (chapter 717 of the Laws of 1894), being abrogated and repealed, it is revived and again becomes a part of the law of the State.

We thus have without any legislation to carry this section of the Constitution into affirmative effect, but by the force and effect of the provisions of the Constitution abrogating and repealing theretofore existing laws repugnant to it, and continuing in effect those laws not repugnant to it, a civil service law to which the applicant, although an honorably discharged soldier of the late civil war, is subject; under the provisions of which he must be examined to test his fitness for the position he aspires to, and be placed upon the eligible list, where he can be given a preference over all others, not soldiers or sailors, who have also been placed upon such list as the result of the examinations to which they have been subjected.

This conclusion leads to a denial of the applica-

tion for a *mandamus*, but as the question is a new one, about which there has arisen differences of opinion amongst persons learned in the law, it is denied without costs; denied not as a matter of discretion, but as a matter of law.

#### INFERIOR COURTS OF CRIMINAL JURISDICTION IN THE CITY AND COUNTY OF NEW YORK.

Opinion of Louis Marshall, Joseph H. Choate, Elihu Root, William B. Hornblower, Joseph Larocque, Charles C. Beaman and James C. Carter as to the constitutionality of a bill entitled "An act in relation to the inferior courts of criminal jurisdiction in the city and county of New York."

THE power of the Legislature to deal with the offices of police justice of the city of New York involves consideration of such immense importance to the public, and has been so persistently questioned by the present incumbents of those offices, that a careful examination into the nature of the office of police justice is of the first importance. The office of police justice is not one of constitutional creation. It is purely statutory in its origin; the Legislature being authorized by the Constitution to establish inferior local courts of civil and criminal jurisdiction. Pursuant to this authority alone, the offices of police justices of the city of New York came into being. Their appointment is vested in the mayor of the city of New York. Their salaries and terms of office and their powers and duties are specified in sections 1541 to 1568 of the New York Consolidation Act. These powers have from time to time been altered by the Legislature. The new Constitution does not recognize these police justices as such. None of the inferior local courts, either of civil or criminal jurisdiction, existing at the time of the adoption of the new judicial article, is mentioned or erected into a tribunal superior to the Legislature which created it. The manifest purpose of that article is to reduce the number of constitutional courts to a minimum, to abolish many of those theretofore existing, and to prohibit the creation of courts which can in any manner develop by process of evolution into constitutional tribunals. The Legislature, having thus created these offices, has been in no manner forbidden to further legislate with respect to them or to exercise such authority over the office, as well as over the incumbents thereof, as lies within the legitimate purview of the law-making power.

Foremost among the powers which have been conceded to American legislatures by the most uniform consensus of judicial opinion with respect to this subject is that providing for the abolition of offices of legislative creation, and restricting or enlarging the duties and functions pertaining thereto, and the reduction or abolition of the compensation which is incidental to a public office. It was at one

time claimed that a public officer, when once chosen to hold office for a specified term at a fixed compensation, was thereby vested with a property right in the office and in the compensation provided by the Legislature, and that a contract was created between the public and the officer which could not be impaired without doing violence to the Federal Constitution. It has, however, been decided that this view is fallacious; that the relation described does not constitute a contract; neither does an appointment or election to office constitute property in any constitutional sense. Wholesome considerations of public policy lie at the foundation of the adjudications which have asserted these doctrines. Nowhere has the reason been better stated than by Mr. Justice Daniels in *Butler v. Pennsylvania*, 10 How. (U. S.) 402 (416), where he says: "The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon the principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy, either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or, if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a State, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect and competent government, there must exist a general power to enact and to repeal laws, and to create and change or discontinue the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or Constitution of the State, as is the case in some instances in the State Constitutions, and as is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The Constitution of Pennsylvania contains no limit upon the discretion of the Legislature, either in the augmentation or diminution of salaries, with the exception of

those of the governor, the judges of the Supreme Court and the presidents of the several Courts of Common Pleas. The salaries of these officers cannot, under the Constitution, be diminished during their continuance in office. Those of all other officers in the State are dependent upon legislative discretion."

The courts of this State have adopted the same doctrine, notably in *Connor v. The Mayor*, 5 N. Y. 285; *People v. Devlin*, 33 id. 372; *People, ex rel. Ryan, v. Greene*, 58 id. 295-304; *Nichols v. McLean*, 101 id. 533; *Fitzsimmons v. City of Brooklyn*, 102 id. 536.

In *Nichols v. McLean*, Judge Andrews states the rule as recognized in this State to be as follows: "It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office and to receive the emoluments belonging to it does not grow out of any contract with the State, nor is an office property in the same sense that the cattle or land are the property of the owner. It is, therefore, the settled doctrine that an officer acquires no vested right to have an office continued during the time for which he was elected or appointed, nor to have the compensation remain unchanged. The Legislature may abolish an office during the term of an incumbent, or diminish the salary, or change the mode of compensation, subject only to constitutional restrictions."

It has likewise been held in *People v. Devlin, supra*, that an act changing the compensation of a public officer after he has entered upon the performance of his duties is not an *ex post facto* law. To the same effect is the decision in *Coulter v. Murray*, 4 Daly, 506, which related to the act providing for the appointment of police justices in the city of New York, from which the present incumbents derive their authority.

It is, however, urged that section 1543 of the Consolidation Act provides that: "The salaries of police justices appointed thereunder shall be \$8,000 a year, which shall not be diminished during the term of office." As has been seen under the authorities above cited, such a provision does not constitute a contract; it is nothing more than a declaration of public policy made by one Legislature, which has no binding force upon a succeeding legislative body possessed of equal constitutional powers. As was said in *Newton v. Commissioners*, 100 U. S. 559: "Every succeeding Legislature possesses the same jurisdiction and power with respect to them (public interests) as its predecessors. The latter have the same power of repeal and modification which the former had of enactment; neither more nor less. All occupy in this respect a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public wel-

fare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

In the same connection the court said that "the legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may, also, shorten or lengthen the term of service, and it may increase or diminish the salary or change the mode of compensation."

As has been seen, there is nothing in the Constitution which prohibits the Legislature from abolishing the offices of police justice of the city of New York. Neither is there anything in the Constitution which prohibits the Legislature from altogether abolishing the compensation which is now fixed by section 1541 of the Consolidation Act. There are but two provisions in the judiciary article touching the subject of the compensation of judicial officers. Section 12 declares that the compensation of the judges of the Court of Appeals and the justices of the Supreme Court shall not be increased or diminished during their official terms, and section 15 makes like provision as to county judges and surrogates. The Constitution is silent with respect to all other judicial officers. Hence, the Legislature is absolutely unrestricted in dealing with the compensation of other judicial officers.

But it is urged that section 22 of article VI of the Constitution places the police justices now in office beyond the reach of the Legislature. That section provides: "Justices of the peace and other local judicial officers provided for in sections 17 and 18, in office when this article takes effect, shall hold their offices until the expiration of their respective terms."

It may be premised that reading article VI as an entirety it is manifest that this article was not intended to go into effect until January 1, 1896. That purpose is expressed in section after section, and since all its parts are interwoven and interdependent, it would be a most remarkable result if an isolated section of the article should be deemed in force now, while the article in all of its salient features is not to go into effect until a year hence.

But, irrespective of this consideration, there is nothing in section 23 which impairs the right of the Legislature to abolish the office of police justice, or to restrict the Legislature from dealing with the compensation of these offices. This section does not transform a local judicial officer, created by the Legislature, into a constitutional officer. Neither does it in any way deal with the office. That has already been done by the Legislature, and no limitations are attached to the legislative power. The

provision is practically the same as section 25 of the judiciary article which went into effect in 1870. That provides: "Surrogates, justices of the peace and local judicial officers provided for in section 16 in office when this article shall take effect shall hold their respective offices until the expiration of their term."

These sections are inserted into the several constitutions in which they appear out of abundant caution in order to avoid what might be claimed, that the incumbents of the office named at the time of the adoption of the new Constitution were thereby deprived of their offices. To guard against such claim, section 1 of article VI of the new Constitution provides for the continuance in office of the justices of the Supreme Court and of the justices transferred thereto by section 5. Section 7 provides for the continuance in office of the judges of the Court of Appeals; section 14, of the county judges; section 15, of the surrogates. For the same reason justices of the peace are continued in office, and, inasmuch as there was no provision for the continuance of inferior local courts previously established, because they are legislative, and not constitutional, courts, and to indicate that there was no purpose to interfere with those who were then incumbents of local judicial offices, it was provided that they should hold their offices until the expiration of their respective terms. With respect to the judges of the Court of Appeals, the justices of the Supreme Court, county judges and surrogates, it is, however, to be observed that the Constitution fixes their terms of office. Both the old and the new Constitutions prescribe the duration of their official term, while, with respect to the local judicial officers, there is no constitutional term of office but one fixed by the Legislature. The language of the Constitution is not that the officers named shall hold their office for the respective terms for which they are elected or appointed, but merely until the expiration of their respective terms. These terms are of legislative creation, and the power to fix such term is in no manner taken away by the language employed. All that was sought to be accomplished was, that the existing legislative courts should not be without incumbents by reason of the adoption of a new Constitution. There certainly is no reason why the Legislature should be prevented from fixing the terms of those who should happen to be in office upon the taking effect of the new judiciary article, and leave it entirely unrestricted with respect to their successors. By the phrase, "the expiration of their respective terms," it was undoubtedly intended to refer to all methods whereby the expiration of an official term could be brought about. Death, resignation, removal for misconduct, or other sufficient cause, operate, even in the case of a con-

stitutional office, as an expiration of the term. With respect to a legislative office, the term must be deemed to have expired whenever the Legislature so declares. This interpretation is entirely consistent with the scope of the judiciary article, and the underlying thought which it contains, that the legislative courts should remain subject to the legislative power, and not advance into the rank of constitutional courts.

For these and other reasons it is concluded:

First. That the Legislature has the power to regulate the terms of the present police justices of the city of New York, to the extent of removing them from office if necessary.

Second. In any event it has the power to abolish the offices; and,

Third. To reduce or altogether take away the compensation given to these officers by the Consolidation Act.

(Signed)

LOUIS MARSHALL.

I concur in Mr. Marshall's conclusions that the Legislature may abolish the office of police justice or reduce or take away the compensation thereof.

30th January, 1895.

(Signed)

JOSEPH H. CHOATE.

(Signed)

ELIHU ROOT.

(Signed)

WM. B. HORNBLLOWER.

(Signed)

JOS. LAROCQUE.

(Signed)

CHARLES C. BEAMAN.

I concur in the opinion of which the above is a copy.

JAMES C. CARTER.

#### JUDGE PRYOR'S SPEECH AT THE DINNER OF THE UNIVERSITY LAW SCHOOL ALUMNI.

THE following address was delivered by Judge Roger A. Pryor at the annual dinner of the Alumni of the University Law School on April 18, 1895, in response to the toast, "The Bench:"

"MR. CHAIRMAN AND GENTLEMEN: The topic naturally suggested by the toast you offer, is the reciprocal obligations of the bench and the bar. The duty of counsel is by careful research and discussion so to present the case, on each side, as to enable the court to render a right decision. In the performance of this function great scope is afforded for the display of learning and ability. The learning, however, should not be abused by an ostentatious prodigality of citation, but be seen only in the production of authorities pertinent and conclusive of the point. Bulk is not always weight; and the attraction of a brief may be in an inverse ratio to its length. And the ability exhibited should be manifest in an orderly marshaling of essential facts in a firm grasp of the principles involved, in an accurate apprehension of the conflicting analogies, and

in an argument clear, compact and cogent. Forensic eloquence is still a power, though not of the kind formerly in vogue — florid, copious and declamatory; but simple, subdued and severely logical — pure reason aglow with animation.

"The first and indispensable requisite is to engage the attention of the court; and by no means is this condition so effectually fulfilled as by luminous statement, elegance of diction, methodical arrangement of topics and earnestness of address. I say elegance of diction because, after all, there is a fascination and an effect in mere felicity of phrase; and I inculcate earnestness of manner, because the Horatian precept *Si vis me flectere* is as imperative as ever.

"Having so presented his client's case, the advocate's office is at an end, and the judge occupies the scene with his imposing presence. The duty of the bench to the bar is primarily a patient attention to the arguments. 'Patience and gravity of hearing,' says Bacon, 'is an essential part of justice, and an overspeaking judge is no well-tuned cymbal.' However able the judge, and however inexperienced the lawyer, it stands to reason that he who has made a special study of the case must know it better than he to whom it is just presented, and that so something may be learned even from the speech of the least expert advocate. Hence, another maxim of the same great authority, namely: 'Let not the judge meet the cause half way, nor give occasion to the party to say his counsel or proofs were not heard.' Again, the advocate is entitled to the most respectful treatment by the court. The amenities of the gentleman are not incompatible with the dignity of the judge. And this courtesy of the bench to the bar should not be proportioned to the eminence of the advocate; on the contrary, the younger, the weaker and the obscurer the counsel, the clearer his title to deferential encouragement from the court. It may be more perilous to provoke a duel of wit and disputation with a Choate than with a tyro; but for that very reason the judge should be prompter to challenge Mr. Choate than the tyro. How crushing to modest merit a sneer or a frown from the court, and how cruel, too! How helpful a word of praise or a look of approval!

"The briefs handed in, the judge should study them thoroughly and impartially, so that when he delivers his decision, the defeated counsel will say that, at all events, the court has tried to do justice. It is not for mortals never to err, and everything will be forgiven to the judge who has sought diligently and conscientiously to discover the right. Whether he go wrong from corruption or indolence, the miscarriage of justice is the same, and equally oppressive to the suitor.

"But, while gravely meditating the case, the

judge need not prolong his deliberation to an Eldonian period of gestation. *Curia advisari vult* should not be the synonym of interminable procrastination. In *magna charta*, the sale of justice, the denial of justice and the *delay* of justice appear in the same category of unpardonable offenses. Indeed, gentlemen, the judicial office is not of dignity only, but of awful responsibility. The dispensing justice, the righting of wrong, the protection of innocence, the punishment of guilt — these are the functions; and what prudence, what labor, what vigilance, what learning, what courage, what probity, are indispensable to their faithful fulfilment! Be assured that the bench has its trials and perplexities, and is not exempt even from the remorse of an unjust decision, though the effect merely of human fallibility. Bear with us, then, I pray you, if, under the strain of our arduous, anxious and distracting duties, we sometimes lapse into error and occasionally give vent to ebullitions of ill-humor. Over the infirmities of the upright judge clarity will cast its veil; and the worth of the magistrate may atone for the weakness of the man.

"Gentlemen of the bar, the bench greets you as brothers. It is only while the ermine is on that we assert any superiority of position. Descending from our official station, we stand on a level with the most recent of Dr. Abbott's graduates; and we solicit from them the familiarities of an equal friendship. Meanwhile, we invoke for you, one and all, the utmost fortune of the profession. *Dat Galenus opes, dat Justitianus honores*; wealth is not the reward of the lawyer, but by noble endeavor he may attain a better prize — a name of renown and an influence for good."

### Abstracts of Recent Decisions.

ASSOCIATION — LIABILITY OF MEMBERS. — Where parties unite in a voluntary unincorporated association, and for convenience contract under an associate name, the acts of the association, it not being a legally responsible body, are the acts of its members who instigate and sanction the same. (*Winona Lumber Co. v. Church* [S. Dak.], 62 N. W. Rep. 107.)

CONFLICT OF LAWS — DEATH BY WRONGFUL ACT. — In an action by a father for the negligent killing of his child in a foreign State, unless the statute of the foreign State authorizing such an action be pleaded, plaintiff's right of recovery is governed by the common law. (*Jackson v. Pittsburgh, C. C. & St. L. Ry. Co.* [Ind.], 39 N. E. Rep. 663.)

CONTRACTS — CONSIDERATION — PUBLIC POLICY. — An agreement by property owners and business men, in the immediate neighborhood of the post-office, to pay the owners of the building in which it is located

a specified sum monthly for four years, in case the latter rent the building to the government for a nominal sum, in order to secure the retention of the office in that locality, is supported by sufficient consideration and is not void, as against public policy. (*Fearnley v. De Mainville* [Colo.], 39 Pac. Rep. 73.)

**CONTRACTS OF CORPORATION.**—A contract made by a promoter is binding on the corporation, if adopted by it after its organization. (*Pratt v. Oshkosh Match Co.* [Wis.], 62 N. W. Rep. 84.)

**DEED—BONA FIDE PURCHASER.**—Plaintiff left a deed to his land with a real estate broker, who was negotiating for the sale of said land, with express instructions not to deliver it without plaintiff's consent. Subsequently, the broker delivered the deed, without plaintiff's knowledge or consent. The grantee never took possession of the land, and thereafter sold it to defendant. *Held*, that defendant took no title in the land, although he was a *bona fide* purchaser. (*Allen v. Ayer* [Oreg.], 39 Pac. Rep. 1.)

**ELECTIONS—ERRONEOUS EXCLUSION OF VOTERS.**—Where qualified electors offered to vote, but were prevented from actually casting their ballots by an erroneous decision of the election judges, held, such ballots cannot be counted for the candidate the electors subsequently declared they intended to have voted for, if they had voted. (*Pennington v. Hare* [Minn.], 62 N. W. Rep. 116.)

**ESTOPPEL—RETAINING BENEFITS.**—Where a debtor sells his property to a third person, and transfers the notes received in payment to a creditor, the latter is estopped, while retaining the notes, to attach the property in the hands of the third person as that of the debtor. (*Larkin v. Wilsford* [Tex.], 29 S. W. Rep. 548.)

**HOMESTEAD.**—The fact that a building is used for a saloon will not deprive the occupant of homestead rights as against a creditor not claiming under a violation of the prohibitory law. (*Groneweg v. Beck* [Iowa], 62 N. W. Rep. 31.)

**HOMESTEAD EXEMPTION—REMAINDERMAN.**—A remainderman may, on the determination of the particular estate, claim a homestead in the land as against his judgment creditors who have failed to sell, under execution, his interest in the land before the termination of the life estate. (*Stern v. Lee* [No. Car.], 20 S. E. Rep. 726.)

**INSOLVENCY—PREFERENCE.**—Where an insolvent buys goods, and, under the contract, pays part of the price in cash, such transaction is not a voluntary payment in contemplation of insolvency, with a view to preferring the seller as a creditor. (*H. B. Clafin Co. v. Levitch* [Ky.], 29 S. W. Rep. 452.)

**INSURANCE—PROPERTY COVERED.**—A policy on a two-story brick building "and additions thereto," occupied as a dwelling, includes a building partly occupied by assured servants, and one of the rooms of which is used as a laundry, though it is not annexed to the brick building, where there is no other building in assured's yard which can possibly be claimed as an addition to the main building, not built in it as part of the house originally. (*Phenix Insurance Co. v. Martin* [Miss.], 16 South. Rep. 417.)

**MASTER AND SERVANT—PROMISE TO PROTECT EMPLOYEE.**—A promise by an employer that "he would take all the risks of any accident that might occur" to an employee, does not include injuries caused by contributory negligence. (*Phillips v. Michael* [Ind.], 39 N. E. Rep. 669.)

**MUTUAL BENEFIT SOCIETY—CERTIFICATE.**—The beneficiary in a certificate of membership in a benevolent society, the Constitution of which provides that its members may surrender their certificates, has no vested interest therein which prevents the member from surrendering it. (*Wells v. Covenant Mutual Benefit Ass'n of Illinois* [Mo.], 29 S. W. Rep. 607.)

**NEGOTIABLE NOTE—BONA FIDES.**—The fact that the purchaser of a note had notice of facts which would have put a prudent man on inquiry as to defects therein, and failed to make inquiry, does not, as a matter of law, prevent him from holding the note free from all equities. (*Bowman v. Metzger* [Oreg.], 39 Pac. Rep. 8.)

**PLEDGE—BONA FIDE PURCHASER.**—One who receives as collateral security to a loan contemporaneously made negotiable bonds not yet matured, without knowledge of any defense to such bonds, is entitled to protection as a purchaser thereof, to the extent of the amount of such loan. (*Hayden v. Lincoln City Electric Ry. Co.* [Neb.], 62 N. W. Rep. 73.)

**TRIAL—MISCONDUCT OF JURORS.**—A defendant who joins with jurors in drinking at plaintiff's expense, and who gives no notice to the court of the occurrence till after the verdict is rendered, cannot, on a motion to set aside the verdict, urge that the jurors were, by receiving the liquor, influenced in plaintiff's favor. (*Bradshaw v. Degenhart* [Mont.], 39 Pac. Rep. 90.)

**WILL—ESTATE IN REMAINDER.**—A testator devised all his real estate to his wife for life, and by a subsequent clause devised all his lands to his grandson. *Held*, that the grandson took an estate in remainder. (*McCord v. Caldwell's Ex'r* [Ky.], 29 S. W. Rep. 440.)

# The Albany Law Journal.

ALBANY, MAY 11, 1896.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE recent rejection of two jurors in the McLaughlin trial by Justice Barrett, of New York city, should receive the absolute approval of every member of the bar. There is too much laxity allowed jurors at the present time in answer to questions which involve their qualifications to sit as members of a body who have the most sacred right to determine and decide. Not only is this so, but a much greater danger might be met with in relation to the evils which exist in jury trials and which must necessarily work to the prejudice of the system. In the recent constitutional convention the strongest arguments were advanced in support of the idea of abolishing entirely the system of trial by jurymen and to allow the court to determine the facts as well as the law in the case. With the increasing dangers which appear in the situation and with the increased demand of the people for purity in judicial proceedings it is not difficult to perceive that the day is rapidly approaching when we will be without the service of these arbiters of the destiny of causes.

One of the jurors at the McLaughlin trial distinctly stated that he did not know of the person who was to be one of the witnesses in the case, while the other made some, it is alleged, mis-statements in regard to his relation to certain individuals who were very close and friendly to the defendant. It is not to be presumed that jurors intentionally made these mis-statements with the purpose in view of becoming members of the jury which was to try a man for whom they entertained some friendly feelings, but the attorneys for the parties to the action are entitled to absolutely true answers to the questions which they put, so as to enable them to determine the qualifications of the men who are to decide the cause which they present to the court. In this case Judge Barrett again demonstrates his ability, competency

and fitness for the high office which he holds and more than ever demonstrates that he is one of the most honorable judges in the State.

A dissenting opinion of considerable interest is that of Judge Canty of the Supreme Court of Minnesota in the case of *Blomquist v. Chicago, M. & St. P. Ry. Co.*, which was recently determined by that court and whose decision has just been handed down. The action was brought to recover damages for injuries said to have resulted from the defendant's negligence while constructing a platform on which to raise a derrick. From the evidence it exclusively appears that the foreman of the crew with which the plaintiff was working as a common laborer was vice principal, for whose negligence the defendant's must be held responsible. The opinion of Judge Canty lays down some able and interesting principles in the matter of the liability of a superior to an inferior servant through its vice principal. Among other things Judge Canty says: I cannot concur in the foregoing opinion. It cannot be held in this case, as a question of law, that the foreman, Enger, was a vice principal, except on the doctrine that the mere fact that the foreman has authority to hire, discharge, and oversee other servants constitutes him a vice principal. This is the doctrine of the courts of Ohio and some other States, and was for a time the doctrine of the Federal courts. This court has never before adopted that doctrine. This case cannot be distinguished in principle from *Lindvall v. Woods*, 41 Minn. 212; 42 N. W. 1020. And, while the majority profess still to follow the extreme doctrine of that case, they have in fact gone to the other extreme, and adopted the Ohio doctrine. If the doctrine of *Lindvall v. Woods* is to be overruled, it should be overruled squarely, and not in this manner. On the question of whether such a foreman is a vice principal, the different courts take one extreme or the other. But I am of the opinion that between these two extremes there is a middle ground, which is far more just, and the principles of which are sound and practicable. These principles I will hereinafter discuss.

The foundation for the platform of the derrick in this case was a temporary appliance, constructed by the men in the progress of the work, as was the defective trestle in *Lindvall*



v. Woods, the insufficient curbing and braces for the same in *Bergquist v. City of Minneapolis*, 42 Minn. 471; 44 N. W. 530, the defective step on the side of the lumber pile in *Fraser v. Lumber Co.*, 45 Minn. 235; 47 N. W. 785, and the defective scaffold in *Marsh v. Herman*, 47 Minn. 527; 50 N. W. 611. In each of these cases this court held that the rule which imposes on the master the duty to provide safe machinery and appliances for the use of his servants has no application to temporary appliances of this character; that when such appliances are prepared during the progress of the work by some of the servants of the common master, they do not come within that rule, and I concede this to be the correct principle. But in the case of *Sims v. Barge Co.* (Minn.), 57 N. W. 322, this court, while professing to adhere to that doctrine, held that the mere fact that the temporary appliance — the scaffold — was constructed by servants employed for that purpose, and that the servant injured took no part in the construction of the same, entitled him to recover if the scaffold was defectively constructed, by reason of the negligence of those servants who constructed it, and he was injured thereby. This is simply holding that servants employed by the same common master, in different departments of the same work, are not fellow servants, and that the master is liable for the negligence of a servant in one department resulting in injury to a servant in another department. This court has often repudiated that doctrine. See *Neal v. Railway Co.* (Minn.), 59 N. W. 312, and cases cited. The derrick platform was a temporary place, constructed by the fellow servants of plaintiff as a part of the work in which they were engaged. It was not a permanent place provided by the master beforehand, and what is known as the rule that the master must use due care to provide a safe place for his servants to work in does not apply. But, in my opinion, it does not follow from this that the defendant should not be held liable.

The plaintiff is a common laborer. He was not employed to exercise the mechanical skill or expert knowledge which may have been necessary to determine whether or not the foundation for this derrick was safe. This foundation was built beside the railroad track, on the slope of an embankment. The stone which was being raised at the time was across

the track, on the opposite side of the embankment, and was unusually heavy. The outer end of the boom or arm of the derrick was more than one-half the length of the upright mast, away from the mast. Applying the principle of the lever, the top of the mast, being held fast by the guy ropes, would act as a fulcrum, and the weight of the stone on the end of the boom would have a tendency to push the bottom of the mast off in the opposite direction, down the embankment, with a side pressure of about one-half the weight of the stone, and this probably caused the foundation to give away. But, whether it was this or some other cause, it cannot be held as a question of law, that a common laborer should have sufficient skill to investigate this foundation for himself, and decide whether or not it was safe, or that he should know or appreciate the dangers to which he was being exposed. If he had or should have had such skill, it was his duty to exercise it, and the master should not be held liable. But if he was not employed to have, did not have, and could not be expected to have, the skill reasonably necessary for his own protection, the duty of protecting him should devolve upon the master. The plaintiff is not paid for exercising such skill, and it is a beautiful theory of law which requires him out of his wages, of perhaps one dollar per day, to hire an expert, whose services are worth five or ten dollars per day, to inspect these temporary appliances for him, and inform him as to their safety. As I have stated, it is held by a number of courts that the mere fact that the superior servant has power to hire, discharge, and direct the inferior servant is alone sufficient to constitute the superior servant a vice principal as to the inferior servant; but it seems to me that it should require something more to give the superior servant that character. It is often the case that the inferior servant is more familiar than such foreman with the dangers to which he is exposed, and is better able to protect himself from those dangers than the foreman is to protect him; and yet, without his fault, and by reason of exposure to those dangers, he may be injured through the negligence of the foreman. When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able

to care for himself as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice principal, but he and the inferior servant are fellow servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and from his grade or position cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant. It is very often the case that the prosecution of the work requires a very high degree of skill and experience in the foreman, and but little skill or experience in the inferior servant, who is neither hired nor paid to exercise the skill necessary for his own protection. If the position of the foreman is one which requires of him superior knowledge or skill, which cannot be required or expected of the inferior servant, but which is necessary for the protection of such inferior servant, then, in regard to the exercise of such superior knowledge or skill, the foreman is a vice principal.

There must be something more in the inequality of the foreman and inferior servant than that which results alone from the one having the authority to hire, discharge, and oversee the other. It is the actual disparity or inequality between them which should control, and the disparity which gives the foreman the character of vice principal must be substantial, not merely slight. As far as I am able to discover, after much investigation, there are but two kinds of this disparity: (1) Disparity of knowledge; and (2) disparity of skill. Disparity of knowledge is where the foreman has or should have knowledge which the inferior servant neither has nor can be expected to have, the want of which knowledge on the part of such servant causes or contributes to his injury. Disparity of skill is where the foreman has or should have skill which the inferior servant neither has nor can be expected to have, the want of which skill on the part of such servant causes or contributes to his injury. The existence of such disparity of either or both kinds is a question of fact for the jury, and the bur-

den is on the party asserting such disparity to prove it. The first case holding the foreman to be a vice principal, by reason of his having authority to hire, discharge and oversee the servant, was a case where there was such disparity of knowledge between the foreman and the inferior servant. It is the case of *Railway Co. v. Stevens*, 20 Ohio, 416, where two trains were, by the regular schedule or time card, in the habit of passing each other at a certain station. New time cards were issued, changing the place of passing, to take effect on the day of the injury. One of these time cards was given to the conductor, but none to the engineer, who stopped at the new place of passing, and inquired of the conductor if a change had taken place. The conductor answered that no change was to take effect that day, and ordered the engineer to proceed. He did so, and a collision occurred, by which he was injured. The engineer was under the control of the conductor, who directed when the cars were to stop and start. It was held that the negligence of the conductor was the negligence of the master, and the defendant was liable. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, is a similar case. There the train was in the habit of passing another train at a certain switch. The conductor got orders to pass at a different place on the day in question, but neglected to communicate the orders to the engineer, who attempted to run on to the usual place, and a collision resulted. It was held that the conductor was vice principal, representing the master, who was liable. In each of these cases the disparity between the engineer and the conductor consisted in the conductor having knowledge which the engineer did not have, but which was absolutely necessary for the safety of the engineer, and the want of which on the part of the engineer was the cause of his injury. In the case of *Railway Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, there was no such disparity. The train consisted only of an engine, and was in charge of the engineer, who acted also as conductor, and the fireman was acting under his orders. The engine was running "wild," and had to keep out of the way of the regular train. The fireman was injured in a collision with that train. He knew, as well as the engineer, the time of the regular

train, and that the engineer was running without orders. He knew that he could not look to the engineer or any superior officer for protection. There was no disparity of knowledge between him and any of his superiors. He knew as much about the situation as the engineer, and they each knew as much about it as any one else knew, or could be expected to know, under the circumstances. He and the engineer had knowingly entered upon a joint venture into danger, and they stood on an equal footing. It has been supposed that this case overrules the Ross case, but it certainly does not. In these three cases it conclusively appeared from the undisputed facts whether or not such actual disparity existed. In the Stevens case and the Ross case it conclusively appeared that it did exist. In the Bough case it conclusively appeared that it did not exist. In each of these cases it was a question of law; but ordinarily, as in the case at bar, it is a question of fact, for the jury, whether or not such actual disparity existed. It is urged that this theory would overturn the rules of the common law. It might overturn some of the blunders of modern courts, but the common law never developed any rules on this question.

One of the clearest indications of the intentions of the framers of the Constitution in respect to direct taxation is a letter which has recently been republished in the *Nation*, from James Madison to Colonel Thompson. It was sent by Worthington C. Ford, Esq., of Washington, D. C., to the editor of the *Nation*, and in connection with the rehearing on the income tax law the letter will prove of no little interest and consideration. The letter is as follows:

Jan<sup>y</sup> 29<sup>th</sup>. 1789.

SIR

A convenient opportunity offering I take the liberty of adding to the former explanation of my sentiments relating to the federal constitution the grounds on w<sup>h</sup> I dislike a change of that part of it which authorizes direct taxes. I am led to give you this further trouble, by intimations that the necessity of such a trust in the Union is by many not truly understood; & is a subject on which the reasons in favour of my opinion may with propriety be suggested. Should I judge amiss, your candour will excuse

the communication. Should I judge aright, your discretion will make a proper use of it.

I approve this part of the Constitution because I think it an essential provision for securing the benefits of the Union, the principal of which are 1<sup>st</sup> the prevention of contests among the States themselves: 2<sup>d</sup> security against danger from foreign Nations.

On the first point it is evident that there is no way to prevent contests among the States but by establishing Justice among them: and equally evident that this cannot be done but by some system that will make each bear its just share of the public burdens. If some States contribute their quotas and others do not, justice is violated; the violation of justice is the ground of disputes among States as well as among individuals; and as among the latter they produce an appeal to the law, so among the former they produce an appeal to the sword. The question to be considered then is which of the two systems, that of requisitions or that of direct taxes, will best answer the essential purpose of making every State bear its equitable share of the common burdens. Shall we put our trust in the system of requisitions, by which each State will furnish or not furnish its share as it may like? Reason tells us this can never succeed. Some States will be more just than others, some less just; some will be more patriotic; others less patriotic; some will be more immediately concerned in the evil to be guarded against or in the good to be obtained. The States therefore not feeling equal motives will not furnish equal aids: Those who furnish most will complain of those who furnish least. From complaints on one side will spring ill-will on both sides; from ill will, quarrels; from quarrels, wars; and from wars a long catalogue of evils including the dreadful evils of disunion and a general confusion. Such is the lesson which reason teaches us. But we have a surer guide in our own experience; which like that of every other confederacy that has tried Requisitions, assures us that they will not be duly complied with; that they will not therefore answer the public exigencies, and that they moreover lay the foundation for injustice, for discord and for contention. I need not quote particular instances in proof of what is here advanced. The whole history of requisitions not only during the war but since the

peace stamps them with the character which I have given them, and proclaims the necessity of resorting for safety to the other system; the system of direct taxes which the Constitution has substituted.

To say that requisitions ought first to be tried, and if they fail, that direct taxes are then to enforce them, is little better than to yield the point by the manner of urging it. For it admits that requisitions are not likely to be complied with voluntarily; at the same time that the efficacy of them is so much insisted on: It admits again that direct taxes are practicable, although the argument against them is that the General Government cannot in the nature of things levy them. But surely if they are practicable after the refusal of the State Government to comply with the requisitions shall have raised prejudices against the General Government, the practicability will be much greater if no such prejudices be thrown in the way. One remark, however, ought not to be omitted. It is, that every State which chuses to collect its own quota may always prevent a federal collection by keeping a little before hand in its finances and making its payment at once into the federal treasury. Another remark deserves to be here made. From the reasoning of many on this subject it would seem as if the question concerning requisitions and direct taxes was whether direct taxes shall be levied or not. This is by no means the case. If extraordinary aids for the public safety shall not be necessary, direct taxes will not be necessary. If extraordinary emergencies call for such aids, the only question will be whether direct taxes shall be raised by the General Government itself or whether the General Government shall require the State Governments to raise them; or in other words whether they shall be raised in all the States, or be raised in some States, whilst others unjustly withdraw their shoulders from the common burden.

On the 2<sup>d</sup> point to wit security against danger from abroad, it is no less evident that Requisitions will fatally deceive us. For the same reason that they will not obtain from the States their respective shares of contribution and thence become a source of intestine quarrels, they must invite foreign attacks by showing the inability of the Union to repel them: and when

attacks are made, must leave the Union to defend itself, if it be defended at all, as was done during the late war, by a waste of blood, a destruction of property, and outrages on private rights, unknown to any country which has credit or money to employ the regular means of defense. Whilst the late war was carried on by means of impress'd property, &c., the annual expense was estimated at about twenty millions of Dollars; at the same time that thousands of brave Citizens were perishing from the scarcity or quality of the supplies provided in that irregular way: to say nothing of the encouragement given by such a situation to the prolongation of the war. Whereas after the General Government was enabled by the pecuniary aids of France to procure supplies in a regular way, the annual expense was reduced to about eight millions of dollars, the army was well fed, the military operations went on with a vigour & the blessings of peace were visibly and happily accelerated. Should another war unfortunately be our lot (and the less our ability to repel it, the more likely it is to happen) what would be the condition of the Union, if obliged to depend on Requisition? There are but two methods by which Nations can carry on a regular plan of self defense; one by waiving the necessary supplies by taxes within the year equal to the public expences: the other, by borrowing money on the credit of taxes pledged for the future repayment of it. The first method is considered by most, if not all nations, as impossible, with the aid of every resource they possess: In the United States, possessed of no resource but duties on trade and their trade probably at the mercy of an enemy superior on the seas, the very idea of such a method is chimerical. The only remaining method is that of borrowing. But who could be expected to lend to a Government which depended on the punctuality of a dozen or more Governments for the means of discharging even the annual interest of the loan? No man who will candidly make the case his own, will say that he would chuse to become a creditor of a Government under such circumstances. Even if the scheme of trying requisitions first, and eventually resorting to direct taxes after a refusal of requisitions, were free from other objections which condemn it, the delay & unpunctuality inseparable from it, would be fatal

to it as a Fund for borrowing: or if loans could be obtained at all, it could only be from usurers who would make the public pay threefold for the risk and disappointment apprehended. What would have been the condition of America at any period since the peace, that is under the system of requisitions, if Great Britain had renewed the war, or an attack had come from any other quarter, & money had become essential for the public safety? How was it to have been obtained? Would requisitions have obtained it from the states? There is not a man acquainted with our affairs who will pretend it. Would they have obtained it in loans from individuals to be repaid out of Requisitions? There is probable not a man within the United States aiming at profit only who would have trusted his money on such a security; or who would not at least have exacted an interest of 20, 30, or 40 per cent., as an indemnification for the fallen state of public credit. We see then that the article of the Constitution in question is absolutely essential, whether we consider it as a means of preserving justice & tranquillity among the states, or of preventing or repelling foreign wars.

But besides these general considerations which affect every part of the Union, there are others which claim the most serious attention of the southern parts of it, & of Virginia particularly. If direct taxes be prohibited, and no reliance can be placed on Requisitions, the inevitable consequence will be, that whenever public exigencies arise, the duties will be accumulated on imports, until they shall have yielded every farthing that can be squeezed out of them. Now who is it that pays duties on imports? Those only who consume them. What parts of the continent manufacture least and consume imported manufactures most? The southern parts. It is clearly the interests of the southern parts therefore, and of Virginia particularly, that trade should not be overburdened; but that direct taxes when necessary should come in aid of that fund; since being laid on all the states by an equal rule provided in the Constitution, they tend to equalize the general burden on every part of the continent. It is truly wonderful that from the same quarter it should be urged, as dangerous to yield a full power over trade, lest the northern interest should overburden it with duties, & as proper

to make an alteration, that might drive the government into the necessity of overburdening it.

In another view the southern states have peculiar reasons for retaining the article of direct taxation. If war ever breaks out against America where will it fall? On the weakest parts. Which are the weakest parts? The southern parts; particularly Virginia, whose long navigable rivers open a great part of her country to surprise & devastation whenever an enemy powerful at sea chuses to invade her. Strike out direct taxation from the list of federal authorities & what will be our situation? The revenue from commerce must in great measure fall along with the security of commerce. The invaded and plundered part of the Union will be unable to raise money for its defence. And no resource will be left; but under the name of Requisitions to solicit benefactions from the Legislatures of other states, who being not witnesses of our distresses cannot properly feel for us; & being remote from the scene of danger cannot feel for themselves. Is this a situation in which any man who loves his Country ought to wish it to be placed? Are these the benefits for which Virginia can wish to stipulate as a return for her concessions in favor of a Union and a General Government? That a northern state should not be averse to expunge the power of direct taxation may be conceived; because a local interest is not always postponed to the general interest. But that a Southern State should hearken to the measure, & be ready to sacrifice its local interest as well as the general interest, admits of no rational explanation to which I am competent.

With great respect & esteem I am, Sir, your obedient & humble servant,

J<sup>r</sup> MADISON, JR.

The United States Supreme Court, in the case of *Brown v. Spilman*, recently decided, a lease for the sole purpose of mining for petroleum and gas, and piping the same, of "all of that certain tract of land described as follows, containing forty acres, excepting reserved therefrom, ten acres," specifically described, "upon which no wells shall be drilled without consent of the party of the first part," is a grant of oil and gas-well right for the whole forty acres, with merely a limitation as to drilling wells on the ten acres.

# PART OF JUDGE WHITE'S OPINION IN THE INCOME TAX CASE.

**A**FTER discussing the power of Congress to levy taxes, the kind of taxes and the manner in which they must be laid, Judge White says:

"The sixth question is: Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not direct taxes, within the meaning of the Constitution of the United States. In considering this subject it is proper to advert to the several provisions of the Constitution relating to taxation by Congress. 'Representatives and direct taxes shall be apportioned among the several States which shall be included in the Union according to their respective numbers,' etc. 'Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.' 'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' 'No tax or duty shall be laid on articles exported from any State.'

"These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

"The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a 'direct tax,' it is clear that it has not been laid in conformity to the requirements of the Constitution. It is, therefore, necessary to ascertain to which of the categories named in the eighth section of the first article it belongs.

"What are direct taxes was elaborately argued and considered by this court in *Hylton v. United States*, decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the convention which framed the Constitution. It was unanimously held by the four justices who heard the argument that a tax upon carriages kept by the owner for his own use was not a direct tax. Justice Chase said: 'I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and a tax on land.'

Paterson, justice, followed in the same line of remarks. He said: 'I never entertained a doubt that the principal — I will not say the only — object the framers of the Constitution contemplated as falling within the rule of apportionment was a capitation tax or a tax on land. \* \* \* The Constitution declares that a capitation tax is a direct tax; both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms 'direct taxes,' 'capitation and other direct tax,' are satisfied.'

"The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject. Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'

"Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excises.'

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

"It has been held that Congress may require direct taxes to be laid and collected in the Territories as well as in the States.

"The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be sup-

posed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

"To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise, that it was obligatory on the plaintiff to pay it.

"The other questions certified up are deemed to be sufficiently answered by the answers given to the first and sixth questions."

This opinion it seems to me closes the door to discussion in regard to the meaning of the word "direct" in the Constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be constructed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision, moreover, is of great importance because it is an authoritative re-affirmance of the *Hylton* case, and an approval of the suggestions there made by the justices, and constitutes another sanction given by this court to the interpretation of the Constitution adopted by the legislative, executive, and judicial departments of the Government, and thereafter continuously acted upon.

Not long thereafter, in *Veazie Bank v. Fenno*, 8 Wall. 583, the question of the application of the word "direct" was again submitted to this court. The issue there was whether a tax on the circulation of State banks was "direct" within the meaning of the Constitution. It was ably argued by the most distinguished counsel, Reverdy Johnson and Caleb Cushing representing the bank, and Attorney-General Hoar the United States. The brief of Mr. Cushing again presented nearly every point now urged upon our consideration. It cited copiously from the opinions of Adam Smith and others. The constitutionality of the tax was maintained by the Government on the ground that the meaning of the word "direct" in the Constitution, as interpreted by the *Hylton* case, as enforced by the continuous legislative construction, and as sanctioned by the consensus of opinion already referred to, was finally settled. Those who assailed the tax there urged, as is done here, that the *Hylton* case was not conclusive, because the only question decided was the particular matter at issue, and insisted that the suggestion of the judges were mere *dicta*, and not to be followed. They said that *Hylton v. United States* adjudged one point alone, which was that a

tax on a carriage was not a direct tax, and that from the utterances of the judges in the case it was obvious that the general question of what was a direct tax was but crudely considered. Thus the argument there, presented to this court the very view of the *Hylton* case which has been reiterated in the argument here, and which is sustained now. What did this court say then, speaking through Chief Justice Chase, as to these arguments? I take very fully from its opinion:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the Constitution.

"We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

"And considered in this light, the meaning and application of the rule, as to direct taxes, appear to us quite clear.

"It is, we think, distinctly shown in every act of Congress on the subject.

"In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

"In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars; in 1812, the amount of the second direct tax was fixed at three millions; in 1815, the amount of the third at six millions, and it was made an annual tax; in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars. No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual; but the provision making it annual was suspended, and no tax, except that first laid,

was ever apportioned. In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. The subjects, in 1798, 1813, 1815, 1816 were lands, improvements, dwelling houses, and slaves, and in 1861 lands, improvements, and dwelling houses only. Under the act of 1798 slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

"This review shows that personal property, contracts, occupations, and the like have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation, but the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most, of the States classed as real property, descendible to heirs. Under the first view they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was taken by the framers of the acts, after 1798, becomes highly probable, when it is considered that, in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves, for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

"The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation as realty.

"It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.

"And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed and of the conventions which ratified the Constitution. \* \* \*

"This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*."

The court then reviews the *Hylton* case, repudiates the attack made upon it, reaffirms the con-

struction placed on it by the legislative, executive and judicial departments, and expressly adheres to the ruling in the insurance company case, to which I have referred. Summing up, it said:

"It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule*, held not to be a direct tax."

This case was, so far as the question of direct taxation is concerned, decided by an undivided court; for, although Mr. Justice Nelson dissented from the opinion, it was not on the ground that the tax was a direct tax, but on another question.

Some years after this decision the matter again came here for adjudication, in the case of *Scholey v. Rew*, 23 Wall. 331. The issue there involved was the validity of a tax placed by a United States statute on the right to take real estate by inheritance. The collection of the tax was resisted on the ground that it was direct. The brief expressly urged this contention, and said the tax in question was a tax on land, if ever there was one. It discussed the *Hylton* case, referred to the language used by the various judges, and sought to place upon it the construction which we are now urged to give it, and which has been so often rejected by this court.

This court again by its unanimous judgment answered all these contentions. I quote its language:

"Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions. Instead of that, it is plainly an excise tax or duty, authorized by section 8 of article 1, which vests the power in Congress to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare. \* \* \*

"Indirect taxes, such as duties of impost and excises, and every other description of the same, must



be uniform, and direct taxes must be laid in 'proportion to the census or enumeration as remodelled in the Fourteenth Amendment. Taxes on lands, houses and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the constitution, are within the same category, but it never has been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers that the assessment is invalid.

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine. That the term does not include the tax on income which cannot be distinguished in principle from a succession tax, such as the one involved in the present controversy."

What language could more clearly and forcibly re-affirm the previous rulings of the court upon this subject? What stronger endorsement could be given to the construction of the Constitution, which had been given in the Hylton case, and which had been adopted and adhered to by all branches of the government, almost from the hour of its establishment? It is worthy of note that the court here treated the decision in the Hylton case as conveying the view that the only direct taxes were "taxes on land and appurtenances." In so doing it necessarily again adopted the suggestion of the justices there made, thus making them the adjudged conclusions of this court. It is too late now to destroy the force of the opinions in that case by qualifying them as mere *dicta* when they have again and again been expressly approved by this court.

If there were left a doubt as to what this established construction is, it seems to be entirely removed by the case of Springer v. United States, 102 U. S. 586. Springer was assessed for an income tax on his professional earnings and on the interest on United States bonds. He declined to pay. His real estate was sold in consequence. The suit involved the validity of the tax, as a basis for the sale. Again every question now presented was urged upon this court. The brief of the plaintiff in error, Springer, made the most copious references to the economic writers, continental and English. It cited the opinions of the framers of the Constitution. It contained extracts from the journals of the convention, and marshalled the authorities in extensive and impressive array. It reiterated the argument against the validity of an income tax which included rentals. It is also asserted that the Hylton case was not authority, because the expressions of the judges, in regard to anything except the carriage tax, were mere *dicta*.

The court adhered to the ruling announced in the previous cases and held that the tax was not direct within the meaning of the Constitution. It re-examined and answered everything advanced here, and said, in summing up the case:

"Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate, and that the tax of which the plaintiff in error complained is within the category of an excise or duty."

The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word "direct." That controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion made use of language which clearly showed that he thought the word "direct" in the Constitution applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definitive. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the Hylton case were adopted here, and, in the last case here decided, reviewing all the others, this court said that direct taxes within the meaning of the Constitution were only taxes on land and capitation taxes. And now, after a hundred years, after long-continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word "direct" in its economic sense, instead of in accordance with its meaning in the Constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever.

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court, could not be better illustrated than by the example which this case affords. Under the income tax laws

which prevailed in the past for many years, and which covered every conceivable source of income, rentals from real estate, and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim in equity and good conscience against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of Congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time and in accordance with the oft-repeated decisions of this court, furnishes the occasion for creating a claim against the government for hundreds of millions of dollars; I say, creating a claim, because if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the Constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen to his grievous injury, the equity endures, and will present itself to the conscience of the government. This consequence shows how necessary it is that the court should not overthrow its past decisions. A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

"If results and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by, or depend at all upon further determinations in other cases of a like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase? No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title might be again drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty), to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him." *Fearne on Contingent Remainders*, London ed., 1801, p. 264.

The disastrous consequences to flow from disregarding settled decisions thus cogently described must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by

denying an essential power of taxation long conceded to exist and often exerted by Congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the Constitution existed and should have been availed of. Since the *Hylton* case was decided the Constitution has been repeatedly amended. The construction which confines the word "direct" to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a judicial amendment of the Constitution.

The finding of the court in this case, that the inclusion of rentals from real estate in an income tax makes it direct to that extent is, in my judgment, conclusively denied by the authorities to which I have referred, and which establish the validity of an income tax in itself. Hence, I submit, the decision necessarily reverses the settled rule which it seemingly adopts in part. Can there be serious doubt that the question of the validity of an income tax, in which the rentals of real estate are included, is covered by the decisions which say that an income tax is generically indirect, and that, therefore, it is valid without apportionment? I mean, of course, could there be any such doubt were it not for the present opinion of the court? Before undertaking to answer this question, I deem it necessary to consider some arguments advanced or suggestions made.

1st. The opinions of Turgot and Smith and other economists are cited, and it is said their views were known to the framers of the Constitution; and we are then referred to the opinions of the framers themselves. The object of the collocation of these two sources of authority is to show that there was a concurrence between them as to the meaning of the word "direct." But, in order to reach this conclusion, we are compelled to overlook the fact that this court has always held, as appears from the preceding cases, that the opinions of the economists threw little or no light on the interpretation of the word "direct" as found in the Constitution. And the whole effect of the decisions of this court is to establish the proposition that the word has a different significance in the Constitution from that which Smith and Turgot have given to it when used in a general economic sense. Indeed, it seems to me that the conclusion deduced from this line of thought itself demonstrates its own unsoundness. What is that conclusion? That the framers well understood the meaning of direct.

Now, it seems evident that the framers, who well understood the meaning of this word, have themselves declared in the most positive way, that it shall not be here construed in the sense of Smith and Turgot. The Congress which passed the car-

riage-tax-act was composed largely of men who had participated in framing the Constitution. That act was approved by Washington, who had presided over the deliberations of the convention. Certainly Washington himself, and the majority of the framers, if they well understood the sense in which the word "direct" was used, would have declined to adopt and approve a taxing act, which clearly violated the provisions of the Constitution, if the word "direct," as therein used, had the meaning which must be attached to it, if read by the light of the theories of Turgot and Adam Smith. As has already been noted, all the judges who expressed opinions in the Hylton case suggested that "direct," in the Constitutional sense, referred only to taxes on land and capitation taxes. Could they have possibly made this suggestion if the word had been used as Smith and Turgot used it? It is immaterial whether the suggestions of the judges were *dicta* or not. They could not certainly have made this intimation, if they understood the meaning of the word "direct," as being that which it must have imported if construed according to the writers mentioned. Take the language of Mr. Justice Patterson: "*I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.*" He had borne a conspicuous part in the convention. Can we say that he understood the meaning of the framers, and yet, after the lapse of a hundred years, fritter away that language, uttered by him from this bench in the first great case, in which this court was called upon to interpret the meaning of the word "direct?" It cannot be said that his language was used carelessly or without a knowledge of its great import. The debate upon the passage of the carriage tax-act had manifested divergence of opinion as to the meaning of the word "direct." The magnitude of the issue is shown by all contemporaneous authority to have been deeply felt and its far-reaching consequence was appreciated. Those controversies came here for settlement, and were then determined with a full knowledge of the importance of the issues. They should not now be re-opened.

The argument, then, it seems to me, reduces itself to this: That the framers well knew the meaning of the word "direct;" that so well understanding it, they practically interpreted it in such a way as to plainly indicate that it had a sense contrary to that now given to it in the view adopted by the court. Although they thus comprehended the meaning of the word, and interpreted it at an early day, their interpretation is now to be overthrown by resorting to the economists whose construction was repudi-

ated by them. It is thus demonstrable that the conclusion deduced from the premise that the framers well understood the meaning of the word "direct," involves a fallacy. In other words, that it draws a faulty conclusion, even if the predicate upon which the conclusion is rested be fully admitted. But I do not admit the premise. The views of the framers cited in the argument conclusively show that they did not well understand, but were in great doubt as to the meaning of the word "direct." The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the articles of confederation had shown. Those who accepted the compromise viewed the word in different lights, and expected different results to flow from its adoption. This was the natural result of the struggle which was terminated by the adoption of the provision as to representation and direct taxes. That warfare of opinion had been engendered by the existence of slavery in some of the States, and was the consequence of the conflict of interest thus brought about. In reaching a settlement, the minds of those who acted on it were naturally concerned in the main with the cause of the contention and not with the other things, which had been previously settled by the convention. Thus, whilst there was in all probability clearness of vision as to the meaning of the word "direct," in relation to its bearing on slave property, there was inattention in regard to other things, and there was, therefore, diverse opinions as to its proper signification. That such was the case in regard to many other clauses of the Constitution has been shown to be the case by those great controversies of the past which have been peacefully settled by the adjudications of this court. Whilst this difference undoubtedly existed, as to the effect to be given to the word "direct," the consensus of the majority of the framers as to its meaning was shown by the passage of the carriage tax act. That consensus found adequate expression in the opinions of the justices in the Hylton case, and in the decree of this court there rendered. The passage of that act, those opinions and that decree, settled the proposition that the word applied only to capitation taxes and taxes on land.

Nor does the fact that there was difference in the minds of the framers as to the meaning of the word "direct" weaken the binding force of the interpretation placed upon that word from the beginning. For, if such difference existed, it is certainly sound to hold that a contemporaneous solution of a doubtful question, which has been often confirmed by this

court, should not now be reversed. The framers of the Constitution, the members of the earliest Congress, the illustrious man first called to the office of chief executive, the jurists who first sat in this court, two of whom had borne a great part in the labors of the convention, all of whom dealt with this doubtful question, surely occupied a higher vantage ground for its correct solution than do those of our day. Here then is the dilemma: if the framers understood the meaning of the word direct in the Constitution, the practical effect which they gave to it should remain undisturbed; if they were in doubt as to the meaning, the interpretation long since authoritatively affixed to it should be upheld.

2d. Nor do I think any light is thrown upon the question of whether the tax here under consideration is direct or indirect, by referring to the principle of "taxation without representation," and the great struggle of our forefathers for its enforcement. It cannot be said that the Congress which passed this act was not the representative body fixed by the Constitution. Nor can it be contended that the struggle for the enforcement of the principle involved the contention that representation should be in exact proportion to the wealth taxed. If the argument be used in order to draw the inference that, because in this instance, the indirect tax imposed will operate differently through various sections of the country, therefore that tax should be treated as direct, it seems to me it is unsound. The right to tax and not the effects which may follow from its lawful exercise is the only judicial question which this court is called upon to consider. If an indirect tax, which the Constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country, according to the extent of such aggregations, then the power is denied to Congress to do that which the Constitution authorizes, because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction. The justness of tariff legislation has turned upon the assertion on the one hand, denied on the other, that it operated unequally on the inhabitants of different sections of the country. Those who opposed such legislation have always contended that its necessary effect was not only to put the whole burden upon one section, but also to directly enrich certain of our citizens at the expense of the rest, and thus build up great fortunes to the benefit of the few, and the detriment of the many. Whether this economic contention be true or untrue is not the question. Of course, I intimate no view on the sub-

ject. Will it be said that if to-morrow the personnel of this court should be changed, it could deny the power to enact tariff legislation which has been admitted to exist in Congress from the beginning, upon the ground that such legislation beneficially affects one section or set of people to the detriment of others, within the spirit of the Constitution, and, therefore, constitutes a direct tax?

3d. Nor, in my judgment, does any force result from the argument that the framers expected direct taxes to be rarely resorted to, and, as the present tax was imposed without public necessity, it should be declared void.

It seems to me that this statement begs the whole question, for it assumes that the act now before us levies a direct tax, whereas the question whether the tax is direct or not is the very issue involved in this case. If Congress now deems it advisable to resort to certain forms of indirect taxation, which have been frequently, though not continuously, availed of in the past, I cannot see that its so doing affords any reason for converting an indirect into a direct tax in order to nullify the legislative will. The policy of any particular method of taxation, or the presence of an exigency which requires its adoption, is a purely legislative question. It seems to me that it violates the elementary distinction between the two departments of the government to allow an opinion of this court, upon the necessity or expediency of a tax, to affect or control our determination of the existence of the power to impose it.

But I pass from these considerations to approach the question whether the inclusion of rentals from real estate in an income tax renders such a tax to that extent "direct" under the Constitution, because it constitutes the imposition of a direct tax on the land itself.

*Does the inclusion of the rentals from real estate, in the sum going to make up the aggregate income from which (in order to arrive at taxable income) is to be deducted insurance, repairs, losses in business, and four thousand dollars exemption, make the tax on income so ascertained a direct tax on such real estate?*

In answering this question, we must necessarily accept the interpretation of the word "direct" authoritatively given by the history of the government and the decisions of this court just cited. To adopt that interpretation for the general purposes of an income tax, and then repudiate it because of one of the elements of which it is composed, would violate every elementary rule of construction. So, also, to seemingly accept that interpretation and then resort to the framers and the economists, in order to limit its application and give it a different significance, is equivalent to its destruction, and amounts to repudiating it without directly doing

so. Under the settled interpretation of the word, we ascertain whether a tax be direct or not by considering whether it is a tax on land, or a capitation tax. And the tax on land, to be within the provision for apportionment, must be direct. Therefore, we have two things to take into account: Is it a tax on land, and is it direct thereon, or so immediately on the land, as to be equivalent to a direct levy upon it? To say that any burden on land, even though indirect, must be apportioned, is not only to incorporate a new provision in the Constitution, but is also to obliterate all the decisions to which I have referred, by construing them as holding that, although the Constitution forbids only a direct tax on land without apportionment, it must be so interpreted as to bring an indirect tax on land within its inhibition.

It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is, whether a tax on net income, when such income is made up by aggregating all sources of revenue, and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to a direct levy on the land itself? It seems to me the question, when thus accurately stated, furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land.

It must be borne in mind that we are dealing not with the want of power in Congress to assess real estate at all; on the contrary, as I have shown at the outset, Congress has plenary power to reach real estate both directly and indirectly. If it taxes real estate directly, the Constitution commands that such direct imposition shall be apportioned. But because an excise or other indirect tax, imposed without apportionment, has an indirect effect upon real estate, no violation of the Constitution is committed, because the Constitution has left Congress untrammelled by any rule of apportionment as to indirect taxes—imposts, duties and excises. The opinions in the *Hylton* case, so often approved and reiterated, the unanimous views of the text-writers, all show that a tax on land, to be direct, must be an assessment of the land itself, either by quantity or valuation. Here there is no such assessment. It is well also to bear in mind, in considering whether the tax is direct on the land, the

fact that if land yields no rental it contributes nothing to the income. If it is vacant, the law does not force the owner to add the rental value to his taxable income. And so it is if he occupies it himself.

The citation made by counsel from *Coke* on *Littleton*, upon which so much stress is laid, seems to me to have no relevancy. The fact that where one delivers or agrees to give or transfer land with all the fruits and revenues, it will be presumed to be a conveyance of the land, in no way supports the proposition that an *indirect* tax on the rental of land is a *direct* burden on the land itself.

Nor can I see the application of *Brown v. Maryland*, *Western v. Peters*, *Dobbins v. Commissioners*, *Almy v. California*, *Cook v. Pennsylvania*, *Railroad Company v. Jackson*, *Philadelphia Steamship Co. v. Pennsylvania*, *Leloup v. Mobile*, *Postal Telegraph Co. v. Adams*. All these cases involved the question whether, under the Constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if Congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by Congress which reached real estate indirectly would necessarily violate the Constitution, because as it had no power in the premises, every attempt to tax direct or indirectly would be null. Here, on the contrary, it is not denied that the power to tax exists in Congress, but the question is, is the tax direct or indirect in the constitutional sense?

But it is unnecessary to follow the argument further; for, if I understand the opinions of this court already referred to, they absolutely settle the proposition that an inclusion of the rentals of real estate in an income tax, does not violate the Constitution. At the risk of repetition, I propose to go over the cases again for the purpose of demonstrating this. In doing so, let it be understood at the outset that I do not question the authority of *Cohn v. Virginia*, or *Carroll v. Lessees of Carroll*, or any other of the cases referred to in argument of counsel. These great opinions hold that an adjudication need not be extended beyond the principles which it decides. Whilst conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then under the very text of the opinions referred to, by the court, they should conclude this question. In the first case, that of *Hylton*, is there any possibility by the subtlest ingenuity to reconcile the decision here announced with what was there established?

In the second case, *Insurance Company v. Soule*, the levy was upon the company, its premiums, its dividends, and net gains from all sources. The

case was certified to this court, and the statement made by the judges in explanation of the question which they propounded says:

"The amount of said premiums, dividends and net gains were truly stated in said lists or returns." (Original Record, p. 27.)

It will be thus seen that the issue there presented was not whether an income tax on business gains was valid, but whether an income tax on gains from business and all other net gains was constitutional. Under this state of facts the question put to the court was:

"Whether the taxes paid by the plaintiff, and sought to be recovered back, in this action, are not direct taxes within the meaning of the Constitution of the United States."

This tax covered revenue of every possible nature, and it therefore appears self-evident that the court could not have upheld the statute without deciding that the income derived from realty, as well as that derived from every other source, might be taxed without apportionment. It is obvious that if the court had considered that any particular subject-matter which the statute reached was not constitutionally included, it would have been obliged by every rule of safe judicial conduct to qualify its answer as to this particular subject.

It is impossible for me to conceive that the court did not embrace in its ruling the constitutionality of an income tax which included rentals from real estate, since, without passing upon that question, it could not have decided the issue presented. And another reason why it is logically impossible that this question of the validity of the inclusion of the rental of real estate in an income tax could have been overlooked by the court is found in the fact to which I have already adverted, that this was one of the principal points urged upon its attention, and the argument covered all the ground which has been occupied here—indeed, the very citation from *Coke upon Littleton*, now urged as conclusive, was there made also in the brief of counsel. And although the return of income, involved in that case, was made "in block," the very fact that the burden of the argument was that to include rentals from real estate, in income subject to taxation, made such tax *pro tanto* direct, seems to me to indicate that such rentals had entered into the return made by the corporation.

Again, in the case of *Schooley v. Rew* the tax in question was laid directly on the right to take real estate by inheritance, a right which the United States had no power to control. The case could not have been decided, in any point of view, without holding a tax upon that right was not direct, and that, therefore, it could be levied without apportionment. It is manifest that the court could not

have overlooked the question, whether this was a direct tax on the land or not, because in the argument of counsel it was said, if there was any tax in the world that was a tax on real estate which was direct, that was the one. The court said it was not, and sustained the law. I repeat that the tax there was put directly upon the right to inherit, which Congress had no power to regulate or control. The case was, therefore, greatly stronger than that here presented, for Congress has a right to tax real estate directly with apportionment. That decision cannot be explained away by saying that the court overlooked the fact that Congress had no power to tax the devolution of real estate, and treated it as a tax on such devolution. Will it be said of the distinguished men who then adorned this bench, that although the argument was pressed upon them that this tax was levied directly on the real estate, they ignored the elementary principle that the control of the inheritance of realty is a State, and not a Federal, function? But even if the case proceeded upon the theory that the tax was on the devolution of the real estate, and was, therefore, not direct, is it not absolutely decisive of this controversy? If to put a burden of taxation on the right to take real estate by inheritance reaches reality only by indirection, how can it be said that a tax on the income, the result of all sources of revenue, including rentals, after deducting losses and expenses, which thus reaches the rentals indirectly, and the real estate indirectly through the rentals, is a direct tax on the real estate itself?

So, it is manifest in the *Springer* case that the same question was necessarily decided. It seems obvious that the court intended in that case to decide the whole question, including the right to tax rental from real estate without apportionment. It was elaborately and carefully argued there that as the law included the rentals of land in the income taxed, and such inclusion was unconstitutional, this, therefore, destroyed that part of the law which imposed the tax on the revenues of personal property. Will it be said, in view of the fact that in this very case four of the judges of this court think that the inclusion of the rentals from real estate in an income tax renders the whole law invalid, that the question of the inclusion of rentals was of no moment there, because the return there did not contain a mention of such rentals? Were the great judges who then composed this court so neglectful that they did not see the importance of a question which is now considered by some of its members so vital that the result, in their opinion, is to annul the whole law, more especially when that question was pressed upon the court in argument with all possible vigor and earnestness? But I think the opinion in the *Springer* case clearly shows that

the court did consider this question of importance, that it did intend to pass upon it, and that it deemed that it had decided all the questions affecting the validity of an income tax in passing upon the main issue, which included the others, as the greater includes the less.

I can discover no principle upon which these cases can be considered as any less conclusive of the right to include rentals of land in the concrete result, income, than they are as to the right to levy a general income tax. Certainly, the decisions which hold that an income tax as such is not direct, decide on principle that, to include the rentals of real estate in an income tax, does not make it direct. If embracing rentals in income makes a tax on income to that extent a direct tax on the land, then the same word, in the same sentence of the Constitution, has two wholly distinct constitutional meanings, and signifies one thing when applied to an income tax generally, and a different thing when applied to the portion of such a tax made up in part of rentals. That is to say, the word means one thing when applied to the greater, and another when applied to the lesser tax.

My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and is, therefore, fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the Federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great prin-

ciples, everything is lost and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the Federal Constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be, if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written Constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the State government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case and not to the other, because, in the one case, there is full power in the Federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the Federal government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power.

Mr. Justice Harlan authorizes me to say that he concurs in the views herein expressed.

# The Albany Law Journal.

ALBANY, MAY 18, 1895.

## Current Topics.

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THE legislative halls of the State of New York are again deserted, the statesmen have departed and the people may again breathe freely unless an extra session is called to annex Canada, to decide the monetary question or to take action on the "open and flagrant violation of the Monroe doctrine." We refrained from bidding the legislators an affectionate farewell last week because we feared lest they would be pleased with the valediction and decide to remain over another week in the hope of having us write a few more lines, not that the phrases would tickle their pride and please their vanity, but because legislative bodies are becoming more and more impressed with the necessity of quantity rather than quality, seeking the former with the rapacity of half-starved wolves. It is so much easier to tell what bills have not been passed or attempted to be and to point out a few rather unimportant matters which might be debated and considered at an extra session that we will only include in our review of the work a few of the measures to which the Governor has added his signature, and to call attention to the operation of the new Constitution on legislative work. When we really come to the obituary notice and ponder over the acts of commission and omission, it is sad to reflect, that either the statesmen should have passed all the legislation which the State needs for the next five years and then adjourned until 1901, or that the framers of our destinies as a body should have been paid on or about January 1, 1895, to take a southern or European trip, so as to acquire slothful habits and set an example of how services may be valuable which are never performed and which do not require an eagle eye and an electric search light to keep track of. The people must be represented when statutes are framed, but would be quite as well satisfied if they could have a

little less indirect "say" about the laws which are passed and could know a little more about what their statesman are doing and have accomplished for many years past. In short, the State as well as the country at large is satiated with too many statutes and sadly needs a period of tranquil rest to enable it to adjust its gourmandized condition to its actual necessities, to recover a healthful appetite, and to feel anxious for more rather than less law. The existing troubles which we have hinted as prevailing are seldom openly objected to, yet it is apparent that public opinion only needs a few choice words to express its pent-up feelings and that thereafter concerted action will find a ready means to prevent further complications of the same kind, while the yearly increase of unnecessary, improper and harmful legislation over what is required will work its own destruction. But to return to our obituary notice. What can we say? It might very properly be the complement to the mass of machine-made legislation and then would have the advantage of brevity and quality, but the funereal dirges of our mourning should recite the deeds of the late warriors of the capitol and may not be drowned in the joyful acclamations which may accompany the return of the astute statesmen to their applauding constituents. An echo of the doings of the late body may be heard in legislative investigations, but every decade produces only one Cæsar, one Napoleon and one Goff.

As a rule, the changes in the Constitution have not been of special advantage and the requirement that bills should be on the desks of members three days before final passage has been of little account in preventing the passage of measures for which it was framed and has only added to the usual confusion attending the close of the session. Even with the present number of senators and assemblymen there is too much unnecessary debate and wasting of valuable time which would be largely obviated if there were about half as many members of each house. Next year, with the increase provided for by the Constitution, the casual visitor to the capitol will have to be careful where he is stepping. The home rule for cities provision of the Constitution has been of little



benefit to the municipalities and has, to be frank, enabled many arrangements to be consummated between the State and municipal authorities while the Legislature has almost invariably passed over the mayor's disapproval any measure which had the tinge of partisanship or politics. The anti-pass amendment of the Constitution has not been pleasantly acquiesced in by the members who do not reside near the capitol, and a reasonable sum of money might very properly be expended each year by the State for the transportation of the legislators who are really inadequately paid for the time which they devote to the work of the session. This state of affairs has its bad effects by preventing men of ability from going to the Legislature, because they cannot afford to devote their time and energy to the duties at the capitol, leaving their professions and occupations and accepting a small salary for four months' work. It is about as difficult to find a person who asserts that the amendments to the Constitution have benefited legislation and made it better as to discover the people who voted for the change in the fundamental law.

Among the most important changes made by the Legislature, in the statutes, are:

Chapter 72, Laws 1895, amends section 378 of the Penal Code to read:

§ 378. *Taking usury.*—A person who, directly or indirectly, receives any interest, discount or consideration upon the loan or forbearance of money, goods or things in action, or upon the loan, use or sale of his personal credit in anywise, where there is taken for such loan, use or sale of personal credit security upon any household furniture, sewing machines, plate or silverware, in actual use, tools or implements of trade, wearing apparel or jewelry, or as security for the loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, and permits the pledger to retain the possession thereof, greater than six per centum per annum, is guilty of a misdemeanor.

Code amendments take effect September 1, 1895, unless otherwise specified. All other laws take effect immediately.

Chapter 698, Laws 1895 amends section 616, Code of Criminal Procedure, to read:

§ 616. *Fees of witnesses in behalf of the people.*—A witness in behalf of the people in a criminal action in a court of record is entitled to the same fees and mileage as a witness in a civil action in the same court, payable by the treasurer of the county upon the certificate of the clerk of the court, stating the number of days the witness actually attended and the number of miles traveled by him in order to attend. Such certificates shall only be issued by the clerk upon the production of the affidavit of the witness, stating that he attended as such either on subpoena or request of the district attorney, the number of miles necessarily traveled and the duration of attendance.

§ 617. *Fees of defendant's witnesses.*—In any such action, the court may also, in its discretion, by order, direct the county treasurer to pay a reasonable sum, to be specified in the order, to any witness attending in behalf of the defendant, not exceeding the amount payable to a witness in a civil action in the same court. Upon the production of the order or a certified copy thereof, the county treasurer must pay the witness the sum specified therein out of the county treasury.

Chapter 145, Laws 1895, amends section 12, title 1, chapter 4, part 2 of the Revised Statutes, thus:

§ 12. Every alteration which shall be made in the names of the general partners, in the nature of the business, or in the capital or shares thereof contributed, held or owned, or to be contributed, held or owned, by any of the special partners, and the death of any partner, whether general or special, shall be deemed a dissolution of the partnership, unless the articles of partnership shall specify that in such events the partnership shall be continued by the survivors, in which case it may be so continued with the assent of the heirs or legal representatives of the deceased partner. And every such partnership which shall be carried on after such alteration shall have been made, or such death shall have occurred, shall be deemed a general partnership in respect to all business transacted after such alteration or death, except in the case of a provision in the articles of partnership for the continuance of the business by the survivors as aforesaid, in which case the heirs or legal representatives of the deceased

partner may succeed to the partnership rights of such deceased partner, and to continue the business the same as if such partner had remained alive; provided, however, that any special partner may at any time increase the amount of capital stock contributed, held or owned by him, or one or more special partner or partners may be added to the partnership, upon actually paying in an additional amount of capital to be agreed upon by the general and special partners, and the alteration of the partnership by such an increase of the capital stock, or by such additional special partners, shall not make the partnership general, nor alter its name, nor work a dissolution, provided the general partners in the partnership name shall file an additional certificate with the clerk with whom the original certificate may have been filed, signed by each member of the partnership general or special, and duly acknowledged by one of them and certified in the manner required by law for the original certificate, stating the names and residences of such special partners, and the increase of capital or the amounts respectively contributed to the common stock by them together, with an affidavit of one or more of the general partners, stating that the sums specified in such additional certificate, to have been contributed by each of such special partners to the common stock, have been actually and in good faith paid in cash. No additional publication of the terms of the partnership nor of the alteration thereof shall be required in any of the cases provided for in this section. And any special partner, or the heirs or legal representatives of any such special partner, deceased, may sell his interest in the partnership without working a dissolution thereof, or rendering the partnership general, provided a notice of such sale be filed within ten days thereafter with the clerk with whom such original certificate of partnership may have been filed, and the purchaser of such interest may thereupon become a special partner, with the same rights as an original special partner.

Chapter 171, Laws 1895, amends sections 13 and 14 of title 3, chapter 1, article 2, viz.:

§ 13. If lands be devised to a woman or inherited by her from her husband, or a pecuniary or other provision be made for her by will in lieu of her dower, she shall make her elec-

tion whether she will take the lands so devised or inherited or the provision so made, or whether she will be endowed of the lands of her husband.

§ 14. When a woman shall be entitled to an election under either of the two last sections, she shall be deemed to have elected to take such jointure, inheritance, devise or pecuniary provision, unless within one year after the death of her husband, she shall enter on the land to be assigned to her for her dower or commence proceedings for the recovery or assignment thereof.

Section 1 of chapter 2, part 2 of the Revised Statutes, is amended as follows, also by chapter 171, Laws 1895:

§ 1. After this chapter shall take effect the real estate of every person who shall die without devising the same shall descend in manner following:

1. To his lineal descendants and widow.
2. To his father.
3. To his mother; and
4. To his collateral relatives.

Subject in all cases to the rules and regulations hereinafter prescribed.

The following section is added to chapter 2, part 2 of the Revised Statutes by chapter 171, Laws 1895:

§ 30. Where the intestate leaves a widow she shall, in all cases, inherit as a lineal descendant; if he leaves no lineal descendant living, she shall inherit the whole; if he leaves lineal descendants living, all of equal degrees of consanguinity, she shall inherit a like share as each of such descendants; if he leaves descendants entitled to share, of unequal degrees of consanguinity, she shall inherit a like share as the descendant living of nearest degree of consanguinity to the intestate.

In pursuance to chapter 548, Laws 1895, Governor Morton has appointed as a commission to propose legislation to govern cities of the second class, Hon. Robert Earl of Herkimer, ex-justice of the Court of Appeals; James C. Cutler, Esq., of Rochester; Alden Chester, Esq., of Albany; Michael E. Driscoll, Esq., of Syracuse, and David M. Greene, Esq., of Troy. The commission is to prepare and submit, on February 1, 1895, such proposed general city laws relating to the property, affairs or govern-

ment of the cities of the second class, and proposed general laws as may appear proper and necessary for Albany, Troy, Rochester and Syracuse, which compose the above class. This law and the appointment of the commission is carrying out the idea contained in Article XII of the present Constitution, and with such a number of able men to formulate laws applicable to these cities generally, the special legislation for cities, which has become so odious and disreputable, should be entirely done away with. The unfortunate law which required the retirement of Judge Earl proved most expensive for the State as well as the bar, as it was one of the fatal mistakes of the recent constitutional convention that the judiciary article was not amended to allow judges who retired because of having reached the age limit to be assigned by the Governor as additional members of the court of last resort. Judge Earl has not practiced since he left the bench, on January first, and has only given opinions in few cases. He will, as a close student of municipal government, and from his varied experience as a lawyer and a judge, be a great addition to the commission, and will be enabled to serve the State in a matter which it is greatly hoped will preserve cities from the ruthless onslaughts of hostile legislatures and avaricious politicians.

It is a matter of deep regret to us that the so-called New York City Police Magistrates' bill has become a law, not because it legislates out of office some individuals of a certain political belief, but for the reason that it certainly violates the spirit if not the letter of the Constitution. The bill in effect provides that after midnight, June 30, 1895, the office of police justice in the city of New York is abolished, and all power, authority, duties and jurisdiction then vested in the police justices and in their courts shall cease and be vested in nine city magistrates. The practical effect of this law is to legislate the present justices out of office by abolishing their offices and jurisdiction and conferring it on other individuals who for the purpose of keeping the act constitutional are called city magistrates. Such a flagrant violation of the fundamental law should receive the outspoken disapproval of honest minded citizens who refuse to correct any alleged wrong

by the violation of the Constitution and who object to political grabs for office in this high-handed manner. The police justices were elected to office and held their places as gifts from the people; they were in many cases, men who served the city and against whom no complaint had been lodged; they are turned out of their judgeships and a system of appointing their successors under different names is instituted, which has been refused as a proposition by the people no later than 1873 when it was settled, we thought, once for all time, that the voters preferred to elect their judicial officers from the lowest to the highest and did not intend that such public servants should be appointed. Then these same people who last fall adopted the amendment referred to which prevents the removal of any judicial officer during his term of office, give their support to a measure which is beyond doubt a violation of the spirit of the Constitution. When reform resumes such a guise and seeks any end by disgraceful means, then it is merely the shibboleth of hypocrisy, fraud and deceit.

An article in the New York *Sun* of May 16, from the pen of ex-Gov. Alonzo B. Cornell on the duty of jurors, states some forceful facts which exist in practice and which are very seldom regarded and considered by citizens who perform their obligations to the public as the arbiters of the rights of their fellows. The article is:

"The United States Constitution provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed.' The New York State Constitution also provides that 'the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.'

"These sacred guarantees of our highest organic laws against the unjust tyranny of selfish and unscrupulous public officials over weak and ignorant unfortunates, who have been apprehended and charged with crime or misdemeanor should be faithfully maintained. The guilty should be punished and the inno-

cent protected, but, above all, the trial by jury should be justly and honorably conducted, and this ancient right of liberty and justice ought not to be rendered a byword and reproach—a burlesque, even—in the eyes of the people.

“This community is just now shocked by the brutal treatment of many men called to serve as jurors in a case of peculiar interest. Were it only in this case that such an exhibition has occurred it might perhaps pass without serious comment, but unfortunately it is only a sample of what is of almost weekly recurrence. The shameful treatment by public officials of those drawn for jury service has become a gross and degrading scandal. No wonder that decent, self-respecting men seek every possible excuse to avoid jury duty. Besides the loss of time, they are liable to be insulted and degraded, or at least placed under suspicion, and their lives and families rendered both uncomfortable and unhappy.

“Every juror takes a solemn oath to render a just and honest verdict. Each juror has the same right to his own opinion as every other and all of the rest of his colleagues. If he cannot, with full and cheerful conscience, agree with the others, it is his sacred and imperative duty to refuse to agree. No judge has a right to command a minority to agree with the majority. When he does so he violates his duty and should be held strictly responsible.

“Only a few years ago a foul murder was committed in this State, and the identity of the guilty murderer was clearly established. A serious question arose whether or not the terrible deed was premeditated, and was warmly contested. The jury, after very prolonged delay, finally rendered a verdict of guilty in the first degree, and the prisoner was sentenced to be hung. A motion for a new trial was denied and an appeal to the Governor for clemency was refused, and the prisoner was again sentenced to be hanged.

“Subsequently another appeal for executive clemency revealed the fact that the jury had for a long time stood ten for conviction and two for acquittal; that after a tedious and acrimonious contest they finally compromised their differences by an agreement to convict, with a mutual pledge that they would, after

conviction and sentence, unite in an appeal for commutation to life imprisonment. The Governor was therefore compelled to grant commutation, and leave a red-handed murderer under life sentence and subject to the possibility of pardon by a future Governor.

“This incident forcibly illustrated the danger and wrong of a cowardly surrender of judgment by individual jurors. So long as we require a unanimous verdict we must abide by the risk of disagreement. Until the laws are changed so as to provide for a majority verdict, magistrates have no right to force and frighten jurors to surrender their independent judgments.

“In some of the most enlightened European countries juries are permitted to remain out only a limited time, and if they fail to agree within the time prescribed by law they must be discharged. Has the day not already come when our Legislature should consider some radical revision of our greatly abused jury system?”

The sporting proclivities of the English members of the bar appear to be much greater than the sedate American lawyer, as appears from the following article, taken from the London *Law Times* on the “Bar Point-to-Point Race:”

“An ideal day favored this inaugural meeting, which was held over an easy line of country near the Combe and Malden station of the London and South-western Railway. Gathered about the rails which marked the finish of the race might have been seen the prime minister, the lord chancellor, Lord Justice Lopes, the lord chief justice and Colonel Howard Vincent, M. P. Sir Frank Lockwood, solicitor-general, and Mr. Justice Grantham were on horseback (the latter officiating as judge), whilst a goodly sprinkling of ladies—including the Misses Grantham, Mrs. Darling, Mrs. and the Misses Galliat, and Miss O’Brien, daughter of the chief justice of Ireland—lent color and animation to the scene. On account of the lack of room at one or two of the fences, the wise course was taken of dividing the competitors into two classes, and starting all those carrying under twelve stone in the first race, and those exceeding that weight in the second. In the light-weight event, Lady Hilda, a chestnut

thoroughbred, made strong running until Mr. Cotton unfortunately mistook the course, and had to retrace his steps. This lost him a lot of ground, but, thanks to the comparatively slow rate at which the race was run, he made up so much of the 'lee way' that Mr. Gee, on Defiance, only just managed to beat him at the finish, Mr. Gilliat being third. Mr. Darling's gray mare refused early in the race, but was got over, and went the course.

"In the heavy-weight contest, the first to show with any decided lead was Mr. Terrell, who made play on Gaylad with a ten-lengths' lead to the water, which his horse at first refused. Crossing the plough the lot closed up, and it looked 'anybody's race' for a few moments. Over the fence into the litter-covered road Mr. Smith-Bosanquet (who, by the way, was the only man in 'pink,' and who had ridden with great judgment throughout) came rather fast, his horse slipping up as she landed, and most unhappily breaking her back. Mr. Croxall and Mr. Higgins, closely following him, 'cannoned,' and Cymbeline, the mount of the latter gentleman, was also killed. All three riders escaped with a shaking, as did Lord Justice Lopes, who was standing so close to the fence that Mr. Terrell's horse ran on to him. From here Corunna was never afterward headed, and won, after a really good display of horsemanship on the part of both Mr. Godsal and Mr. Butcher, who rode Fingall. Messrs. Terrell and Cope made a dead heat of it for the barren honor of third place. It must be the earnest wish of all good sportsmen that next year we may have an equally good race and an equally good day, minus the much to be regretted accidents which, to a great extent, marred the success of the first Bar Point-to-Point race."

The question in relation to the appearance of Francis Welman, Esq., assistant district attorney for the city of New York, at the trial of the Hyams brothers, in Toronto, is one which has aroused considerable interest in legal circles, and the United States officers, including members of the cabinet, have been using every effort to prevail upon the authorities to allow Mr. Welman to appear for the prisoners. Secretary of State Gresham has written to Attorney-General

Mowatt asking that the counsel be allowed to appear, while Attorney-General Olney has also endeavored to prevail upon the Canadian authorities to recognize this attorney of the State of New York. Willie Wells, employed by the Hyams brothers, was killed in their warehouse in January, 1894, the circumstances apparently warranting the belief that his skull had been crushed accidentally by a falling elevator weight. Harry P. Hyams was engaged to Wells's sister, who was named as Wells's heir, and who received \$34,000 insurance on his life. She learned subsequently, it is alleged, that the Hyams brothers had insured her life for a large amount. This was after her marriage to Harry Hyams, which occurred four months after the death of her brother. Then she and her brother-in-law, Aylsworth, demanded that the brother's death be investigated, and finally she charged the Hyams brothers with murdering him in order to secure the insurance money. The body was exhumed, and after a preliminary examination the brothers were held for trial at the Assizes. The prisoners have wealthy relatives in New Orleans, and neither money nor talent will be spared in the effort to establish their innocence.

The passage by the Senate and the Assembly of the concurrent resolution that the question should be submitted to the people of the State of New York as to whether women shall have the power to vote, and the recent admission of the second woman to practice in the courts of justice in this State, brings up very serious reflections to the lawyer as to what his vocation will be in the future, or by what process he may change himself so as to take the places which it is evident will be left vacant. It is certain that the men will gracefully give way, perhaps not so much from their own inclination for peace as from the growing and increasing feeling that they may as well acquiesce in the coming order of things. How will the present would-be judges of the Court of Appeals and of the Supreme Court appear in the future determining whether blue or red is the most becoming color? And will the old bewigged faces smile pleasantly on the members of the gentler sex wrangling in the courts of justice?

## INCOME TAX DECISION.

## POLLOCK v. FARMERS' LOAN AND TRUST COMPANY.

**A**FTER discussing the taxes recognized by the Constitution, and the manner in which they are required to be levied, the court discusses the cases applicable to the subject in the following:

Manifestly, as this court is clothed with the power and entrusted with the duty to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

Let us examine the cases referred to in the light of these observations.

In *Pacific Ins. Co. v. Soule*, 7 Wall. 433, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise," and came within the decision in *Hylton's case*. The arguments for the insurance company were elaborate and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, id. 611; and *Hamilton Company v. Massachusetts*, id. 632, in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property, and not upon the franchise or privilege. And see *Van Allen v. The Assessors*, 8 Wall. 573; *Home Ins. Co. v. New York*, 134 U. S. 594; *Pullman Co. v. Pennsylvania*, 141 id. 18. In *Veazie Bank v. Fenno*, 8 Wall. 583, a tax was laid on the circulation of State banks or national banks paying out the notes of individuals or State banks, and it was held that it might well be classed under the head of duties, and as falling within the same category as *Soule's case*, 8 Wall. 547. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading and passenger tickets issued by a railroad company. Referring to the discussions in the convention which framed the Constitution, Mr. Chief Justice Chase observed that what was said there "doubtless shows uncertainty as to the true meaning of the term, direct tax, but it indicates also an understanding that direct taxes are such as may be levied by capitation and upon land and appurtenances; or perhaps by valuation and assessment of personal property upon general lists. For

these were the subjects from which the States at that time usually raised their principal supplies." And in respect of the opinions in *Hylton's case*, the chief justice said: "It may further be taken as established upon the testimony of Paterson that the words direct taxes, as used in the Constitution, comprehend only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States."

In *National Bank v. United States*, 101 U. S. 1, involving the constitutionality of section 3413 of the Revised Statutes, enacting that "every national banking association, State bank or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them." *Veazie Bank v. Fenno* was cited with approval to the point that Congress, having undertaken to provide a currency for the whole country, might, to secure the benefit of it to the people, restrain by suitable enactments, the circulation as money of any notes not issued under its authority; and Mr. Chief Justice Waite, speaking for the court, said: "The tax thus laid is not on the obligation, but on its use in a particular way."

*Scholey v. Rew*, 23 Wall. 331, was the case of a succession tax which the court held to be "plainly an excise tax or duty" "upon the devolution of the estate or the right to become beneficially entitled to the same or the income thereof in possession or expectancy." It was like the succession tax of a State, held constitutional in *Mager v. Grima*, 8 How. 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. In *re Elwes*, 3 H. & N. 719; *Attorney-General v. Sefton*, 2 H. & C. 362; S. C. (H. L.), 8 H. & C. 1023; 11 H. L. Cas. 257.

In *Railroad Company v. Collector*, 100 U. S. 593, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be "essentially an excise on the business of the class of corporations mentioned in the statute." And Mr. Justice Miller, in delivering the opinion, said: "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

All these cases are distinguishable from that in hand, and this brings us to consider that of *Springer v. United States*, 102 U. S. 586, chiefly relied on and urged upon us as decisive.

That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the Constitution. Unless the tax were wholly invalid, the defence failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains and profits consisted in.

The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney-at-law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct."

Be this as it may, it is conceded in all these cases, from that of *Hylton* to that of *Springer*, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or incomes derived from land are not taxes on land.

We admit that it may not unreasonably be said that logically, if taxes on the rents, issues and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes. But we are considering the rule *stare decisis*, and we must decline to hold ourselves bound to extend the scope of decisions—none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only—so as to sustain a tax on the

income of realty on the ground of being an excise or duty.

As no capitation, or other direct, tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as a capitation tax) must be referred to, and it has always been considered that a tax upon real estate *eo nomine*, or upon its owners, in respect thereof, is a direct tax within the meaning of the Constitution. But is there any distinction between the real estate itself, or its owners, in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress, without apportionment, nevertheless, impose taxes upon such real estate under the guise of an annual tax upon its rents or income?

As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits thereof?" (Co. Lit. 45.) And that a devise of the rents and profits, or of the income of lands, passes the land itself both at law and in equity. 1 Jarm. on Wills (5th ed.), \*798, and cases cited.

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income, which is the incident of its ownership, belongs to the other? We are unable

to perceive any ground for the alleged distinction. An annual tax upon the annual value, or annual user of real estate, appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land, and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's case*, "land, independently of its produce, is of no value;" and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Weston v. Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in *Dobbins v. Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In *Almy v. California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co. v. Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook v. Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co. v. Pennsylvania*,

122 U. S. 326, and *Leloup v. Mobile*, 127 id. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and, therefore, unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. "The substance, and not the shadow, determines the validity of the exercise of the power." *Postal Telegraph Co. v. Adams*, 155 U. S. 688.

Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject-matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the States and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If by calling a tax indirect, when it is essentially direct, the rule of protection could be



frittered away, one of the great landmarks defining the boundary between the nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid.

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of \$60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by the nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the State government. It was long ago determined that the property and revenues of municipal corporations are not subject to Federal taxation. *Collector v. Day*, 11 Wall. 115; *United States v. Railroad Co.*, 17 id. 322, 332. In *Collector v. Day* it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins v. Commissioners*, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme, but the States, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government, as that government, within its sphere, is independent of the States."

This is quoted in *Van Brocklin v. Tennessee*, 117 U. S. 151, 178, and the opinion continues: "Applying the same principles, this court, in *United States v. Railroad Company*, 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or in-

terest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the national government from State taxation."

In *Mercantile Bank v. New York*, 121 U. S. 138, 162, this court said: "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

The question in *Bonaparte v. Tax Court*, 104 U. S. 592, was whether the registered public debt of one State, exempt from taxation by that State or actually taxed there, was taxable by another State when owned by a citizen of the latter, and it was held that there was no provision of the Constitution of the United States which prohibited such taxation. The States had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States on the one hand, nor the States on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each.

The law under consideration provides "that nothing herein contained shall apply to States, counties or municipalities." It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from State, county and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston v. Charleston*, 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. The ex-

tent of this power, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. \* \* \* The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

Upon each of the other questions argued at the bar, to wit, 1, Whether the void provisions as to rents and income from real estate invalidated the whole act? 2, Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3, Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—the justices who heard the argument are equally divided, and, therefore, no opinion is expressed.

*The result is that the decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree in favor of the complainant in respect only of the voluntary payment of the tax on the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it.*

### OUR DEGRADED SISTERS.

BY GIFFORD KNOX.

IT is a mistake to regard Mahomedan women as legally inferior to the women of Christian countries. It is to be regretted that the missionaries should represent in the blackest colors the degradation and miserable condition of Moslem women. The mistake appears, all too often, as one of purpose, as one foisted upon the prevailing ignorance of the truth.

So far from degrading women, Islam has elevated them, and maintained for them an elevation the highest that their sex can reasonably claim. It gives them far greater privileges than Christianity bestows, and in many Christian countries their position, until a comparatively recent time, was far inferior to that of Mahomedan women in every country, even Africa and Arabia.

I anticipate the incredulous "Impossible?" The

proofs are not lacking. By what gauge do we measure a woman's superiority? Consider the question, and it should be readily apparent that there are three very important laws affecting women in general—the laws of property, marriage and divorce.

First, then, the laws of property. According to the common law of Christian countries, a cruel husband or father has it in his power to deprive his wife and daughters of property by testamentary disposition. He can make his will as he pleases, and neither wife nor daughter can do aught to prevent the perpetration of the manifest injustice. The Mahomedan law, on the contrary, gives full relief. The wife, sisters and daughters are made "legal sharers," and until their claims are settled the male residuary heirs can get nothing.

Again, in Christian countries the wife has no separate condition in the eyes of the law. During coverture, the existence of the wife is actually merged into that of the husband, and in the eye of the law they are one. Hence, no contract can be made between a man and his wife, unless with the intervention of trustees. She is regarded as *sub potestate viri*, and he cannot grant to or covenant with her, inasmuch as to do so would be to suppose her separate existence. Moreover, the husband is entitled to the rents and profits of the estate of the wife, and, if he chooses, he may reduce her chattels into his possession. In some measure these laws have been amended of late, but for centuries this was the law of enlightened England. Compare it with the Mahomedan law. I quote the learned Moulevi Syed Ameer Ali, who states: "The contract of marriage gives the man no power over the woman's person beyond what the law defines, and none whatever upon her goods and property. She retains in his household all the rights which the law vests in her as a responsible member of society. She can be sued as a *femme sole*. She can receive property without the intervention of trustees. She has a distinct lien upon her husband's estate for her ante-nuptial settlement. Her rights as a mother do not depend for their recognition upon the idiosyncrasies of individual judges. She can enter into binding contracts with her husband, and proceed against him in law."

This is a law that has been in force in the Moslem world for more than twelve centuries, and will remain as long as Islam exists. Is not the law of our Christian countries debasing in comparison? Founded upon the teaching of Christ—"They are no more twain, but one flesh"—is not Christianity, therefore, responsible for the civil death of women in Christian countries? Husband and wife, being in law one, it follows that neither can maintain an

action for tort against the other, but the husband can at common law recover, in his own name, wages that accrue to his wife, or the profits of a business carried on by her. He can sue for her work and labor, and for goods sold or money lent by her. How many times a miserable husband has deserted his wife, and then demanded, under the strict authority of the law, the money which she had by hard labor acquired. The husband of your laundress can claim her wages at your hand. The father of your music teacher can sell her piano. The husband of the Hon. Mrs. Norton could require that the publishers of his wife's books should pay the profits to himself. Tom Loker and George Shelby, in antebellum days, could hire out their slaves as they pleased. Slavery is known by more names than one. But in the Mahomedan law, as Mr. Justice Ali says, "No coverture is recognized, and a wife's property remains hers in her individual right. She can alienate or devise it without his leave. Her earnings, acquired by her individual exertions, cannot be wasted by a prodigal husband." In fact, he has no more right to her wages or her property than an utter stranger.

A Mahomedan wife can sue any of her debtors without an intermediary. If necessary, she can sue her husband on contract. In this country and the countries of Western Europe the woman is helpless as compared to her Eastern sisters. Helpless? Yes, and such complete helplessness! As an illustrative case, there was a woman in England a few years ago who was deserted by her shiftless husband, and left to rear a family of little children. She met with a railway accident, and brought suit against the railway company. The latter at once obtained a nonsuit, on the ground that, as a married woman, she could not sue. Her attorneys sent to this country, and by dint of search found the husband, and induced him to join in the suit with the wife. The case was tried, and the company had to pay £1,000 damages. When it came to be paid, it was necessarily paid to the man, as damage had been done to "his property." He took it, and returned to America, leaving the crippled and paupered wife to go to the workhouse. This is one illustration of many. Just as in Rome, a slave could bring no individual action, he having no *persona* in the eyes of the law, so in this and other like cases the woman is only a *slave*. In Turkey, if a woman sustains an injury, she need not so much as consult her husband about bringing suit. If her husband assaults her, and she is injured in person, she can sue him. It is done time and again.

What about the laws of marriage in the East as compared to ours? Here is another plain and instructive contrast.

Mahomet was himself a married man and a father,

and his laws of marriage gave distinct rights to men and women. In his famous Arafat discourse, he said: "Ye men, ye have rights over your wives, and they have rights over you." He made marriage, therefore, a civil contract, and to this day its validity depends on *I' jah*, or proposal, on one side, and *Kabul*, or acceptance, on the other. As a contract of partnership it requires two witnesses, and is a simple and natural mode of formation of the nuptial tie. What is the civil character of the Christian contract of marriage in comparison? It is true, and "beautiful," that the man undertakes to "protect" and "cherish" his wife, but in the matter of liability he is not responsible for her debts, as is the Mahomedan husband. The latter is legally bound to maintain his wife and her domestic servants, and is held to her full maintenance. To quote the *Hidaya*: "The word of God appoints the wife subsistence and a maintenance." Furthermore, our laws are lame in inadequate provision for widows; but the Koran says that one year's maintenance must be the provision for every widow out of her husband's estate. This is in addition to dower, and every Mahomedan wife is dowered. Ameer Ali says: "In order to make a legal marriage, it is required that there must be an antenuptial consideration moving from the husband in favor of the wife, for her exclusive use and benefit." Fatawa-i-Kaza says: "Dower is so necessary to marriage that if it were not mentioned at the time or in the contract the law will presume it by virtue of the contract itself."

This dower the wife can demand at any time she likes, and until it is satisfied she has a distinct lien on the property of her husband. By such provision she can maintain herself in case of accident, desertion or separation. Need I contrast this with our laws and customs of dower?

What of the laws of divorce? We know, all too well, what it is in our Christian lands. The Church of Rome and many eminent authorities in the Church of England, the Greek Church and the dissenting bodies maintain that the bond of marriage is of such a special and sacred nature that if once constituted, only death can dissolve it. That is one extreme, and the lax laws of some of our American States supply the other. Between the two there are all sorts of middle-grounds. In England, until 1857, divorce was no part of the regular law of the country. Blackstone says: "The law is tender of dissolving marriage." Even adultery was not deemed sufficient cause for divorce by the English divines, and in almost all cases it was refused to women. In fact there are records of but four cases altogether, previous to 1857, in which a woman had obtained a decree, while a man might obtain divorce on charge of adultery without permitting her

to make defense. How much better is it now? The best lawyers admit that the laws of divorce are extremely imperfect. Davidson says of them that they are "unreasonable, ignoring facts, and refusing remedies." Let us ask, with shame, if they are any other than cruel and unjust? But look at the Mahomedan law. The Koran says that men and women should be agreed and reconciled if it is a possible thing, in every instance.

If, however, it is impossible, both equally may obtain separation. Both are entitled to representatives, and dissolution is allowed at the initiative of either party. Upon disagreement the woman can demand release and a settlement. Divorce proceeding from the woman is called *khula*, and that from the husband is *talak*. On proper application, any judge cancels the bond. But do not think that the Mahomedan law encourages divorce. Far from it. Ibrahim Halevi says: "No Mussulman can justify divorce, either in the eyes of religion or the law, for the prophet says, 'God's curse rests on him who capriciously repudiates his wife.'" But, nevertheless, the wife is entitled to the decree for adultery, desertion, cruelty, degradation and threats of bodily injury. During the period when the divorce is pending the husband must still maintain the wife, and after the issue of the decree she is under an obligation to wait a specified length of time before remarriage, namely, three months. Another important point is as to the provision for custody of children in cases of divorce or separation. In our country and others the mothers are often deprived of the children. A learned English judge is quoted as saying: "The law does not recognize the mother at all; it only sees the father and the child." Mahomed, however, laid down as his opinion the statement that "The claims of the mother to the custody of the child so absolutely outweigh those of the father, that he really ought not to come into the question at all." Alamgri says: "The mother is best entitled to the custody of her children." Other writers are equally emphatic in maintaining that it is the mother's natural right. They are unable to conceive that a father has any right at all to his children that can for a moment outweigh or even compete with that of the mother. The law is therefore very explicit, and the mother is given the custody of daughters until they arrive at puberty, and of sons until they are able to earn their own living. So completely is the law in favor of the women in this matter, that on the death of the mother the custody is given, not to the father, but to the female relatives of the mother. The order of right runs thus: First, mother, then grandmother, then sisters, then mother's sisters, and, finally, father's sister's. The preference is for women to men, and relations of mother to relations of father.

The Mahomedan law has also to do very decidedly with the treatment of parents by children. In Christian countries, although there exists a strong moral obligation on the part of children to support their parents, when poor or incapacitated, there is little, if any, legal obligation. The Mahomedan law is very explicit on this point. Alamgri has said: "Daughters as well as sons are liable for the maintenance of their poverty-stricken parents." Again: "If a mother is poor, and the son is able to work, he is bound to support her, even though he is in straitened circumstance." And again: "If a son is able to maintain but one parent or grandparent, the mother or grandmother has the preference," that is, over the father or grandfather. No law in the universe enjoins so much respect for mothers. Indeed, Mahomet once said, "Paradise is under the feet of the mother."

In this connection let me observe that it makes no difference if the Moslem has become a Christian. It is still his to keep legal obligations. In Constantinople, Cairo, Smyrna and other Eastern cities one may see on almost any Sunday young Mahomedans carrying on their backs their mothers and grandmothers to and from the Christian chapels. Christian countries can show no nobler examples of warm devotion. It is the same with man and wife. The Christian wife of a Moslem is provided with a conveyance to take her to and from her place of worship; and if there is a matter of contributions, he sees to it that she has the money. There is little of friction in the Mahomedan families. Though the man is liable for maintaining his wife, he is rarely *forced* to do it, but agrees to do it of good will. Though divorce is so readily had, it is a remarkable fact, that among India's sixty million Mahomedans divorce is rarely heard of. The very liberty acts as a natural check, by making man and wife respect each other's rights and privileges. Edmund Burke, when asked an antidote for the abuse of liberty in the House of Commons, said, "Give them more liberty."

I am not inclined to regard the women of Islam as legally inferior to their sisters of Christian countries. If there is any "degradation," it is not of the kind that the law correct, and makes, and modifies. The Moslem wife regards her husband as her lord, and serves him with devotion. If, however, he is in any wise a transgressor of rights, she has it in her power and province to summarily correct him.

WESTFIELD, N. J.

LIBEL—PUBLICATION.—Giving a letter containing matter defamatory of another to a clerk to copy, which he does, is a publication. (*State v. McIntire* [No. Car.], 20 S. E. Rep. 721.)

## OUR GREATEST LAWYER.

WHO is the greatest lawyer that I have known? If you will kindly tell me what you mean by "lawyer," I may answer you more readily and easily than without such an explanation. I could name several men who answer this superlative description. But the qualities that make up a great lawyer are so diverse that the question might be objected to as vague and indefinite.

Charles O'Connor was the greatest lawyer that my generation has known, in one sense of the word. He was thoroughly imbued and saturated with the law, its principles and its philosophy. He exuded law learning, as some men are said to radiate goodness. If the law had been an inflammable substance, he might have been expected to perish in a blaze of spontaneous combustion, the material being furnished from the essence of numberless tomes which he has perused and digested.

The reports, text-books, treatises, briefs, essays on the subject of the law which he had assimilated, would in their original form have heated the baths of some modern cities, as long as the baths of Alexandria were kept in operation by the volumes that a ruthless barbarian conqueror turned into fuel.

To build up a clean-cut, technical case was as much an object of love to him as the erection of a temple would have been to an architect of old Athens. Logic was his constant companion and friend. Rhetoric he looked on with suspicion, and if at times he did allow himself to be drawn away from the mathematics of his profession, it was only a short-lived truancy. He did show in these brief moments of infidelity to his stern-browed mistress that he might enter the lists with the best sophists of them all and gather laurels with them on the slopes of Hymettus or Parnassus. But he soon tired of the flowers that he picked, and flung them aside, as though weaving garlands were beneath his dignity.

To put it in plainer prose, he sometimes gave me the impression that he was reigning in his fancy, lest it carry him away. It was a disappointment, and I longed to see him lose his self-control and give a free field to his imagination, and a touch of the spur to the poetical side of his genius. But he never yielded wholly to the temptation. He rode back in season to the beaten track, and grappled with court and jury on the prosaic ground of hard, practical sense and prosaic demonstration.

As a lawyer, and simply a lawyer, he was great. If he had allowed himself to be an orator besides, he probably could have done so. Imagine Demosthenes with no Philip to denounce, and making it his business to elucidate the law of trusts, and to make contingent remainders intelligible, you have my idea of Charles O'Connor. I may add that some

of his philippics are still extant, and you feel sorry for the modern Philip when you read them.

If, however, you mean by the greatest lawyer the most persuasive, the most delightful, charming, fascinating and irresistible of men, then you must take Ogden Hoffman. He may not have been at besieging strongholds. He may not have understood counterscraps, circumvallations, redoubts and the like. I really believe he could not have captured Alesia 2,000 years ago, as Caesar did, but when it came to storming the jury-box, to sweeping away intervening obstacles in spite of all the rules of war—except those that rested on honorable carriage—Ogden Hoffman was the chief of them all.

His onslaught was simply irresistible. He was in the jury-box with the jurors, telling them what to do, and they obeying him, before the case was out of the judge's hands. He charmed men from their determination, as Apollo with his lyre drew the oaks by the roots from their mother soil. He hypnotized and wrought a spell about them. His voice was like a silver flute in the hands of an enchanter. And it was all done so modestly and gently and courteously, that really it was not fair to the other side.

Fortunately for the administration of justice, nature, in giving Hoffman such possibilities of wrongdoing, had limited his capacity for mischief by a double and very effective infiction. He was lazy and he was a gentleman. He would never willingly harm a human being, even if it could be accomplished without labor, because he was a gentleman. And as for doing a wrong or anything else to any one where labor was involved, he scorned such baseness. He was incapable of thus flying in the face of the good fairy who had lovingly endowed him at his birth with a splendid fund of unconquerable laziness.

James T. Brady completes the trio of great lawyers whom I have known. Perhaps he was the most richly endowed of them all. He was a man of intense personality. His massive head, with the deep-set eyes, his charming smile and winning ways, his exquisite command of language, his wit, his fancy, his eloquence, his genius—were his, and the union his alone. On the whole, take him altogether, he was second to none. Had he chosen he might have been first.

But there was a *cui bono* note in his efforts before court and jury that handicapped success. Except in great cases, especially criminal cases, he seldom called out his reserves. He fought his battle with a light brigade, as it were, and made use of a brilliantly uniformed cavalry when less picturesque allies might be necessary. But you know that he had the forces behind him, and when he did take upon himself the responsibility of a human life he was inimitable, and never failed to do his best, and

more than his best no man could do. In a word, Brady was one of the few lawyers of those I have known who deserved to be called a genius

The impression that he left on the mind of his juniors was that he could do anything — if he only cared to try. He might have commanded an army or written an epic poem if he had settled down doggedly to work. But such men do not set doggedly to work. Nature's partiality to her chosen children does not often go so far as to hatch genius and industry from the same egg.

I do not mention the names of any of my living brethren. Until their work is done who call tell what material will appropriately serve to preserve their memory? Shall it be enduring bronze or brittle clay? You may safely call no man happy, nor great, nor good, nor wise until he has turned his back forever on friends and foes alike.

F. R. COUDERT.

—*The World.*

#### THE MYSTERY OF AN HEIR.

**P**ERHAPS the most curious case that has come under my observation in a long while was this: I returned from lunch one day, rather more than a year ago, and found in my office a woman who had evidently been crying and was in distress. She explained to me that she was a saleswoman, and married; that her husband was also a salesman, but was temporarily out of work, and that they were very poor, and had a desperate time making both ends meet.

About two months before she had given birth to a boy, the second in the family, and on account of their poverty she determined to give the child away, and one day, seeing an ad. in the paper, "Wanted, for adoption, a fine blond boy," she had taken the child, without the knowledge of her husband, to the address given. Upon the solicitations of the woman in charge, she had left the child over night. The next day she returned and the boy was gone.

The woman explained that a lady who had inserted the advertisement had called and seen the child, had been very much taken with it, and had promptly taken him away. Meanwhile the mother's heart had rebelled, and she did not wish to give the boy up. The woman in charge of the place where the boy was left would give her no satisfaction, and she returned home and confessed the whole transaction to her husband. He, it seemed, was highly indignant, and declared that unless she got the boy back he would not live with her any longer. It was then that the woman, at the suggestion of the Gerry society, came to see me.

I took the case, and sent for the woman who kept the place from whence the baby had been taken.

She was, as I thought, a midwife, but she declared she did not know anything of the woman who had taken the child; that the woman had simply come there, seen the boy, and had taken him away. Finally, however, the woman gave me an address, which I was quite sure was fictitious. However, I let her go. I waited long enough to have received a reply from the address I had, and then I sent for the woman a second time. When she came into the office I told her to sit down, and then I explained to her that I knew all about her (which I didn't); that I knew her whole record; that this was a case of kidnapping, and that if she didn't help me find the baby I would send her to State prison. I gave her twenty-four hours to think over the matter, and the next day a man came to my office and told me that all the woman knew of the case was simply that a lady, giving her name as Brown, from a big north-western city, had come to her place and taken the child. Well, I went up to Trow's Directory Company and looked through a directory of the city given. I selected at random an address answering the name and wrote a letter, not more than half expecting a reply. The letter came, however, by return mail. It said briefly: "Your letter received. We know of this child, and your letter contains surprising revelations. I will follow this note to New York to-morrow."

The next day after receiving the letter I received a visit from the writer of the letter. He proved to be a wealthy merchant. He explained that his son had met a woman, and had become rather intimate with her, and that later, upon the woman's representations that she was about to become a mother he had married her. The family, of course, were grieved over the affair, for they stood very high socially, and the young man's new wife was unknown.

Well, a few months after the marriage, and under the pretext of avoiding a scandal, the wife had come east alone. She remained here about two months, and then returned to her home with a fine blond boy. The latter proved an instant peacemaker, and in a very short time the whole family were deeply in love with the youngster, particularly the supposed grandfather. Then it was that my letter fell in their midst like a bombshell.

The old gentleman explained that they had become very much attached to the boy, and, despite everything, wished to keep him. The mother, however, would not consent, and the old gentleman returned west, but meanwhile the adopted mother had got wind of things, and had promptly decamped with the child. The old gentleman came back deeply grieved.

We determined to find the woman, but all the clue we had was that she had a friend in Philadel-

phia. We looked up this thread, found that the woman was there, and finally, through a Philadelphia Gerry society, at last recovered the child. Then the old merchant made a settlement with the boy's real mother, and took the youngster back with him to his home. What became of the merchant's daughter-in-law, who had tried to pass the boy off as her own, I never knew. She disappeared, and was never heard of afterward.

But the boy has been taken into the merchant's home, and is the pride of the family. He has been legally adopted, and is the prospective heir of the old man's money.

No one in the city where they lived is the wiser for the story, and no one knows that this boy was the son of two New York working people, too poor to bring him up.

Strange a case as this is, there are countless others, just as strange, taking place in New York every day. And yet, if one were to take this story and put it into a novel, readers and critics alike would say, "How improbable!"

WM. TRAVERS JEROME.

—*The World.*

### Abstracts of Recent Decisions.

**ATTACHMENTS—ELEMENTS OF DAMAGE.**—Attorney's fees are not a proper element of damages for wrongfully suing out attachment or injunction writs and obtaining impounding orders, even where they are capable of being apportioned so as to show the amount incurred for the attachment and injunctions, as separate and distinct from the other services necessary in the case. (*Stringfield v. Hirsch* [Tenn.], 29 S. W. Rep. 609.)

**CARRIERS OF PASSENGERS—STREET RAILWAY—INJURY.**—The rear car of an electric railway train was just passing over the further crosswalk at a street crossing, at which the city ordinance required it to stop for passengers, and was running three miles an hour when plaintiff came on the street. Plaintiff, intending to board the train, ran towards the motor car, but was not seen by the conductor until within ten feet of the car. There was no slacking of speed or other act showing any intention on the part of the conductor or motorman to accept him as a passenger. *Held*, that by his attempt to board the train he did not become a passenger so as to require of the railway company the highest degree of care to avoid injuring him. (*Schepers v. Union Depot R. Co.* [Mo.], 29 S. W. Rep. 712.)

**CRIMINAL LAW — CHARGE — CONFESSION.**—In a criminal trial it was proper to refuse to charge that evidence of a verbal confession by defendant should

be received with great caution, as it was for the jury to determine the effect of such evidence. (*Bobo v. State* [Miss.], 16 South. Rep. 755.)

**CRIMINAL PRACTICE—FEDERAL OFFENSE.**—An indictment under section 5209, Rev. St. U. S., for embezzlement, which charges that the defendant did have and receive "certain of the moneys and funds of said national banking association of the amount and value of \$7,123.93," is defective in not stating with sufficient definiteness what the property was which defendant is accused of misappropriating "funds" being a word including several species of property. (*United States v. Greve* [U. S. Dist. Ct., Mo.], 65 Fed. Rep. 488.)

**DESCENT AND DISTRIBUTION—SLAVE MARRIAGES.**—Where slave marriages have terminated before, or have never been recognized by the parties thereto after they became free persons, the offspring thereof have no inheritable blood. They cannot inherit property acquired by their ancestors after emancipation. (*Williams v. Kimball* [Fla.], 16 South. Rep. 783.)

**ESTOPPEL BY DEED—EVIDENCE.**—A want of consideration cannot be shown, against a recitation in the deed, to establish a resulting trust. (*Weiss v. Heitkamp* [Mo.], 29 S. W. Rep. 709.)

**FRAUDS, STATUTE OF—PROMISE TO PAY RENT.**—The fact that a person rents a house for the use of another does not make his promise to pay the rent an agreement to pay the debt of another. (*Shafer v. Cherry* [Colo.], 39 Pac. Rep. 345.)

**INSURANCE—CONDITION AGAINST MORTGAGE INCUMBRANCES.**—In record of a chattel mortgage does not charge an insurer with notice thereof, so as to render a failure to cancel a policy on the property a waiver of a condition against mortgage incumbrances. (*Milwaukee Mechanic's Ins. Co. v. Niewedde* [Ind.], 39 N. E. Rep. 757.)

**MECHANIC'S LIEN—CONSTRUCTION OF RAILROAD.**—A complaint in an action to enforce a mechanic's lien against a railroad company for labor in the construction of the roadbed, which shows that the company was engaged in the construction of a railroad between two points in P. county, that the company contracted with its co-defendant for the construction of the road, that the contractors sublet a portion of the work to plaintiff, that plaintiff performed the work under the contract in the construction of the road until stopped by the contractor, and that the work was of a certain value, is not demurrable as failing to show that the work was performed in P. county, and that it was work for which a lien can be enforced, and that the work was such as was provided for by the contract. (*Dean v. Reynolds* [Ind.], 39 N. E. Rep. 763.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

AT last the nefarious Income Tax Act has been declared unconstitutional, and no more fitting summary of the position of the court could be written than these words of Chief Justice Fuller:

"We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decisions. Differences have often occurred in this court—differences exist now—but there has never been a time in its history when there has been a difference of opinion, as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare."

Well, indeed, may the people place their confidence in the highest tribunal of the United States, and feel that there exists a court of spotless character and notable ability to stand between them and the enactment of vicious statutes aimed at one class of individuals. No longer can a citizen declare that a principle such as *stare decisis* will prevent the Supreme Court from construing a statute in the light of the intent of the framers of the law, and it is most pleasing to note that the tribunal recognizes advance and development of law in accordance with the changes of the times and the necessities of the people who live under the operation of its provisions.

Judge Harlan's dissenting opinion contained

two arguments with which we cannot agree. He said:

"While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth. Believing, as I do, that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and approaches the proportions of a national calamity, I feel it a duty to enter my protest against it."

In the first place, is there any question involved in the construction of the law by the court which presents what action Congress may take to provide revenue, and will not the people in time of trouble or war consent gladly to any taxation of their property to protect the government? The history of the United States is a sufficient reply. And in answer to the second sentence, would not the socialistic and inquisitorial features of the Income Tax Act have raised up in the midst of a country where equality and liberty are its crowning blessing, the first recognition by the United States of classes of its citizens and an acquiescence in the theories of the people who compose the scum of Europe?

Another dissenting opinion says:

"This decision may well excite the gravest apprehension. It strikes at the very foundation of national authority, in that it denies to the general government a power which is, or may at some time, in a great emergency, such as that of war, become vital to the existence and preservation of the Union."

We fail to see how the government is prevented from taxing its citizens except by unconstitutional methods instigated by small politicians anxious to cater to the lowest elements of their constituents. History will show that the Supreme Court refused to sanction a statute which would have given birth to principles foreign to the Constitution, and declared in thoughtful phrases that each individual has the same right to contribute to the expenses of the protecting government in proportion to his ability and worldly possessions.



On Monday, the 20th day of May, 1895, the Court of Appeals granted an order directing the warden of Sing Sing prison to produce before the bar of the Court of Appeals the defendant, Robert W. Buchanan, who was at the March term of the General Sessions of the city of New York, in 1893, convicted of murder in the first degree. This case is one which has attracted more than the usual amount of comment, owing to the many attempts which have been made by the attorneys for the defendant and by other individuals to prevent the execution of the sentence. We have stated that the defendant was convicted in March, 1893, and was to be executed on the second day of the following October. The case was appealed to the Court of Appeals and on the 26th day of February, 1895, the court of last resort handed down a decision affirming the decision of the trial term and the defendant was subsequently sentenced to be executed during the week beginning April 22, 1895. On the 16th day of April, 1895, the petition of the defendant for a writ of error and *supersedeas* was heard by the Supreme Court of the United States at Washington and was dismissed on the following day. On the dismissal of the petition the chief justice handed down a decision which was in part as follows, so far as material to the present application of the defendant: "Application is made for a writ of error to this court upon the ground that the petitioner's trial, conviction and sentence are in contravention of the Constitution of the United States in that 'petitioner is sought to be deprived of life without due process of law,' and in 'that he was not tried by an impartial jury of the State and district wherein the crime was committed.' In the sixty-sixth specification of his motion for a new trial defendant alleged that 'the verdict of the jury is not such a verdict as is contemplated by the Constitution of the United States or the Constitution of the State of New York. The only verdict recognized thereunder is that of a jury of twelve men of sound mind and memory, which this verdict is not.' This seems to have been the only claim of a Federal question made in the State courts, and falls far short of that specific assertion of a right, privilege or immunity under the Constitution, at the proper time and in the proper way, upon the denial of

which this court is entitled to re-examine the judgment of a State court on writ of error" (ff. 51-53).

And after quoting from the opinion rendered by this court upon the affirmance of the judgment, the statement regarding the question here considered as to the physical and mental condition of the juror Paradise, the chief justice concluded: "It will be seen from this statement, which sufficiently summarizes the circumstances disclosed by the record, that the question in relation to the physical and mental condition of the juror and his competency to return a verdict was a question of fact, and this court, upon a writ of error to the highest court of a State in an action at law, cannot re-review its judgment upon such a question. (*Dower v. Richards*, 151 U. S. 658, 664, and cases cited.) We are unable, therefore, to discover any ground justifying the granting of the writ applied for (*Andrews v. Swartz*, *ante*, —; *Lambert v. Barrett*, *ante* —; *In re Kemmler*, 136 U. S. 436; *Caldwell v. Texas*, 137 id. 692; *McNulty v. California*, 149 id. 645; *McKane v. Durston*, 153 id. 684, 687)."

On the 24th day of April the governor granted the defendant a respite until the 1st day of May, and on the 29th day of April a petition was presented to Judge Brown, of the United States District Court for the Southern District of New York, for a writ of *habeas corpus*, which Judge Brown refused, claiming that there was no legal ground for further consideration for a writ of *habeas corpus*. On the 1st day of May the governor granted the defendant a further respite until May 8th, and as the defendant had not been executed, and application is now made to the Court of Appeals under section 503 of the Code of Criminal Procedure, for an order directed to the warden of Sing Sing prison to produce the defendant before the Court. The application to Judge Brown was merely dismissed and no order entered thereon, but the defendant's counsel filed notice of appeal, so that the effect of this notice of appeal must be decided by the Court of Appeals before it can sentence the defendant. The authorities seem quite clear that there is no appeal from the action of Judge Brown in dismissing the application for a writ of *habeas corpus*. It will be the first time that a prisoner has ever been sentenced by the Court

of Appeals, if they follow this procedure on next Monday, rather than order the prisoner to be taken before a trial term for resentence. We believe that there is always commendable zeal on the part of the defendant's counsel to secure to him the benefit of all laws for the protection of his life and liberty; but we have no sympathy for dilatory motions and unnecessary proceedings which simply tend to make a mockery of the law and justice. It will be a solemn scene when the unfortunate culprit appears before the bar of the highest appellate court of the State, who will probably, for the first time in the history of this commonwealth, pronounce sentence.

At the annual dinner of the Hardwicke Society, on the 25th day of April, at the Criterion Restaurant, Piccadilly, a notable gathering of legal talent and judges were present. The lord chief justice of England, Lord Morris, Mr. Justice Matthews, and other distinguished legal lights, gathered around the festive board. It will be especially interesting to Americans to learn that Thomas F. Bayard, the American ambassador, replied to the toast of "The American Bar." As reported in the Law Times, the speech of Mr. Bayard is as follows:

One word of this toast quite places me at my ease—it is the word kindred; and when my honored friend, Sir Wm. Grantham, asks me for what society I speak, and what are the kindred societies to such as this in my home across the Atlantic, I will answer him, the American Bar. We are loyal kindred in a society and in the purposes and sentiments of a society that ranges itself under the name of Hardwicke. When Hardwicke was the predecessor in office of the distinguished man who is your guest to-night; when Hardwicke was the chief justice of England; when Hardwicke was the chancellor (for he held both of those offices for several months together); when he was the leading legal mind of this kingdom, he was the leading legal mind of the country which I have the honor to represent. When Hardwicke was lord chief justice, when Hardwicke was lord high chancellor, he was the lord chancellor of those who were my ancestors and my countrymen as much as he was yours. I can well speak, not in the name of kindred, but in the sympathy and in the reality of intellectual and

moral kinship with the great man whose name dignifies the society that meets here to-night. There is no title, my kindred and friends; there is no title better for England, and better for the world, than that given by one of your lords of language—Tennyson—when he spoke of this as an old and settled government. No blessing short of that which Divinity can give is greater to a people than a settled government. Look over the world to-day; see the troubles and the conflicts, the obscurity and difficulty of arranging human affairs, of subduing human ambitions, of checking human aggressions, and then you will realize what Tennyson meant when he said that this is a land of settled government. And the government that was so settled, was settled by the application of the principles of government. It is the philosophy of government, under the forms of law, that has made England a State happy, great and powerful, and has linked the name of Hardwicke with that of Russell, with no break in the application of the principles that give you a settled government. Gentlemen, to follow the words of this master, not only the settled government, but the *sequitur*, this is

A land of just and proud renown,  
Where freedom slowly broadens down  
From precedent to precedent.

The precedent of Hardwicke's mind, his judgments as a chief justice, his decrees as a chancellor, were the law of my country, and are to-day the law of my country. They were the law of England, and they are the law of England. The law has not changed by substituting Russell for Hardwicke, but Russell follows honorably and worthily where Hardwicke walked, and in the paths were Hardwicke trod. There is the strength of the adherence to principle, of the adherence to ideas of justice, which this society was built to maintain, and which makes it so easy for me, one of your distant kinsmen from a distant country, to feel in such perfect and close alliance as I do with you to-night. And what a wonderful man was this from whom your society takes its name! And is there not something due to the people who prize his name, and have continued his influence? I believe as a matter recorded in history, that from his decisions there were three appeals, and that there was only one reversal. That is

what is meant by settled government. No greater blessing can come to man than the blessing of a settled government before which the heat of passion, and the adventures of ambition, and the lower calls of interest, shall all be silent in the face of the law. It is a reverence and a respect for such a doctrine that makes it possible for me to come to this country in the capacity in which I have been honored by my own. It is that which has kept the law of England supreme from Hardwicke to Russell, and shall carry it from Russell to some one equally honorable, equally distinguished, and equally honest, and make a rule before which we all will bow, and make a rule before which we all shall be proud to bow, grateful to bow, because it will be the rule of justice in applying its profound principles to human affairs. It is that which dignifies your society, it is that which dignifies the profession to which you belong, and of which I am an unworthy member; that it is which we cannot too respectfully consider, and which we cannot possibly overvalue; it is that upon which, under God, the good government of this world is reposed. Therefore, it is that which, in coming to this ancient country from one that drew from it its seeds of thought and its fruits of practice and results, I feel, perhaps more than you do here, in this wonderful center of human affairs, a center made only possible by modern invention, but a center also only made possible and sustained by the principles of law laid down here in the years long past, and which were never more wonderfully illustrated than by the great man whose name you have chosen for your society. When I am asked for kindred societies, I think of a whole continent governed by the principles of Hardwicke, governed by the rules which he laid down so clearly, which he transmitted, and which are still applied to the control of human affairs. Therefore, I may speak for the kindred societies in the United States, societies kindred to the Hardwicke Society of London; I speak for the law-abiding people of that country everywhere. We are his heirs, and we are his debtors, and with you we can only say that we hope to continue in the effort to strengthen and extend, to fit to the ever-changing concerns of humanity the same rules of justice between man and man, the same respect for [the law, for the ap-

pointed powers of a self-ruling people, in each continent. We trust the same spirit will prevail, and the name of the Hardwicke and the name of Russell shall be honored and respected on both sides of the Atlantic.'

The gradual opening of the doors of causes for divorce and separation has been repeatedly commented on in the columns of this journal, and we feel that the last so-called progressive step in England will not meet with the hearty approval of the American bar and public. Formerly, in an action for separation, the cruelty which was to be alleged and proven was to be such that it caused actual physical pain, or else was a menace to life and health; at least there was the appearance of force. It is with considerable interest, therefore, that we give to our readers this week an article on cruelty as a matrimonial offense which was published in the *Law Times* on May 4th. It is recognized as a fundamental principle of law that rules of justice change and modify to correspond to public feeling, and the question in regard to divorce and separation, therefore, seems to rest entirely on the attitude of the public towards these legal means to change one of the most sacred relations of life. Either the public must acquiesce in the theory that the marriage relation is one that may be broken at pleasure, or that judges must prevent the development of those principles which will effect such a result. The article to which we refer is as follows:

"The Russell suit has called forth some views in the press which would suggest a belief that hitherto cruelty has not constituted a matrimonial offense unless it was in some degree physical. That, of course, is an error. Although, as we said last week, the cruelty in the Russell suit was of a remarkable character, the records of the court would show that it is by no means the first time that a husband has obtained a decree on such a ground; and in the next place, it most certainly is *not* the first time that proof of physical violence has been dispensed with. Turning to the decisions given in recent years on the subject of cruelty, we shall find that the borders of construction have been steadily widened, and that the last illustration of the modernized doctrine flows almost naturally from those that have preceded it. In

a word, all recent authority on this branch of matrimonial law goes to establish the proposition that cruelty, to justify a decree, may be inflicted on the mind instead of on the body.

"Unquestionably this is a revolution of the old practice, but it is a revolution that has been very gradually effected. In former times moral iniquity was not deemed equivalent to actual violence so as to constitute cruelty within the meaning of the matrimonial causes act 1857. Reproaches and abuse in themselves furnished no ground for the intervention of the court; for, as Sir Jenner Fust once declared, 'hard words break no bones, and the court must not suffer family quarrels to be a sufficient ground for divorce by reason of cruelty between parties who have contracted to live together for better or for worse.' The judicial view in the present era negatives Sir Jenner Fust's decision, and proceeds on the theory that, though hard words break no bones, they may break hearts, or at any rate cause mental anguish than which no amount of physical ill-treatment could be crueller. All the rulings of Dr. Lushington and other judges in this connection must now be considered as of none effect, and *Birch v. Birch*, 28 L. T. Rep. 540, where it was shown that the husband had abused and sworn at his wife and wantonly beaten her child before her eyes, but nevertheless a decree was refused, can no longer be regarded as an authority.

"In *Kelly v. Kelly*, 22 L. T. Rep. 308, there were marked signs of departure from the older rules of construction in regard to cruelty, and in *Mytton v. Mytton*, 57 L. T. Rep. 92, the parting of the ways came fully into view. There it was shown that the husband had pursued a course of harsh and irritating conduct towards his wife, but that he had refrained from actual physical violence. The petitioner's health became affected, and she left the respondent on two occasions. Prior to the first departure there had been conduct which might have furnished cause for a decree under the old practice, but after the wife's return there was nothing more than the general course of harsh conduct above indicated. In these circumstances Mr. Justice Butt, taking the facts from beginning to end, held that legal cruelty was sufficiently established. In *Bethune v. Bethune*, 63 L. T. Rep. 259, the only actual instance of violence was a rough push. The wife

fell, but was not hurt; and the gravamen of the case lay in the husband's words and general conduct rather than in his acts towards the petitioner. Her health, however, suffered (and that has been regarded as the main test in recent cases where the wife alleged cruelty), and Sir James Hannen ruled that the medical evidence taken with that of the petitioner brought the case in line with *Kelly v. Kelly*, *ubi sup.*

"*Walmesley v. Walmesley*, 69 L. T. Rep. 152, was decided by yet another judge — Mr. Justice Barnes. There was no allegation by the wife that the respondent had treated her with physical violence. She did not even charge him with using angry or quarrelsome words; but it was clearly shown that he had treated her with coldness and neglect, and sometimes with indirect insult, thereby affecting her health to such an extent that the medical witnesses considered it would be dangerous for her to continue to live with the respondent. The wife obtained a decree, and it should be noticed that Mr. Justice Barnes expressed himself prepared to hold that, even without regarding the authority furnished by the previous cases cited above, the husband's conduct amounted to cruelty within the meaning of the act. His lordship, however, having considered the cases, was of opinion that *Kelly v. Kelly* established the petitioner's right to a decree on the facts as proved.

"Finally, in *Aubourg v. Aubourg*, 72 L. T. Rep. 295, Lord Justice Smith granted the wife a decree where the cruelty consisted of degrading treatment, the only acts of physical violence being of old date, and long since condoned by the petitioner.

In the case of *David B. Sayre*, the Supreme Court of the United States have just held that the judgments of a court-martial are not subject to review by civil courts on application for a writ of mandamus. This raises some very interesting questions as to whether an enlisted man, who was wrongfully and illegally tried by a court-martial and convicted, has any civil rights granted him by the Constitution, subsequent to the judgment of the court-martial. The act of enlistment may be such as to exclude him from the provisions of the common law; but it is an extremely dangerous proposition to hold that he is deprived of those rights granted to him by the Constitution of the United States.

# INCOME TAX — PARTS OF THE OPINIONS BY JUDGES OF THE SUPREME COURT OF THE UNITED STATES.

CHIEF JUSTICE FULLER'S opinion was, in part, as follows:

"Whenever this court is required to pass upon the validity of an act of Congress, as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care, and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power, and brings into consideration, as vitally affected by the decision, that complex system of government so sagaciously framed to secure and perpetuate 'an indestructible union, composed of indestructible States.' We have, therefore, with an anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully re-examined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences. The very nature of the Constitution, as observed by Chief Justice Marshall in one of his greatest judgments, 'requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. In considering this question, then, we must never forget that it is a Constitution that we are expounding.' (McCulloch v. Maryland, 4 Wheat. 316, 407.)

"As heretofore stated, the Constitution divided Federal taxation into two great classes,—the class of direct taxes and the class of duties, imposts, and excises, and prescribed two rules which qualified the grant of power to each class. The power to lay direct taxes, apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts and excises was subject to the qualification that the imposition must be uniform throughout the United States.

"Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived; that is, that a tax

upon the realty and a tax from the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

"We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products, or otherwise, of real estate or from bonds, stocks or other forms of personal property belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owners of real and personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct but an indirect tax, in the meaning of the Constitution.

"We know no reason for holding otherwise than the words 'direct taxes,' on the one hand, and 'duties, imposts and excises,' on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. And, passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the Constitution are considered. We do not care to retravel ground already traversed, but some observations may be added."

The chief justice then reviewed the history of the struggle in the Constitutional Convention as to the power to be granted the government in the matter of levying taxes; the views of early constitutional writers and expounders, and the early decisions of the court, and continued:

"The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax imposed upon all property-owners as a body, for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape

from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself. Nor can we perceive any ground why the same reasoning does not apply to capital in personality, held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country and all its invested personal property are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes, and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, 'upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed.'

"The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted in their new form into taxable subject matter; in other words, that income is taxable irrespective of the source from which it is derived.

"If it were the fact that there had been no income tax law, such as this, at the time the Constitution was framed and adopted, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. As Chief Justice Marshall said in the Dartmouth College case: 'It is not enough to say that this particular case was not in the mind of the convention when the article was framed nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a

special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception.' (4 Wheat. 518, 644.)

"Being direct, and, therefore, to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property or the income of all persons in the State, and collect the same, if the State does not in the mean time assume and pay its quota and collect the amount according to its own system and its own way? Inconveniences might possibly attend the levy of an income tax, but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

"We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare.

"Differences have often occurred in this court — differences exist now — but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions, unaffected by considerations not pertaining to the case in hand.

Judge Harlan, in his dissenting opinion, said in part:

"In my judgment — to say nothing of the disregard of the former adjudications of this court, and of the practice of the government for a century — this decision may well excite the gravest apprehensions. It strikes at the very foundation of national authority, in that it denies to the general government a power which is, or may at some time, in a great emergency, such as that of war, become vital to the existence and preservation of the union. It tends to re-establish that condition of helplessness

in which Congress found itself during the period of the Articles of Confederation, when it was without power, by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the expenses of government, and was dependent in all such matters upon the good will of the States and their promptness in meeting the requisitions made upon them by Congress.

"Why do I say that the decision just rendered impairs or menaces the national authority? The reason is so apparent that it need only be stated. In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but the personal property of the whole country—invested personal property, bonds, stocks, investments of all kinds—and the income that may be derived from such property. This results from the fact that, under the decision of the court, such incomes cannot be taxed otherwise than by apportionment among the States, on the basis simply of population. No such apportionment can possibly be made without doing monstrous, wicked injustice to the many for the benefit of the favored few in particular States. Any attempt upon the part of Congress to apportion the taxation of incomes among the States upon the basis of their population, would and properly ought to arouse such indignation among the freemen of America that it never would be repeated. No one ought to doubt this statement. When, therefore, this court adjudges, as it does now adjudge, that Congress cannot impose a duty or tax upon income arising from rents of real estate, or upon 'invested personal property,' or upon income arising from 'invested personal property, stocks, bonds, investments of all kinds,' except by apportioning the sum to be so raised among the States according to population, it practically decides that without an amendment of the Constitution such incomes can never be made to contribute to the support of the national government.

"But this is not all. The decision now made will inevitably provoke a contest in this country from which the American people would have been spared if the court had not overturned its former adjudications and had adhered to those principles of taxation under which our government, following the repeated adjudications of this court, has always been administered. Thoughtful, conservative men have uniformly held that the government could not be administered safely except upon principles of right, justice and equality—without discrimination against any part of the people because of their owning or not owning invested or tangible property. But by its present construction of the Constitution, this court, for the first time in all its history, de-

clares that our government has been so framed that in matters of taxation for its support and maintenance those who have money derived from the renting of real estate, or from the leasing or using of tangible personal property, have privileges that cannot be accorded to those who have money derived from the labor of their hands, or the exercise of their skill, or the use of their brains. Let me illustrate this.

"In the large cities or financial centers of the country there are persons who derive enormous incomes from the renting of houses that have been erected not to be occupied by the owner, but for the sole purpose of being rented. Near by are other persons, trusts, combinations, and corporations, possessing vast quantities of personal property—such as the bonds and stocks of railroad, telegraph, mining, telephone, banking, coal oil, gas, and sugar refining corporations—from which millions upon millions of income are regularly derived. In the same neighborhood are others who own neither real estate nor invested personal property, nor bonds nor stocks of any kind, and whose entire income arises from the skill and industry which are displayed by them in particular callings, trades or professions, or from the labor of their hands, or the use of their brains. And it is now held that under the Constitution, however urgent may be the needs of the government, however sorely the administration in power may be pressed to meet the moneyed obligations of the nation, Congress cannot tax invested personal property, nor the income arising either from real estate or from invested personal property, except by a tax apportioned among the States on the basis of their population, while it may compel the artisan, the workman, the artist, the author, the lawyer, the physician, even the minister of the gospel, no one of whom happens to own real estate, invested personal property, stocks or bonds, to contribute directly, and under the rule of uniformity or equality, from their respective earnings for the support of the government.

"The attorney-general of the United States very appropriately said, that the constitutional exemption from taxation of incomes arising from the rents of real estate, otherwise than by a direct tax, apportioned among the States on the basis of numbers, was a new theory of the Constitution, the importance of which to the whole country could not be exaggerated. If any one has questioned the correctness of that view of the decision rendered on the original hearing, it ought not again to be questioned, now that this court has included in the constitutional exemption from the rule of uniformity incomes derived from invested personal property. If Congress shall hereafter impose an income tax in order to meet the pressing debts of the na-

tion and to provide for the necessary expenses of the government, it is advised, by the judgment now rendered, that it cannot touch the income from real estate nor the income from invested personal property, except by apportionment among the States on the basis of population. Under that system the people of a State containing 1,000,000 of inhabitants, who receive annually \$20,000,000 of income from real and invested personal property, would pay no more than would be exacted from the people of another State having the same number of inhabitants, but who receive an income from the same kind of property of only \$5,000,000. If this new theory of the Constitution, as I believe it to be; if this new departure from the way marked out by the fathers is justified by the fundamental law, the American people cannot too soon amend their Constitution."

Justice Harlan devoted some time to the consideration of the proposition that because a part of the law was unconstitutional, the remainder of it was invalid, and concluded as follows:

"If the sections of the statute relating to a tax upon incomes derived from other sources than rents and invested personal property are to fall because, and only because, those relating to rents and to incomes from invested personal property are invalid, let us see to what result such a rule would logically lead. There is no distinct separate statute providing for a tax upon incomes. The income tax is prescribed in certain sections of a general statute, the object of which was to reduce taxation and to provide a revenue for the government. The judgment just rendered defeats the purpose of Congress by taking out of the revenue not less than thirty millions, and possibly fifty millions of dollars, expected to be raised from incomes. We know from the official journals of both houses of Congress that taxation would not have been reduced to the extent it was before the Wilson act but for the belief that if the country had the benefit of revenue derived from a tax on incomes that could be safely done. We know from official sources that each house of Congress distinctly refused to strike out the provisions imposing a tax on incomes. In every possible way the two houses of Congress indicated that it must be a part of any scheme for the reduction of taxation and for raising revenue for the support of the government, that (with certain exceptions) incomes arising from every kind of property and from every trade and calling should bear some of the burdens of the taxation imposed. If the court knows, or is justified in believing, that Congress would not have provided an income tax which did not include a tax on incomes from real estate, we are more justified in believing that the Wilson act would not have become a law at all with-

out provision being made in it for an income tax. If, therefore, all the income tax sections of the Wilson act must fall because some of them are invalid, does not the judgment this day rendered furnish ground for the contention that the entire act falls when the court strikes from it all of the income tax provisions, without which the act would never have been passed?

"But the court takes care to say that there is no question as to the validity of any part of the Wilson act except those sections which provide for a tax on incomes. Thus something is saved for the support and maintenance of the government. It, nevertheless, results that those parts of the Wilson act which survive the new theory of the Constitution evolved by these cases are these imposing burdens upon the great body of the American people who derive no rents from real estate, and who are not so fortunate as to own invested personal property, such as the bonds or stocks of mammoth corporations, which hold within their control almost the entire business of the country.

"Such a result is one to be deeply deplored. It cannot be regarded otherwise than as a disaster to the country. The practical, if not the direct, effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage that is inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless. I dissent from the opinion and judgment of the court."

Judge Brown dissents, thus:

"In view of the fact that the great burden of taxation among the several States is assessed upon real estate at a valuation, and that a similar tax was apparently an important part of the revenue of such States at the time the Constitution was adopted, it is not unreasonable to suppose that this is the direct tax the framers of the Constitution had in view when they incorporated this clause into that instrument. The significance of the words 'direct tax' was not so well understood then as it is now, and it is entirely probable that these words were used with reference to a generally accepted method of raising a revenue by tax upon real estate.

"That the rule of apportionment was adopted for a special and temporary purpose that passed away with the existence of slavery, and that it should be narrowly construed, is also evident from the opinion of Mr. Justice Patterson, wherein he says that 'the Constitution has been considered as an accommo-



dating system; it was the effect of mutual compromises and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule ought not, therefore, to be extended by construction.' 'Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle laid down in the Constitution.'

"But, however this may be, I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population. It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of Congress to tax in some way all taxable property within the jurisdiction of the Federal government for the purposes of a national revenue. And if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax within the meaning of the cause in question."

Discussing the application of the doctrine of apportionment, Justice Brown showed how unequally it would work in the various States because of the varying per capita amount of wealth possessed, and continued:

"I have always entertained the view that, in cases turning upon questions of jurisdiction, or involving only the rights of private parties, courts should feel at liberty to settle principles of law according to the opinions of their existing members, neither regardless of nor implicitly bound by prior decisions, subject only to the condition that they do not require the disturbance of settled rules of property. There are a vast number of questions, however, which it is more important should be settled in some way than that they should be settled right, and once settled by the solemn adjudication of the court of last resort, the legislature and the people have a right to rely upon such settlement as forever fixing their rights in that connection. Even 'a century of error' may be less pregnant with evil to the State than a long deferred discovery of the truth. I cannot reconcile myself to the idea that adjudications thus solemnly made, usually by a unanimous court, should now be set aside by reason of a doubt as to the correctness of those adjudications, or because we may suspect that possibly the cases would have been otherwise decided if the court had had before it the wealth of learning which has been brought to bear upon the consideration of this case.

"Congress ought never to legislate, in raising the revenues of the government, in fear that important laws like this shall encounter the veto of this court or be crippled in great political crises by its inability to raise a revenue for immediate use. Twice in the history of this country such exigencies have arisen, and twice has Congress called upon the patriotism of its citizens to respond to the imposition of an income tax—once in the throes of civil war and once in the exigency of a financial panic, scarcely less disastrous."

Justice Brown argued that Congress has the power to impose indirect taxes by the rule of uniformity; and being of opinion that a tax upon rents is an indirect tax upon lands, he said he was driven to the conclusion that the tax in question is valid. He then argued that there was no want of uniformity in the law within the meaning of the Constitution, since the court has repeatedly held that the uniformity there referred to is territorial only. He continued:

"In the words of the Constitution the tax must be uniform 'throughout the United States.' Irrespective, however, of the Constitution, a tax which is wanting in uniformity among members of the same class is, or may be, invalid. But this does not deprive the legislature of the power to make exemptions, provided such exemptions rest upon some principle and are not purely arbitrary or created solely for the purpose of favoring some person or body of persons. Thus in every civilized country there is an exemption of small incomes, which it would be manifest cruelty to tax, and the power to make such exemptions once granted, the amount is within the discretion of the legislature, and so long as that power is not wantonly abused, the courts are bound to respect it. In this law there is an exemption of \$4,000, which indicates a purpose on the part of Congress that the burden of this tax should fall on the wealthy, or at least upon the well to do. If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are; in other words, enlightened taxation is imposed upon property and not upon persons."

In conclusion, Justice Brown said:

"It is difficult to overestimate the importance of these cases. I certainly cannot overestimate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should never be done except upon the clearest proof of its conflict with the fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit the necessary powers of Congress. Did the reversal

of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious, but as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than the surrender of the taxing power to the moneyed class. By resuscitating an argument that was exploded in the *Hylton* case, and has lain practically dormant for a hundred years, it is made to do duty in nullifying not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the spectre of socialism is conjured up to dissuade Congress from laying taxes upon the people in proportion to their ability to pay them.

"While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth. Believing, as I do, that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and approaches the proportions of a national calamity, I feel it a duty to enter my protest against it."

Judge Jackson delivered a very long opinion, thus:

"I am unable to yield my assent to the judgment of the court in these cases. My strength has not been equal to the task of preparing a formal dissenting opinion since the decision was agreed upon. I concur fully in the dissents expressed by Justice White on the former hearing and by the justices who dissent now, and will only add a brief outline of my views upon the main questions presented and decided.

"It should be borne in mind, it is not and cannot be denied, that under the broad and comprehensive taxing power conferred by the Constitution on the national government, Congress has the authority to tax incomes from whatever source arising, whether from real estate or personal property or otherwise. It is equally clear that Congress, in the exercise of this authority, has the discretion to impose the tax upon incomes above a designated amount. The underlying and controlling question now presented is, whether the taxation of income received from land and personalty are subject to the rule of apportionment.

"The decision of the court holding the Income Tax law of August, 1894, void is based upon the following propositions:

"First. That a tax upon real and personal prop-

erty is a direct tax within the meaning of the Constitution, and, as such, in order to be valid, must be apportioned among the several States, according to their respective populations.

"Second. That the incomes derived or realized from such property are an inseparable incident thereof, and so far partake of the nature of the property out of which they arise as to stand upon the same footing as the property itself. From these premises the conclusion is reached that a tax on incomes arising from both real and personal property is subject to the same rule of apportionment as a tax laid directly on the property itself, and not being so imposed by the act of 1894, by the rule of numbers, is unconstitutional and void.

"Third. That the invalidity of the tax on incomes from real and personal property being established, the remaining portions of the Income Tax law are also void, notwithstanding the fact that such remaining portions clearly come within the class of taxes designated as duties or exercises, in respect to which the rule of apportionment has no application, but which are controlled and regulated by the rule of uniformity.

"It is not found and could not be properly found by the court that there is any want of uniformity in this legislation. In the other provisions of the law there is not found and could not be, I say, any such lack of uniformity as would be sufficient to render these remaining provisions void for that reason. There is, therefore, no essential connection between the class of incomes which the court holds to be within the rule of apportionment and the other class falling within the rule of uniformity, and I cannot understand the principle upon which the court reaches the conclusion that because one branch of the law is invalid, or the reason that the tax is not laid by the rule of apportionment, it thereby defeats and invalidates another branch resting upon the rule of uniformity, and in respect to which there is no valid objection. If the conclusion of the court on this third proposition is sound, the principle upon which it rests could with equal propriety be extended to the entire revenue act of August, 1894.

"Take the freight tax cases in 15 Wallace. There was a single act, imposing a tax upon all railroads taking up freight without the State and bringing it within, and all freight taken up within the State and carried without. It came before this court, and this court decided that the valid and the invalid parts were separable, and that it would not defeat the entire act, though it was one singly and as a whole. Take the case cited by Mr. Justice Harlan in addition, and, besides those, we come to the case of *Rathman v. The Western Union Telegraph Company* in 127 U. S., where Ohio had

levied a tax on the receipts of the telegraph company and the contention was made in the record and in this court that being void as to the receipts from inter-State commerce, the act was wholly void. But this court answered no. So, in the other cases of *Huntington v. Worthen*, *Allen v. Louisiana*, and, last, in *Field v. Clark*, 143 U. S., where the court said, 'unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part, relating to a distinct subject-matter, may be invalid. A different rule might be disastrous to the financial operations of the government and produce the utmost confusion in the business of the entire country. Here the distinction between the two branches of the income tax law are entirely separable. They rest upon different rules; one can be enforced without the other; and to hold that the alleged invalid portion, if invalid, should break down the valid portion, is a proposition which I think entirely erroneous, wholly unsupported either upon principle or authority.'

"In considering the question whether a tax on incomes from real or personal estate is a direct tax within the meaning of those words as employed in the Constitution, I shall not enter upon any discussion of the decisions of this court, commencing with the *Hylton* case in 1796 and ending with the *Springer* case in 1880; nor shall I dwell upon the approval of those decisions by the great law writers of the country, and by all the commentators on the Constitution; nor will I dwell upon the long-continued practice of the government in compliance with the principle laid down in those decisions. They, in my judgment, settle and conclude this question now before the court contrary to the present decision. But if they do not settle, they certainly raise such a doubt on the subject as should restrain the court from declaring the act unconstitutional. No rule or canon of construction is better settled than that this court will not declare invalid a statute passed by a co-ordinate branch of the government, in whose favor every presumption should be made unless its repugnancy to the Constitution is clear beyond a reasonable doubt.

"I object to the opinion of the court in this case because it takes a wrong method, in my judgment, of arriving at the true meaning of the words 'direct tax.' What light can we derive from the opinions of text writers and of individuals who agree upon nothing? What right have we to construe the Constitution in the light of those subsequent diverse expressions? I know of none. To ascertain the true meaning of the words 'direct tax' or 'direct taxes,' we should have regard not merely to the words themselves, but to the connection in which they are used in the Constitution and to the condi-

tions and circumstances existing when the Constitution was formed and adopted. What were the surrounding circumstances? I shall refer to them very briefly. The only subject of direct taxation prevailing at the time was land. The States did tax some articles of personal property, but no established rule existed on the subject. By the eighth article of confederation the expenses of the government were to be borne out of a common fund or treasury, to be supplied by the States according to the value of the granted and surveyed lands in each State, such valuation to be estimated or the assessment to be made by the Congress, in such mode as they should determine from time to time. There was a direct tax. There was a direct tax directly laid upon the value of all the real estate in the country. The trouble with it was that the confederation had no power of enforcing its assessment. All it could do, after arriving at the assessment or estimate, was to make its requisition upon the respective States for their respective quotas. They were not met. That, I say, was a direct tax in all its essential features, and the States have the same subject matter of taxation as the general source of revenue.

"Now, I say it is a proper assumption for us to assume that when the framers of the Constitution adopted the rule as to apportionment, they had reference to some subjects or species of taxation that prevailed generally throughout the States. It never was contemplated by them to reach by direct taxation subjects of partial distribution. What would be thought of a direct tax and the apportionment thereof laid upon cotton at so much a bale; upon tobacco at so much a hogshhead; upon rice at so much a ton or a tierce? Would not the idea of apportioning that tax on property non-existing in a majority of the States, be utterly frivolous and absurd?

"Not only was land the subject of general distribution, but evidently in the minds of the framers of the Constitution, from the fact that it was the subject of direct taxation under the confederation. But at the time of the adoption of the Constitution there was, with the single exception of a partial income tax in the State of Delaware, no general tax on incomes in this country, nor in any State thereof. Did the framers of the Constitution look forward into the future so as to contemplate and intend to cover such tax as was then unknown to them? I think not. It was ten or eleven years after the adoption of the Constitution before the English government passed her first Income Tax Law, under the leadership of Mr. Pitt. The question then arose, to which the chief justice has referred, whether, in estimating incomes, you could look or have any regard to the source from which it sprang. That

question was material, because, by the English Loan Act, it was provided that the public dividends should be paid free of any tax or charge whatever, and Mr. Pitt was confronted with the question on his Income Tax Law whether he proposed to reach, or could reach, income from those stocks. He said the words must receive a reasonable interpretation, and that the true construction was that you should not look at all to the nature of the source, but that you should consider dividends, for the purpose of the income tax, simply in the relation to the receiver as so much income. This construction was adopted and put in practice for over fifty years without question. In 1853, Mr. Gladstone, as chancellor of the exchequer, resisting with all his genius the effort to repeal that income tax, said, in a speech before the House of Commons, that the construction of Mr. Pitt was undoubtedly correct. These opinions of distinguished statesmen may not have the force of judicial authority, but they show what men of eminence and men of ability and distinction thought of the income tax at its original inception.

"Now, I say that we must assume that the framers of the Constitution, in providing for the apportionment of a direct tax, had in mind a subject-matter, or subjects-matter, which had some general distribution among the States. Any other supposition would put them into an absurd position. Now, as to rents from real estate. By the by, it was assumed at that day by all the political writers that there was some relation between population and land. But there is no connection, direct or approximate, between rents of land and income, or personalty and population—none whatever. They did not have any relation to each other at the time the Constitution was adopted, nor have they ever had since, and perhaps never will have.

"Again, it is settled by well-considered authorities that a tax on rents and a tax on the land itself is not duplicate taxation. The authorities in England and in this country hold that a tax on rent and a tax on land are different things. Besides, the English cases, to which I have not the time or strength to refer, there is a well-considered case (*Robinson v. County of Allegheny*, in 7 Barr), when Gibson was the chief justice of that court, when a lease in fee of certain premises was made, the tenant covenanting to pay the rent on the demised premises. A tax was laid by the State on both land and rent, and the question arose whether the tenant, even under that express covenant, was bound to pay the tax on the land itself. The Supreme Court of the State held that it was not; that there were two separate and distinct and independent subjects-matter; that his covenant to pay on the demised premises did not extend to the payment of the tax charged upon the rent against the

land-owner. The truth of the business is that the framers of the Constitution never contemplated anything to valuation of assessment. No student of the history of the government can arrive, I think, at any other conclusion. All the circumstances surrounding the formation and adoption of the Constitution lead inevitably to that conclusion.

"Again, we cannot attribute to the framers of the Constitution any intention to make any tax a direct tax which it was impossible to apportion. If it cannot be apportioned without gross injustice we may feel sure that it is a tax never contemplated by the Constitution as a direct tax. No tax, therefore, can be regarded as a direct tax in the sense of that instrument which is incapable of apportionment by the rule of numbers. The constitutional provision clearly implied in the requirements of apportionment that a direct tax is such and such only as can be apportioned without glaring inequality and manifest injustice and unfairness as between those subject to its burden. The most natural and practical case by which to determine what is a direct tax in the sense of the Constitution is to ascertain whether the tax can be apportioned among the several States according to their respective number with reasonable approximate justice, fairness and equality to all citizens and the inhabitants of the country who may be subject to the operation of the law. The fact that a tax cannot be apportioned without producing gross injustice and inequality among those required to pay it, should settle the question that it was not a direct tax within the true sense and meaning of those words as they are used in the Constitution.

"But it is said that this inequality was intentional upon the part of the framers of the Constitution, that it was adopted with a view to protect property-owners as a class. What an idea! Inequality among its own citizens in this government being intentionally adopted by the framers of its Constitution? Why, the very object of its formation was the reverse. The government is not dealing with States in this matter; it is dealing with its own citizens throughout the country irrespective of State lines, and to say that the Constitution, which was intended to promote peace and justice, either in its whole or in any part thereof, ever intended to work out such a result and produce such inequality between the citizens of a common country, is beyond all reason, in my judgment.

"Where is this thing to stop? What is to be the end of the application of this rule, this new rule, as I say, adopted by the court? A tax is laid by the general government on all the money on hand or on deposit of every citizen of the government at a given date. Such taxation prevails in many of the States. The government has under its taxing

power the right to lay such a tax. When laid, a few parties come before the court and say, 'My deposits were derived from the proceeds of farm products or from the interest on bonds and securities and they are not therefore taxable by this law. To make your tax valid, you must apportion the tax among all the citizens of the government according to the population of the respective States, taking the whole subject-matter out of the control of Congress, both the rate of taxation and the assessment, and imposing it upon the people of the country by an arbitrary rule which has no equality.'

"In my judgment, the principle announced in the decision practically destroys the power of the government to reach incomes from the sources of them. There is to my mind little or no real difference between denying the existence of the power to tax incomes from real and personal estate and the attaching such conditions and requirements to its exercise as will render it impossible or incapable of any practical operation. You might just as well in this case strike at the power to reach incomes from the sources indicated as to attach these conditions of apportionment, which no legislature can ever undertake to adopt, and which, if adopted, cannot be enforced with any degree of equality or fairness between common citizens of a common country.

"The practical operation of the decision is not only to disregard the great principles of equality in taxation, but the further principle that in the imposition of taxes for the benefit of the government the burdens thereof should be imposed upon those having the most ability to bear them. This decision, in effect, works out a directly opposite result, in relieving the citizens having the greater ability, while the burdens of taxation are made to fall most heavily and oppressively upon those having the least ability. It lightens the burden upon the larger number in some States subject to the tax, and places it most unequally and disproportionately on the smaller number in other States. Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress. It strikes down an important portion of the most vital and essential power of the government in practically excluding any recourse to incomes from real and personal estate for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances. I, therefore, am compelled to dissent from the decision of the court, and think that it is one most disastrous in its consequences."

Payments of interest on a note by the principal, without knowledge of the surety, will not, as regards the surety, take the note out of the statute of limitations. (*Meitzler v. Todd* [Ind.], 39 N. E. Rep. 1046.)

## OUR JURY SYSTEM.

WE were in hopes that something would be done at the late Constitutional Convention to adapt our jury system to the needs of modern society. We know very well that such matters ought as a rule to be left to the Legislature, but we have now had experience enough of the difficulty of securing from such bodies the enactment of any real reform in a shape approved by competent men. For permanent and well-considered changes in the structure and procedure of the government, we have clearly to rely in the main on the constitutional conventions. Still, the evils of our jury system are so glaring, and so promotive of crime that it is surprising that neither the judiciary nor the bar have before now made any effort to reform it. In this city three weeks have been spent by a judge and the lawyers in finding twelve men to try a policeman for taking bribes. After these were found, two had to be excluded for fraudulent concealment of facts, so that the process is not yet over. In any other civilized country the whole affair would have been over in three days—one for preparation, one for trial, and the last for sentence in case of conviction. What is the reason for this astonishing difference?

It is in reality quite simple. In a country in which publicity reigns as it has never reigned anywhere before, in which the newspapers record crimes and offenses as they have never been recorded elsewhere, we have a rule that anybody who has heard about a crime and formed an opinion about it, is presumptively disqualified from trying the criminal. He has, the law says, to approach the case in ignorance about it caused by not reading the newspapers, or in the state of mental decrepitude which prevents one who reads of a murder from forming an opinion that anybody committed it. The acceptable juror has, in short, to be in a state of mind about the whole matter which it is difficult to find except among the grossly ignorant or the feeble-minded. Consequently the process of impanelling a New York jury in a notorious case is apt to consist in a search for twelve extremely illiterate or half-witted men—a process which it would be impossible to witness anywhere else outside the comic opera.

The encouragement which criminals get from this system we need not point out. It increases very greatly the chance of escape which even the best jury trials hold out. The spectacle alone of the impanelling of a jury demoralizes the community and distinctly diminishes popular respect for the administration of justice, so that the escape of the criminals is by no means the whole of the evil it works. The worst of it is that it makes the attempt of the State to punish crime somewhat ridiculous. Clearly, nobody but the criminals and the "jury

fixers" are interested in the continuance of the present state of things. The only obstacle such a reform would meet with in the Legislature would come from sheer frivolity or dislike of serious subjects; but this might be got over by patience and perseverance.

The truth is, that our jury law belongs to the age before newspapers, railroads and telegraphs. It is somewhat like the Supreme Court view that the only incomes are incomes from land, and that men pay capitation taxes with something that is not income. However we may feel about it, we must do the work of the world, including the administration of justice, with people that will read newspapers and form opinions about what they read. There is no other class fit to do the work of the world available. Even the judges read the newspapers. The old formula, "My attention has been drawn," is no longer available, even for them. Nobody can now pretend that he does not see what is in the newspapers till somebody tells him about it. We have to do the best we can with the modern man, seeing that the ancient or mediæval man no longer exists. The earth, in fact, has to be "run" by the living, and not by the dead. We must take decent men's word for it that they can try a criminal according to the evidence, in spite of the previous formation of an opinion. We cannot go on much longer picking out imbeciles, knaves and ignoramuses to bring our malefactors to justice. The mere waste of time of the judges who preside over these processes is a serious injury to the public. Hundreds of important causes wait for adjudication, not while one criminal is being tried, but while a tribunal is being prepared to try him.—*The Nation*.

#### THE REMARRIAGE OF DIVORCED PERSONS.

INTO the moral and religious aspects of the controversy raised by Father Black's protest against the remarriage of a divorcee in St. Mark's Church, North Audley street, on Saturday last, we have no desire to enter. But the legal issues raised by the incident are of some importance. In the first place, we are not able to attach much weight to Father Black's objection that the officiating clergyman did not postpone the proceedings in consequence of his allegation of a just cause or impediment why the union should not take place, in terms of the fifth rubric in the service for the solemnization of matrimony in the Book of Common Prayer. This is not a point of substance if the proceedings were really legal, and we agree with Lord Grimthorpe that no court of law would listen to it for five minutes.

In the second place, assuming that the remarriage of divorcees is an evil of which the Church has a

right to complain and wishes to get rid, would she effect this object by disestablishment? Here, again, we must guard ourselves by saying that on the question whether disestablishment is right or desirable or not, we offer no opinion. The question is: Would it rid the Church of the obnoxious section in the Divorce Act of 1857 (§ 58), which provides that, while by the previous section no clergyman in holy orders of the United Church of England and Ireland shall be compellable to remarry a guilty divorcee, any minister so refusing shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese, to perform the ceremony within his church? Is this section not binding still on the Church of Ireland notwithstanding the act of 1869? If it is, the mere severance of the union between Church and State would certainly not give Father Black, the Duke of Newcastle and Lord Halifax what they want, whatever else it might do. Moreover, is the matter not one with which the Church is already competent to deal? Under the act of 1857 no divorcee can be remarried in the Church of England unless he finds a clergyman willing to solemnize the union. Is it not competent for convocation to prohibit such remarriages altogether by a canon which would bind the clergy without parliamentary ratification? It might be held, however, that the possibility of finding a willing clergyman under such circumstances is one of the rights of the laity which convocation cannot abolish or restrict without parliamentary ratification. In that case, the only alternative open to Father Black and his friends would be a direct assault on the Divorce Act in Parliament by a bill repealing the section to which they object, and prohibiting the remarriage of divorcees from being clothed with any ecclesiastical solemnization.

The last point that we shall mention is this: Under the Marriage Registration Act could not a divorcee get himself remarried in a Dissenting chapel without the consent, or even against the wishes, of the minister, if he secured the assent of a single trustee, deacon or manager (cf. 19 and 20 Vict., ch. 119, § 11)? We put forward these points tentatively. The whole subject is invested with so much obscurity that no lawyer, at least, will be disposed to dogmatize upon it. They appear to us, however, to be worthy of consideration in the controversy.—*Law Journal*.

Where a contractor contracts for a city work which, by reason of its nature and location, causes damage to another, which might have been prevented by the exercise of reasonable prudence as to the plan and location of such work, the contractor and the city are severally liable. (*De Baker v. Southern Cal. Ry. Co.* [Cal.], 39 Pac. Rep. 610.)

### Abstracts of Recent Decisions.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**—Where the purchaser of chattels only pays part of the price, and agrees that title shall not pass to him until the residue is paid, his assignee for the benefit of creditors takes title thereto subject to the lien of the seller, even though the agreement was not recorded and the general creditors had no notice of it. (*Hooven, Owens & Rentschler Co. v. Burdette* [Ill.], 39 N. E. Rep. 1107.)

**ATTORNEY AND CLIENT—FEES—CONTRACT.**—Defendants contracted with a lawyer to prosecute their claim to a certain inheritance, he to retain out of the proceeds his expenses and one-half the balance for his services, and he thereupon retained plaintiff to assist in the prosecution of the claim. *Hell*, that plaintiff could not recover for his services from the defendants, since he had no contract with them. (*Evans v. Mohr* [Ill.], 39 N. E. Rep. 1083.)

**CORPORATION—SUBSCRIPTION—ESTOPPEL.**—Part payment of their subscriptions to the capital stock of a proposed corporation does not constitute a waiver by the subscribers of the performance of conditions necessary to the formation of the corporation, or an estoppel to deny its corporate existence, in the absence of evidence that they attended the corporate meetings, and knew that such conditions were not performed. (*Birge v. Browning* [Wash.], 39 Pac. Rep. 648.)

——— **CONTRACTS.**—A corporation cannot avoid a mortgage given by its president and secretary, who are the only stockholders, to another corporation, upon the ground that the same person is president of both corporations. (*Roy & Co. v. Scott Hartley & Co.* [Wash.], 39 Pac. Rep. 679.)

**CRIMINAL LAW—HOMICIDE.**—Where three persons form a design to kill a person, and one of them provokes a difficulty with him to furnish a pretext for killing him, he is equally guilty with the other two, who inflict the wounds. (*State v. Paxton* [Mo.], 29 S. W. Rep. 705.)

**DIVORCE—ALIMONY.**—Where an action is brought for divorce and alimony, alimony may be allowed as an incident to the divorce; and where the parties are in equal wrong, and a divorce is refused, the court may make an order for the control and disposition of the property of the parties, or either of them, as may seem proper. (*Johnson v. Johnson* [Kans.], 39 Pac. Rep. 725.)

**EVIDENCE—ATTORNEY AS WITNESS TO WILL.**—Where the attorney who drew a will witnesses it, at testator's request, he is free, if the will is contested, to testify as to any fact concerning its execution

which he learned by virtue of his professional relation. (*In re Wax's Estate* [Cal.], 39 Pac. Rep. 624.)

**HUSBAND AND WIFE—COMMUNITY PROPERTY.**—Where a debt incurred by a husband in a sister State which does not recognize community property, would have been enforceable against property which from the nature of its acquisition would have been community property in this State, it is by comity enforceable in Washington against community property. (*La Selle v. Woolery* [Wash.], 39 Pac. Rep. 663.)

**MASTER AND SERVANT—DEFECTIVE APPLIANCES.**—A railroad company is bound to furnish and keep in repair proper handholds on the ends of car boxes for the support of brakemen, and it is negligence to send out a car the handhold on which is so bent that it can only be grasped at the ends. (*Settle v. St. Louis & S. F. R. Co.* [Mo.], 30 S. W. Rep. 126.)

**MORTGAGE—ASSUMPTION BY GRANTEE.**—Where a mortgagor conveys his equity of redemption to a grantee, who assumes the mortgage, the mortgagor, although as between himself and his grantee, he becomes a surety for the debt, still remains a principal debtor so far as the mortgagee is concerned. (*Fish v. Glover* [Ill.], 39 N. E. Rep. 1081.)

**MUNICIPAL CORPORATION—ORDINANCE—DISTRIBUTING HANDBILLS.**—An ordinance of a city prohibiting the distribution of such handbills on the streets as those receiving them would naturally throw on the street, and which are calculated to frighten or endanger horses, is a valid exercise of the police power given to a city by its charter providing that the council may prevent any practice having a tendency to frighten horses, and the general welfare clause. (*Wettengel v. City of Denver* [Colo.], 39 Pac. Rep. 343.)

**RAILROAD COMPANY—INJURY TO BRAKEMAN.**—The maintenance by a railroad company of a bridge across its track at such a height as to endanger the lives of brakemen in the discharge of their duty on the top of its freight cars is wilful negligence. (*Cincinnati, N. O. & T. P. Ry. Co. v. Sampson's Adm'r* [Ky.], 30 S. W. Rep. 12.)

**WILLS—CONTEST.**—Where a physician, who knew testatrix for several years, and attended her in her last sickness, testifies fully as to her condition on the day the will was executed, stating that her mind seemed clear, and that she answered all questions intelligently, and appreciated everything that was going on about her, he may state that, in his opinion, she was competent to make a will. (*McHugh v. Fitzgerald* [Mich.], 61 N. W. Rep. 354.)

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ON Monday, the 27th day of May, the Court of Appeals of the State of New York, for the first time in its history, was called upon to exercise the power conferred on them by the Code of Criminal Procedure, to fix a time for the execution of Robert W. Buchanan. The scene was impressive, and one which will long be remembered by those who attended the proceedings. There seemed to be unusual dignity and solemnity in the bearing of the judges of the court, who appeared to feel the peculiar power which they were called upon to exercise for the first time. They have undoubtedly appreciated in many cases how the life of an individual hung upon the affirmance or the reversal of a former judgment, but they have never before come into contact with and been face to face with the prisoner whose life was to be taken in order to maintain the dignity and majesty of the laws of the State of New York. The morbid curiosity of the crowd was sadly in contrast with the dignity of the court and the deathly pallor of the condemned man.

Perhaps the most unusual feature in relation to the Buchanan case was the number of legal proceedings which were instituted on behalf of the prisoner. In a recent decision of the United States Supreme Court the facts in relation to the deliberations of the jurors were brought out. As stated in the opinion of Mr. Chief Justice Fuller, they are as follows:

"Subsequently, however, upon the hearing of the motion for a new trial, certain other facts were made to appear, which we have considered carefully, with the view of ascertaining whether they furnish any sufficient reason for believing that the verdict of the jury was not properly or fairly reached. One branch of the motion was based on the ground that there had been an illegal separation of the jurors. Affidavits were read, showing that upon the re-

moval of the sick juror from the room in which he and his fellow jurors were dining together, the other jurors separated; some running to and from the sick man's room and others going in other directions and alone. In opposition were read the affidavits of the jurors and of the court officers, to the effect that the jurors were always in charge of the officers; that none of them were ever alone, and that no communication was had with them by any person in reference to the case. Upon these proofs, it was discretionary with the trial court to order a new trial or not, and with the exercise of its discretion we will not interfere. Code Crim. Proc., § 465, subd. 3. It was a question of fact, and I think the judicial discretion of the learned recorder was well exercised in having regarded the involuntary separation of the jurors as working no possible prejudice to the defendant. The second branch of the motion for a new trial was passed on the ground that the attack which the juror (Paradise) suffered from was an expression of a generally deranged judgment, and that his mind could not have been clear and sound, or capable of judgment, for some hours before and after. In support of that ground, the affidavits of several distinguished physicians and alienists were produced and read. It was their opinion, upon the statement of the physician who attended the said juror, of the juror's son and of others detailing what had occurred, that the attack was epileptic in character. They, in substance, thought it evidenced a confirmed epileptic condition, and indicated a mental disturbance which must have existed for several hours, and must have rendered his mental action unreliable and valueless. In opposition to these opinions were read affidavits by several other physicians, expert in mental diseases, who had made a personal examination of the juror, and who gave it as their opinion that there was no perceptible indication of epilepsy, or of paresis, and that he was in full possession of his faculties. Upon Paradise's statements as to his past life, they were of the opinion that he had never suffered from epilepsy or insanity. They thought the symptoms of his attack were those of nervous exhaustion and of hysteria, induced by the close confinement and the long continued strain upon him in the performance of his duties as a



juror. His own affidavit was read, denying ever having suffered from epileptic attacks. He narrated the occurrences in the jury room, and stated that after the first ballot, when he had voted 'not guilty,' he had upon each subsequent ballot voted 'guilty,' and that the jury had agreed upon their verdict before they went to the hotel for their meal. He stated that he felt well when he came back to court and was able to deliberate. He gave the facts about his past life, and he showed that the day after the conclusion of the trial he had gone away on business and remained away until June, being in the full possession of his health and faculties. The affidavits of physicians, who had known and attended him in the past, stated that he had never manifested any epileptic symptoms, or any form of nervous disease. Other affidavits, by his employer and by his fellow jurors, were read to show his mental competency.

"The recorder, in denying a new trial, had before him the conflicting opinions of the experts, the facts stated in the affidavits and those within his own observation. It cannot be said that the defendant made out a case of mental incompetency in the juror. While the opinions of the physicians, secured by him, seemed to give support to his theory of a mental or nervous disease in the juror, which incapacitated him to deliberate or confer upon his case, they were not based upon any personal examination, but were premised upon the statements given them. In view of the evidence as to his physical and mental condition upon actual examination, as to the facts of his past life and of his condition for weeks after the trial, the learned recorder could not well have decided otherwise than he did, and I think we must agree with him that the opinions of the experts for the people were warranted by the evidence, and that those of the defendant's experts were not."

There appears to be considerable difficulty arising from the conflict of decisions of the United States courts and the interests of the State authorities, who in many instances show much energy in trying to avoid the operation of the judgments of the United States tribunals. In the first case to which our attention has been called *The Nation* very tersely sums up the situation, thus:

"It is not yet clear what will be the effect of Judge Goff's decision in the United States Circuit Court declaring unconstitutional the registration laws of South Carolina, and forbidding the State to take any further action under those laws. The governor has announced his intention to appeal to the Supreme Court while still preparing for the convention. The *Columbia State*, organ of the conservative Democrats, points out that the injunction does not apply to the managers of the election, and predicts that the Tillman-Evans element will instruct these managers to go ahead and refuse to receive the ballots of unregistered voters. This would make the election illegal, and as the Tillmanites can hardly expect to control a convention legally elected, the *State* thinks that they would be glad to escape from the dilemma in this way. Tillman, however, predicts that the convention will be held, and that 'it will be composed of white men principally, who will take care of South Carolina, and see that white supremacy is maintained within its borders.' Governor Evans has issued a fire-eating proclamation of defiance, 'Constitution or no Constitution, law or no law, court or no court.' The leaders of the negroes, however, talk very sensibly. An address issued by the officers of the Colored Ministerial Union says that they will 'vote for and with our white friends for good government, seeking only for that minority representation which any reasonable white man will accord us,' and that they 'recognize the fact that intelligence and money must rule.' "

Continuing on the South Carolina crisis, *The Nation* says:

"It is a singular coincidence that the State should again bring to the test another question of hardly inferior importance—the question how far the government of the United States, under the amended Constitution, may interfere with the processes of State laws when those laws affect the highest prerogative of a State in the formation of a constitution for the commonwealth. For this is the issue that has been before Judge Goff in the United States Circuit Court at Columbia, and was passed upon by him on Wednesday week.

"By itself, the decision of Judge Simonton, another Federal judge, at Columbia on the same day, practically annulling essential pro-

visions of the dispensary act as in violation of the interstate commerce law, would be important enough to engage general attention, but it sinks into insignificance in comparison with the broader questions and wider consequences involved in the other case. Every citizen of every State is concerned in this latter decision, because the whole issue of State rights is bound up in it.

"The present Constitution was adopted in 1868, during the reconstruction era, when the carpet-baggers and negroes were 'on top;' and although there has been agitation for a new one ever since the native whites resumed control in 1876-'77, no steps were taken in that direction until Tillman came into power. The last legislature passed an act providing that an election for delegates to a constitutional convention should be held on the third Tuesday in August next, and that the body should meet on the second Tuesday in September. Certain citizens of South Carolina last month applied to the Circuit Court of the United States for an injunction to restrain the State officials from taking further action under the registration and election laws, on the ground that those laws are in violation both of the State Constitution and of the Federal Constitution. Judge Goff granted a temporary injunction, and on May 8 made it permanent.

"The chief points of attack were two. The State Constitution provides that 'every inhabitant possessing the qualifications provided for in this Constitution shall have an equal right to elect officers.' The qualifications are that one shall be a male citizen of the United States twenty-one years old, a resident of the State one year, and of the county in which he offers to vote sixty days, next preceding the election. The Constitution further provides that 'the right of suffrage shall be protected by laws regulating elections,' and that 'it shall be the duty of the general assembly to provide, from time to time, for the registration of all electors.'

"In 1882 a registration act was enacted, which still remains on the statute book, and which was enlarged by amendments passed in 1893 and 1894. The practical effect of these provisions is that, for an ordinary election occurring in November, registration ceases early in July (except for those afterwards coming of

age), which operates to require a residence in the county of 120 days—in violation, as is contended, of the constitutional requirement of only sixty days' residence. For the election of next August, registration was to be allowed until a month previous, but the difficulties put in the way of getting on the roll the name of any man objectionable to the supervisor are almost incredibly great. A man who is once registered must preserve the certificate then given him and show it at the polls as a condition of voting—which, it is alleged, is a new qualification for the exercise of the suffrage not warranted by the Constitution. If he moves, not simply from one county to another, but even from one precinct to another, and even from one residence to another in the same precinct, he must surrender his old certificate and get a new one. If he loses his certificate, he can get a new one only by proving to the satisfaction of the supervisor, upon such evidence as the latter may require, that he really lost it, and has not destroyed or sold it. If he has never been registered, he must make an affidavit setting forth his full name, age, occupation, and residence when the act of 1882 was passed, or at any time thereafter when he became old enough to vote, "and the place or places of his residence since the time when he became entitled to register;" and this must be supported by the affidavits of two "reputable" citizens who were each twenty-one years old in 1882, or at the time when the applicant became entitled to register. These, and sundry other provisions unnecessary to chronicle, are, it is held, in violation of the State Constitution, as establishing qualifications for the suffrage not required or warranted by that instrument.

"The other chief point is the claim that these State laws violate the Federal Constitution. The latter provides that the electors of the lower branch of Congress in each State 'shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.' These qualifications, it is contended, must be set down in the State Constitution, and any attempt by State law to establish other qualifications, violates the right of the citizen to vote for members of Congress, and so is obnoxious to the Federal Constitution. The fifteenth amendment forbids any abridgment of the right of citizens of the United States to vote

'on account of race, color, or previous condition of servitude.' While the registration law in question does not specifically discriminate against the negro, its rigorous provisions regarding the procurement of a certificate, its preservation, and its restoration if lost, are notoriously directed against the ignorant and migratory blacks. A justification for an appeal to the Federal judiciary is found in the provision of the Federal Constitution, that 'the United States shall guarantee to every State in this Union a republican form of government,' and in the contention that the practical effect of the registration laws of South Carolina is to put that State under the rule of a white oligarchy.

"The main reliance of the attorneys on the other side was the argument that the action was virtually directed against the State, and so was forbidden by the eleventh amendment, declaring that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State,' though the present action, it will be observed, was brought by citizens of the State itself. It was also argued that the matters complained of were political rather than judicial, and consequently not the subject of judicial cognizance, and that adequate remedies for any grievance might be obtained at law in the State courts. Judge Goff, however, brushed these contentions aside, and made the injunction permanent on the ground of the unconstitutionality of the registration laws.

"The case will, no doubt, be carried up to the Supreme Court of the United States. Unless, however, there is immediate action, and that tribunal takes up the question out of order, no decision can be reached until next autumn, as the court's summer recess is near at hand. In that case, the election for members of the convention cannot be held, unless the governor at once summons the Legislature in special session to pass a new registration law. Gov. Evans, who seems as youthful in mind as in years, at first declared that he should 'treat the proceeding with the contempt it deserved,' but he has learned something during the past fortnight, and now announces that 'we will take no action without mature deliberation.' "

## CONDITIONS PRECEDENT OR SUBSEQUENT.

A CONDITION is something required to be done in the acquisition or retention of some right or estate. It is evident from the adjudications that a condition may be created by contract, or found inherent in the nature of the matter, or by reasonable implication from the circumstances. Conditions, therefore, arising from contract are defined as *express or in deed*, or existing by operation of law, are termed *implied or in law*.

The term "contract" is not used as invariably expressing a writing, for when founded upon consideration, "a promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract as much as any covenant." (2 Blackstone Com. [Cooley's ed.], 157; *McCreery v. Day*, 119 N. Y. 1, 8, 9; *Reynolds v. Robinson*, 110 id. 654; *Engelhorn v. Retlinger*, 122 id. 76, 80; *Juillard v. Chaffee*, 92 id. 529, 535; *Sands v. Crook*, 46 id. 564, 570; *Trustees v. Lynch*, 70 id. 440, 447; *Wilson v. Powers*, 131 Mass. 539; *Wendlinger v. Smith*, 75 Va. 309; *Westman v. Kramweide*, 30 Minn. 813; *Michels v. Oldsted*, 14 Fed. Rep. 219; *Wallis v. Litell*, 11 C. B. [N. S.] 369.)

It has been said that a condition cannot be annexed by parol to an instrument that is absolute in its terms, nevertheless the rule is well established that a writing which in form is a complete contract, of which there has been a manual tradition also, may not, however, become a binding contract until the performance of some condition resting in parol. (*Reynolds v. Robinson*, 110 N. Y. 654; *Thomas v. Scutt*, 127 id. 133, 137, 138; *Blewitt v. Boorum*, 142 id. 357, 365.)

Thus, a deed unconditional upon its face may be shown by parol to be subject to defeasance, having been intended as a mortgage merely, although no fraud or mistake existed. (*Odell v. Montross*, 68 N. Y. 490, 502, 503; *Horn v. Keteltas*, 46 id. 605, 609; *Barry v. Colville*, 120 id. 306; *Clark v. Henry*, 2 Cow. [N. Y.] 324, 332; *Thomas v. Scutt*, 127 N. Y. 140.)

In the expression of conditions the law has not thus far appropriated any set form of words as absolutely necessary. The words "upon condition," "provided," "if it shall so happen," "so that," "upon the consideration," "subject to the condition," "and if," or others have been declared appropriate to a condition, a limitation or a covenant, the words used not being conclusive. (*Craig v. Wells*, 11 N. Y. 315, 320; *Gibert v. Peteler*, 38 id. 165, 168; *Post v. Weill*, 115 id. 361, 369, 370; *Avery v. R. R. Co.* 106 id. 142, 154; *Graves v.*

Deterling, 120 id. 447, 456, 457; Rich v. Atwater, 16 Conn. 419; 57 Mass. [3 Cush.] 285.)

Conditions never exist *merely* from the use of technical or precise phraseology or formal arrangement of words. It is a maxim of the law that "he who considers merely the letter of an instrument goes but skin deep into its meaning." (Hay v. Ins. Co., 77 N. Y. 244.) Indeed, "technical words may be overlooked where they do not inevitably evidence the intention of the parties" (Post v. Weill, 115 N. Y. 361, 366, 371; Graves v. Deterling, 120 id. 447, 456, 457), and that which is a condition must be some substantial provision, which cannot be severed from the agreement, and leave the balance, within any fair interpretation, as the contract of the parties.

The question must, therefore, "depend upon the intention of the parties, to be collected in each particular case, from the terms of the agreement itself and from the subject-matter to which it relates" (Glaholm v. Hays, 2 M. & G. 257, 266; Barruso v. Madan, 2 Johns. 145, 148; Tipton v. Feitner, 20 N. Y. 423, 431, 433; Towle v. Remsen, 70 id. 303, 311, 322; Bank of M. v. Recknagel, 109 id. 483, 491; Coleman v. Beach, 97 id. 545, 553, 554; Schnorer v. Market Ass'n, 99 Mass. 285), considering, also, the circumstances surrounding the subject of the agreement, the situation and relations of the parties, the nature of the acts provided for (Lyon v. Hersey, 103 N. Y. 264, 270; Post v. Weill, 115 id. 361, 369, 370, 375; Avery v. R. R. Co., 106 id. 142, 154, 155; Blossom v. Griffin, 18 id. 569, 574; French v. Carhart, 1 id. 93, 102; Coleman v. Beach, 97 id. 545, 553, 554; Bromley v. U. S., 96 U. S. 168, 173, 174; Merriam v. U. S., 107 id. 437, 441; U. S. v. Gibbons, 109 id. 200, 203; Williamson v. McClure, 37 Penn. St. 402; Kencken v. Voltz, 110 Ill. 264; Tracy v. Chicago, 24 id. 500; Graves v. Legg, 9 Exch. 709, 715), and "in the light of the cardinal rule that a writing contains all that may fairly be implied from it." (Jones v. Kent, 80 N. Y. 585, 588; Booth v. Mill Co., 74 id. 15, 21; Jugla v. Trouett, 120 id. 21, 27, 28; Gelpe v. Dubuque, 1 Wall. [U. S.] 222; Robbins v. Rollins, 127 U. S. 622, 623.)

That course leads directly to the additional conclusion that something required of one party precedes or follows that of the other party, thereby causing the division of *conditions precedent* or *subsequent*.

Coined from existing authorities, the Civil Code of California states "a condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is to be performed," and "a condition subsequent is one referring to a future event, upon the happening of which the obligation be-

comes no longer binding upon the other party, if he chooses to avail himself of the condition." (§§ 1436, 1438.)

There are no technical words, however, to distinguish one from the other, and whether the requirement or stipulation be a condition precedent or subsequent is a question of construction, not always readily determined by fixed rules, though the rules for finding the intention of the parties are the same as those in regard to covenants. (Parmlee v. R. R. Co., 6 N. Y. 74, 80.)

"There are," says Lord Mansfield, "three kinds of covenants; first, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, there are covenants which are conditional and dependent, in which the performance of one depends on the prior performance of another, and therefore till the prior condition is performed the other party is not liable to an action on his covenant; there is also a third sort of covenants, which are mutual conditions to be performed at the same time, and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act." (Kingston v. Preston, cited, 2 Doug. 689, 690; Lester v. Jewett, 11 N. Y. 453, 457.)

As declared by the same learned jurist, "the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." (Jones v. Barkley, 2 Doug. 684, 691; Havelock v. Geddes, 10 East, 555, 563; Fishmongers Co. v. Robertson, 5 M. & G. 131, 197; Seeger v. Duthie, 8 C. B. [N. S.] 45, 74; Grant v. Johnson, 5 N. Y. 247, 250; Parmlee v. R. R. Co., 6 id. 74, 80; Lester v. Jewett, 11 id. 453, 457, 458; Tipton v. Feitner, 20 id. 423, 425; Paine v. Brown, 37 id. 228, 232, 233; Post v. Weill, 115 id. 361, 370; Seeden v. Pringle, 17 Barb. [N. Y.] 458; Dox v. Dey, 3 Wend. 357, 359; Gardner v. Corson, 15 Mass. 499, 503; Tileston v. Newell, 13 id. 271, 287; Knight v. Worsted Co., 56 id. [2 Cush.] 271, 287; Cadwell v. Blake, 72 id. [6 Gray] 402; 407; Schwerner v. Market Ass'n, 99 id. 285, 298; Sears v. Fuller, 137 id. 326; Phillips v. Car Co., 82 Penn. St. 368; Leonard v. Dyer, 26 Conn. 172, 176; Smith v. Lewis, id. 110; Kettle v. Harvey, 21 Vt. 301, 305; Sewall v. Wilkins, 14 Me.

168; *Mfg. Co. v. Armstrong*, 19 id. 147; *The Railroad v. Brewer*, 67 id. 295; *Putnam v. Mellen*, 34 N. H. 71, 79; *K. P. Mills v. Slater*, 12 R. I. 82; *Adrian v. Lane*, 13 S. C. 183; *Hollis v. Chapman*, 33 Tex. 1; *Brokenburg v. Ward*, 4 Rand. [Va.] 352; *Malcomson v. Morton*, 11 Ir. L. R. 230; *Moore v. Waldo*, 69 Mo. 277; *Waldron v. Coal Co.*, 7 Ill. App. 542; *Runkle v. Johnson*, 30 Ill. 328; *R. R. Co. v. Butts*, 50 Cal. 574, 577; *Southwell v. Beezly*, 5 Oreg. 458; *Hamilton v. Thrall*, 7 Neb. 210; *R. R. Co. v. Howard*, 13 How. [U. S.] 307; 339; *Pollock v. Electric Ass'n*, 128 U. S. 447; *Ashmann v. Penn. Co.*, 4 Dutch. [N. J.] 185.)

One general rule will solve many cases, however, if the thing conditioned is to happen or exist before the right accrues or estate vests, the condition is precedent; if after, it is subsequent. (*Nicoll v. R. R. Co.*, 12 N. Y. 121, 130; *Towle v. Remsen*, 70 id. 303, 311, 322.)

While the ruling upon and interpretation of one agreement will seldom aid in the construction of another, except as it may illustrate some general rule of interpretation applicable to both, the rules inferred from or arising under the authorities, for separating or distinguishing conditions are chiefly these:

1. Where the terms of the agreement or the nature of the case, requires the things to be done by one party to precede those by the other party, the former may not sue without actual or offered performance as a condition precedent to liability by the latter, while the former may be sued by the latter, although nothing has been done or offered to be done by him, because the former relied, not upon performance by the latter, but trusted to his remedy by action. (*Paine v. Brown*, 37 N. Y. 232, 233; *Glaholm v. Hays*, 2 M. & G. 257, 266, 268; *Mattock v. Kinglake*, 10 Ad. & E. 50, 55-57; *Decker v. Jackson*, 6 C. B. 103, 112; *Grant v. Johnson*, 5 N. Y. 247, 253; *Acer v. Hotchkiss*, 97 id. 395, 403; *Eddy v. Davis*, 116 id. 247, 252; *Kirtz v. Peck*, 113 id. 222, 228; *Byron v. Low*, 109 id. 291, 294; *Phelan v. The Mayor*, 119 id. 86, 90; *De Kay v. Bliss*, 120 id. 91, 96; *Smith v. Brady*, 17 id. 173, 185, 187, 188, as modified in *Woodward v. Fuller*, 80 id. 312, 315; *People's Bank v. Mitchell*, 73 id. 406, 411, 415; *Parke v. Trading Co.*, 120 id. 51, 56; *Champion v. White*, 5 Cow. [N. Y.] 509, 510, 511; *M. D. Foundry v. Hovey*, 38 Mass. [21 Pick.] 417, 438, 439; *Knight v. Worsted Co.*, 56 id. [2 Cush.] 271, 286, 287; *Cadwell v. Blake*, 73 id. [6 Gray] 402; *Gates v. Ryan*, 115 id. 596; *Allard v. Belfast*, 40 Me. 369, 376; *Connor v. Atwood*, 57 id. 100, 115; *Savage Mfg. Co. v. Armstrong*, 19 id. 147, 149; *Palmer v. Mellen*, 34 N. H. 71, 79; *Sumner v. Parker*, 36 id. 449, 454; *Kettle v. Harvey*, 21 Vt. 301, 305; *Rockwell v. Newton*, 44

*Conn.* 333; *Shereen v. Moses*, 84 Ill. 448, 450, 451; *Barney v. Giles*, 120 Ill. 154; *Arnold v. Cons. Co.*, 85 Iowa, 99, 101; *Cooper v. McKee*, 53 id. 239; *R. R. Co. v. Fort Scott*, 15 Kans. 485; *Sweeney v. U. S.*, 15 Ct. of Cl. 400; *Ex parte Koehler*, 24 Fed. Rep. 107; *Rives v. Baptiste*, 25 Ala. 382.)

2. Where a definite time is either fixed by the contract or ascertainable from the circumstances for the payment of money, such time happening *after* the thing which is the consideration for the payment is to be performed, then the money is not owing or an action therefor maintainable without actual or tendered performance. (*Paine v. Brown*, 37 N. Y. 232, 233, and 2 Smith's L. O. [9th ed.], 1223, note 2; *Glaholm v. Hays*, 2 M. & G. 257, 266, 268; *Grant v. Johnson*, 5 N. Y. 247, 250, 254; *Eddy v. Davis*, 116 id. 247, 242, 255; *People's Bank v. Mitchell*, 73 id. 406, 411; *Nolan v. Whitney*, 88 id. 648, 649, 650; *Bean v. Atwater*, 4 Conn. 13, 15.)

3. Where each party is to do the things required at the same time, or concurrently, there arises dependent obligations, operating as mutual or concurrent conditions, whereby neither can default the other or maintain suit until there has been performance or offer to perform what was necessary or specified on his part. (*Paine v. Brown*, 37 N. Y. 232, 233; *Callenon v. Briggs*, 1 Salk. 112; *Goodson v. Munn*, 4 T. R. 761; *Glazebrook v. Woodrow*, 8 id. 366; *Kirtz v. Peck*, 113 N. Y. 222, 228; *Morris v. Sliter*, 1 Den. [N. Y.] 59, 60; *Williams v. Healy*, 3 id. 363, 366; *Morange v. Morris*, 3 Keyes [N. Y.], 48, 50; *Lester v. Jewett*, 11 N. Y. 453, 457, 458; *Eddy v. Davis*, 116 id. 247, 252, 254; *Nelson v. Fireproof Co.*, 55 id. 480, 484; *Parker v. Parmlee*, 20 Johns. [N. Y.] 130, 134; *Hudson v. Swift*, id. 24, 26; *Champion v. White*, 5 Cow. [N. Y.] 509, 510, 511; *James v. Burchell*, 82 N. Y. 108, 113; *Hapgood v. Shaw*, 105 Mass. 276, 278, 279; *Smith v. R. R. Co.*, 88 id. 262, 272, 273; *Knight v. Worsted Co.*, 56 id. [2 Cush.] 271, 286, 287; *Kane v. Hood*, 30 id. [13 Pick.] 281, 283, 284; *Hunt v. Liverman*, 22 id. [5 Pick.] 395, 397, 398; *Dana v. King*, 19 id. [2 Pick.] 155, 156, 157; *Gardiner v. Corson*, 15 id. 499, 508; *Smith v. Lewis*, 26 Conn. 109, 116, 117; *Bean v. Atwater*, 4 id. 13, 15; *Stockton Soc. v. Hildreth*, 53 Cal. 721, 723; *Clark v. Weiss*, 87 Ill. 438, 441; *Hough v. Rawson*, 17 id. 588, 591, 592; *Simmons v. Sleeth*, 45 Ind. 598, 599, 600; *Moore v. Waldo*, 69 Mo. 277, 280; *Wyvell v. Jones*, 37 Minn. 68, 69; *Putnam v. Mellen*, 34 N. H. 71, 80; *Cobb v. Hall*, 33 Vt. 233, 237, 238; *Phelps v. Hubbard*, 51 id. 489, 493, 494; *Faulkner v. Hebard*, 26 id. 452; *Stokes v. Grant*, 3 Grant [Penn.] Cas. 241; *Powell v. R. R. Co.*, 12 Oreg. 488; *Powell v. R. R. Co.*, 14 id. 356; *Dorland v. Greenwood*, 1 McCrary [Cir. Ct. U. S.], 337; *Fry v. Johnson*, 22 How. Pr. [N. Y.] 316; *Egbert v. Chew*, 2 Gr.

(N. J.) 446; Biddle v. Coryell, 3 Har. [N. J.] 377; Courtright v. Deeds, 37 Iowa, 503; Bridge Co. v. Greene, 53 id. 562.)

4. Where the mutual promises, acts or covenants apply to the whole consideration on both sides they are mutual conditions precedent, whereby actual or offered performance must appear to cause default or authorize recovery. (Paine v. Brown, 37 N. Y. 232, 233; Havelock v. Geddes, 10 East, 555, 564; Ritchie v. Atkinson, id. 295, 306; Atkinson v. Smith, 14 M. & W. 695, 696; Stavers v. Curling, 3 Bing. [N. C.] 355, 368; Boon v. Eyre, 2 Wm. Black, 1312; Boon v. Eyre, 1 H. Black, 272, n.; Poussard v. Spiers, 1 Q. B. Div. 410; Tipton v. Feitner, 20 N. Y. 423, 430, 431; Baker v. Higgins, 21 id. 397, 399; Avery v. Nelson, 81 id. 341, 344, 347; Mount v. Lyon, 49 id. 552, 553, 554; Catlin v. Tobias, 26 id. 217, 222; Butler v. Butler, 77 id. 472, 474, 475; Nightingale v. Eiseman, 2 N. Y. Supp. 779, 780; Hazard v. Hoxie, 6 id. 295; Archer v. McDonald, 36 Hun, 194; Pepper v. Haight, 20 Barb. 429; Dox v. Day, 3 Wend. 356, 9 id. 129; Knight v. Worsted Co., 56 Mass. 271, 278, 279; M. D. Foundry v. Hovey, 38 id. 417, 439; Lord v. Belknap, 55 id. 279, 284; Clough v. Baker, 48 N. H. 254, 257; Butler v. Manning, 52 Mo. 497; Tilden v. Besley, 42 Mich. 100; Burchardt v. Burchardt, 86 Ohio St. 261; Newman L. Co. v. Purden, 41 id. 378; Scheland v. Orpelding, 6 Oreg. 258; Hartley v. Decker, 89 Penn. St. 470; Weichart v. Hook, 83 id. 434; Alcott v. Hynes, 105 id. 350; Barry v. Alsburg, 6 Litt. [Ky.] 151; Blackwell v. Foster, 1 Metc. [Ky.] 88; Stansberry v. Fringer, 11 Gill. & J. [Md.] 149; R. R. Co. v. Fort Scott, 15 Kans. 435.)

5. Where the promises, acts or covenants apply only to part of the consideration on both sides, so that any breach or failure may be compensated in damages, they are probably independent obligations or covenants, not conditions, thereby allowing recovery upon the original contract without complete performance, but subject to counter-claim for damages. (Paine v. Brown, 37 N. Y. 232, 233; Stavers v. Curling, 3 Bing. [N. C.] 355; Carpenter v. Cresswell, 4 id. 409; Fishmongers Co. v. Robertson, 5 M. & G. 131, 197; Graves v. Legg, 9 Ex. 709, 715; Bettini v. Gye, 1 Q. B. D. 183; Campbell v. Jones, 6 T. R. 570; Seeger v. Duthie, 8 C. B. (N. S.) 45, 74; Ritchie v. Atkinson, 10 East, 295, 306; Havelock v. Geddes, id. 555, 564; Boon v. Eyre, 1 H. Black, 272, n.; Bogardus v. Ins. Co., 101 N. Y. 329, 340; Tipton v. Feitner, 20 id. 423, 430, 431; Grant v. Johnson, 5 id. 247, 250, 252; Paine v. Brown, 37 id. 232, 233; De Kay v. Bliss, 120 id. 91, 97; Tompkins v. Elliott, 5 Wend. 496, 499; Dey v. Dox, 9 id. 129, 133; Nolan v. Whitney, 88 N. Y. 648, 650; Cunningham v. Morell, 10 Johns. 203, 205; Bennett v. Pixley, 7 id. 249, 250; Azee-

man v. Levy, 5 N. Y. Supp. 418, 419; Moree v. Taylor, 42 Hun, 45; Knight v. Worsted Co., 56 Mass. [3 Cush.] 271, 278, 279; Foundry Co. v. Hovey, 38 id. [21 Pick.] 417, 439; Lord v. Belknap, 55 id. [1 Cush.] 279, 284; Scott v. Coal Co., 89 Penn. St. 231; Leggett v. Smith, 3 Watts, 331; Quigley v. De Haas, 83 Penn. St. 267; Ins. Co. Appeal, id. 396; Rugg v. Moore, 110 id. 236; Allard v. Belfast, 40 Me. 369, 377; Connor v. Atwood, 57 id. 100, 105; Dibol v. Minot, 9 Iowa, 403; Veerkamp v. Drying Co., 53 Cal. 229; Speer v. Sneider, 29 Minn. 463; Baeder v. Currie, 44 N. J. L. 208; Canford v. Dist. of Col., 20 Ct. of Cl. 376.)

6. Conditions in grants are not favored in law, hence they must be clearly expressed, and are not sustained by mere inference or recital. In arriving at the meaning of the words used, that which is in form a condition, a breach of which forfeits all estate, is frequently construed as a covenant on which only the actual damages can be recovered. (Woodworth v. Payne, 74 N. Y. 196, 199; Craig v. Wells, 11 id. 315, 320; Lyon v. Hersey, 193 id. 264, 270; Nicoll v. R. R. Co., 12 id. 121, 130; Post v. Weill, 115 id. 361, 375; Avery v. R. R. Co., 106 id. 142, 155; Graves v. Deterling, 120 id. 447-455; R. R. Co. v. Butler, 50 Cal. 574; Hollis v. Chapman, 36 Tex. 1; Labere v. Carleton, 53 Me. 211; Emerson v. Sampson, 43 N. H. 475; Hadley v. Mfg. Co., 4 Mass. [4 Gray] 140, 145; Southard v. R. R. Co., 2 Dutch. [N. J.] 13; Thompson v. Thompson, 9 Ind. 323; Varis v. Renshaw, 49 Ill. 425.)

The intention of the parties must, therefore, be ascertained in every practicable way known to the law, and must, when ascertained, control adjudications. As the effect of conditions precedent has been oftentimes to prevent the courts from administering justice according to the equities of the case, it is not surprising to read so frequently that constructions productive of such conditions should not be encouraged, or that courts looking beyond the contract to its performance or the inequality of losses, have attempted to conform the rule of construction to the remedy invoked; or, interpolated some stipulation into the agreement or transaction from acts subsequent thereto, whereby the confusion, difficulty or perplexity experienced in the law of conditions has chiefly arisen.

FRED'K M. EVARTS.

RAILROAD COMPANY — CONSTRUCTION OF ROAD IN STREET.—An abutting property owner is not estopped to sue on account of the construction of a railroad in a street by the fact that during its construction he knew thereof, and took no measures to prevent it. (Maysville & B. S. R. Co. v. Ingraham [Ky.], 30 S. W. Rep. 8.)

**IMPORTANT LAWS AND AMENDMENTS  
ENACTED BY THE LEGISLATURE OF  
THE STATE OF NEW YORK OF 1895.**

Chap. 9. Mr. Lawson's, the procedure bill for cities of the first class.

Chap. 11. Mr. Lawson's, the New York city power of removal bill.

Chap. 13. Mr. Ainsworth's bill, extending the power of audit of the State comptroller over charitable institutions and giving him the appointment of a second deputy.

Chap. 23. Senator Pound's, providing that general election officers shall serve at charter elections.

Chaps. 29 and 30. Senator Pound's, enabling Donald Stewart Moore and Ovid Robbillard to be admitted to practice in the State Supreme Court as attorneys and counselors at law.

Chap. 32. Mr. Ainsworth's, providing for the payment of experts employed by the State comptroller to examine the books of racing associations in connection with the collection of the Ives pool tax.

Chap. 34. Mr. Wray's, providing for apportionment of compensation among counties in the second judicial district, not including King's county, to provide for payment of Supreme Court justices whose terms are abridged by the Constitution.

Chap. 35. Mr. Lawson's, to prevent the display of foreign flags on public buildings.

Chap. 39. Senator Persons', regarding the change of location of banks.

Chap. 42. Senator Pound's, amending the Civil Code relative to jail liberties in certain counties.

Chap. 63. Mr. O'Grady's, relating to the office and defining the duties of the special county judge of Monroe county.

Chap. 70. Senator Mullin's, to authorize the commissioner of agriculture to settle and compromise certain claims in favor of the State for violations of sections 24, 27, 28 and 29 of the law regulating the sale and use of oleomargarine.

Chap. 72. Mr. O'Grady's, to amend the Penal Code relating to loan, use or sale of personal credit or security taking usury.

Chap. 73. Senator Parson's, permitting the use of the Myers automatic ballot machine in towns, villages cities and counties, voting precincts or districts to be arranged to contain not more than 600 votes.

Chap. 78. Mr. E. C. Stewart's, to amend chapter 460 of the Laws of 1863 relative to the lands granted by Congress to the several States and Territories which may provide colleges for the benefit of architecture and the mechanic arts.

Chap. 93. Senator Mullin's, repealing the law providing for a State agent of discharged convicts.

Chap. 97. Mr. Burns's, providing for commissioners to confer with like representatives of the State of New Jersey for the acquisition of the Palasides of the Hudson river by the United States and making an appropriation therefor.

Chap. 98. Mr. Horton's, to amend the Code of Criminal Procedure in reference to witness's fees.

Chap. 106. Mr. F. F. Schultze's, incorporating the Grand Court of the State of New York for the Ancient Order of Foresters of America.

Chap. 107. Mr. Hamilton's, providing for a second deputy to the secretary of state who shall also be a clerk in the office and receive no extra compensation. The secretary of state is also authorized to affix his signature to certain records of the office left unsigned by his predecessors with the same power and effect as if they had signed.

Chap. 114. Mr. Cutler's, making the maintenance of the Penny bridge over the Minisceongo creek, in Rockland county, a State charge.

Chap. 119. Mr. Norton's, relating to stay upon appeal to the Court of Appeals in certain cases.

Chap. 125. Senator Coggeshall's, incorporating the missionary society of the Calvinistic Church in the United States of America.

Chap. 126. Senator Smelzer's, changing the name of the village of Havana to Montour Falls.

Chap. 128. Senator Raines's, giving the Ontario county clerk six cents a folio for recording instruments.

Chap. 134. Mr. Nixon's, in relation to agents appointed by the commissioner of agriculture to investigate the diseases of yellows or black knot.

Chap. 138. Senator Robinson's, providing that when a nominee dies, that the certificate of the person named in his place shall be filed at least four days before election.

Chap. 144. Mr. Kern's, providing that county clerks shall keep their offices open until 6 P. M. between March 31 and October 1.

Chap. 145. Mr. Pavey's, amending the Revised Statutes relative to limited partnerships.

Chap. 149. Mr. Gerst's, relative to the dissolution of rural cemetery associations.

Chap. 150. Mr. Whittet's, providing that sheriffs' offices shall be kept open from 9 A. M. to 5 P. M. from November 1 to April 1, and during all other months from 8 A. M. to 6 P. M.

Chap. 153. Mr. Norton's, providing that where a plaintiff is not a resident of the county, or if there are two or more plaintiffs when all are non-residents thereof, the action must be brought in the town where the defendant resides or in any adjoining town thereto.

Chap. 154. Senator Coggeshall's, providing that if a resident village population shall exceed 1,200, for every 400 additional population a trustee may

be elected, until the entire number, exclusive of the president, shall be nine.

Chap. 153. Mr. A. R. Conkling's, providing that any person who solicits from a candidate for an elective office, after this November, money or property, or seeks to induce him to buy admission tickets to balls, picnics or fairs or entertainments, shall be guilty of a misdemeanor. This provision shall not apply to a request for a contribution of money by an authorized representative of the party or organization to which the candidate belongs.

Chap. 165. Senator Wolff's, providing for the making and use in New York city of diphtheria anti-toxine and other anti-toxines.

Chap. 166. Senator Robertson's, incorporating the trustees of science and historic places and objects, to care for certain historic landmarks.

Chap. 171. Senator Kilburn's amendment to the Revised Statutes relative to dowers.

Chap. 172. Senator O'Connor's, amending the State care act relative to the discharge of patients.

Chap. 175. Mr. Husted's, relative to proceedings in voluntary dissolution of corporations.

Chap. 177. Mr. Stevenson's, providing that stenographers appointed in the Supreme Court shall be residents of the judicial districts in which they are appointed.

Chap. 178. Senator O'Connor's, authorizing foreign insurance companies to do a court-bond business in this State.

Chap. 179. Mr. Fuller's, amending the game law relative to the close of the season for web-footed wild fowl.

Chap. 181. Mr. Stevenson's, relative to laying out and dividing highways upon town lines between towns, cities or villages.

Chap. 187. ?

Chap. 188. Mr. Weed's, declaring Black brook and the west branch thereof, known as Berry Mills creek, a public highway.

Chap. 194. Mr. Maddens's, the Polak escheat bill.

Chap. 200. Mr. Kern's, amending the town law in relation to town auditors.

Chap. 202. Mr. J. N. Stewart's, amending the general sewer construction law.

Chap. 203. Senator Parker's, amending the general health law.

Chap. 208. Senator O'Connor's, authorizing the land board to sell lands under lake waters and off Long Island and to permit dredging companies to dump along the shores of the Hudson river.

Chap. 209. Mr. Fish's, the Astor-Tilden-Lenox library consolidation bill.

Chap. 211. Mr. E. C. Stewart's, authorizing the justice of the peace of Ithaca to act as recorder during the illness of that officer.

Chap. 218. Mr. O'Grady's, providing for the dis-

tribution to incorporated public libraries in this State of State department reports and certain public documents.

Chap. 220. Senator Wolff's, according to veteran's in State, county, city or village employ leave of absence for twenty-four hours on May 30 to participate in the exercises of Memorial Day.

Chap. 222. Mr. Andrews's, providing that every public school shall be provided with a United States flag and flagstaff.

Chap. 223. Senator Smelzer's, providing that a tie vote shall be deemed an affirmative decision in confirming certain preliminary orders at meetings of school commissioners.

Chap. 227. Mr. Horton's, legalizing certain acts of the board of education of school district No. 1 of Ontario, Wayne county.

Chap. 232. Mr. Sherwood's, relative to gospel funds and school lots in the several towns and counties of the State.

Chap. 233. Mr. Wilds's, relative to the disposition by police magistrates of charges for violating city ordinances.

Chap. 237. Mr. Wilds's, in relation to disorderly persons arrested in New York city.

Chap. 239. Mr. Winne's, amending the town law relating to commissioners of highways.

Chap. 240. Senator Higgins's, taxing foreign stock corporations annually one-eighth of one per cent on the amount of capital stock employed in the State excepting banking, fire, marine, casualty and life insurance companies, and corporations wholly engaged in carrying on manufactures in this State, co-operative fraternal insurance companies, endowment orders and building and loan associations.

Chap. 241. Mr. Vacheron's, amending the Code of Civil Procedure relative to fees of referees upon sales of real property.

Chap. 243. Mr. Ainsworth's, regulating the performance of highway labor by the Thousand Islands Park Association in the town of Orleans, Jefferson county.

Chap. 259. Mr. Cartwright's, authorizing Walton, Delaware county, to transfer rights in certain real estate.

Chap. 260. Senator Ahearn's, providing that when a member of the uniformed fire department of New York city is killed in performance of duty or dies from injuries resulting from an accident while in service, his widow, if he has

Chap. 262. Mr. Gray's, amending the town law relative to voting on the question of repairing highways.

Chap. 266. Mr. Schoepflin's, providing that supervisors in counties of not less than 300,000, nor more than 60,000, inhabitants, and containing a city whose supervisors are elected for more than a year,



the supervisors of the towns shall be elected for a like period.

Chap. 267. Mr. Armstrong's, amending the Civil Code relative to qualifications of judges.

Chap. 273. Mr. Ainsworth's, amending the consolidated school act relative to voting on the question of school repairs.

Chap. 274. Mr. Ainsworth's, amending the consolidated school law providing that when bonds are issued when authorized by the vote of the inhabitants of a school district, the board of trustees shall submit a statement of same to the clerk of the board of supervisors.

Chap. 285. Senator Stapleton's, authoring the Supreme Court to lease premises 2019 Fifth avenue, New York city.

Chap. 287. Mr. Vacheron's, amending the Penal Code making it a misdemeanor to open and publish private telegrams, letters, etc., by others than the persons to whom addressed.

Chap. 289. Mr. Gleason's, amending the Civil Code relative to actions for dower.

Chap. 310. Mr. Ainsworth's, amending the county law relating to statements of indebtedness.

Chap. 321. Senator Parsons's, relating to the qualifications of jurors.

Chap. 324. Mr. Nixon's, abolishing the office of mine inspector.

Chap. 316. Mr. Schoepflin's, providing for the incorporation of associations for lending money on personal property, and to forbid certain loans of money, property or credit.

Chap. 327. Mr. Armstrong's, providing for hour sittings of boards of registry in election districts of cities except New York and Brooklyn.

Chap. 328. Mr. Keenholts's, extending to December 31, 1905, the time for the completion of the New York and Canadian Pacific Railway.

Chap. 330. Mr. Husted's, amending the highway law relative to the erection of guide boards and posts upon highway intersections.

Chap. 331. Mr. Armstrong's, amending the Code of Civil Procedure relative to searches.

Chap. 332. Mr. Nixon's, amending the county law relative to the taxation of dogs.

Chap. 337. Mr. Burns', amending the consolidated school law relative to the qualifications of voters and eligibility of certain persons for school officers.

Chap. 344. Mr. Brush's, amending the civil service law.

Chap. 349. Mr. Gerst's, amending the Code of Civil Procedure relating to services of summonses upon express or insurance companies.

Chap. 350. Mr. Ainsworth's, amending the general municipal law relative to the registry of bonds.

Chap. 351. Mr. Hamilton's, providing for free

public baths in cities of the first and second class, both hot and cold water to be provided.

Chap. 352. Mr. Gardiner's, providing for the assessment and collection of certain appropriations made by the superintendent of banks.

Chap. 354. Mr. Terry's, relative to the filing of statements of the interest on mortgages.

Chap. 356. Mr. Norton's, amending section 3070 of the Code of Civil Procedure relating to offers to compromise before return.

Chap. 362. Assemblyman Burns', authorizing the State superintendent of public instruction to furnish additional facilities for instruction in natural history, geography and kindred subjects by means of pictorial representation and lectures to the free common schools of the cities and villages that have, or may have, superintendents of free common schools, and appropriating \$25,000 for that purpose.

Chap. 363. Senator Owens', appropriating \$6,000 for more fully organizing and equipping the volunteer life saving corps of inland waters of this State.

Chap. 365. Senator Mullin's, repealing the act, chapter 756 of the Laws of 1871, creating the office of shore inspector for New York harbor.

Chap. 375. Senator Child's, amending the highway law providing for the adoption of the county road system.

Chap. 376. Mr. Armstrong's, amending the Code of Civil procedure dividing the State into four judicial districts with appellate courts at New York, Brooklyn, Albany and Rochester.

Chap. 381. Mr. Howe's, providing that after October 1, 1895, all hospital buildings and asylums for the insane shall have properly constructed iron stairways on the outside for use in case of fire.

Chap. 383. Senator Donaldson's, relative to village boards of water commissioners.

Chap. 384. Senator Mullin's, relative to the drainage of agricultural lands of another person.

Chap. 395. Senator Donaldson's consolidating the State forest and fish and game commissions.

Chap. 399. Senator Ahearn's bill, providing for a hospital on Gouverneur slip, New York city, at a cost of \$200,000, for reception of persons injured or taken suddenly ill in the lower east side of New York.

Chap. 410. Senator Parker's bill, amending section 793 of the Code of Civil Procedure, relating to orders in preferred cases.

Chap. 411. Assemblyman C. C. Cole's bill, amending the highway law concerning the purchase of stone crushers and materials.

Chap. 412. Assemblyman Wray's, providing for a dog tax in New York and Brooklyn.

Chap. 413. Mr. Tobin's, the stone bill, providing that all stone to be used on public works in the State shall be dressed in the State.

Chap. 414. Mr. E. L. Smith's, amending the laws relative to the poor in Herkimer county.

Chap. 415. Mr. Gardenier's amending the banking law providing for filling vacancies in trustees of banking institutions.

Chap. 416. Senator Mullin's bill, defining the liability of towns for the construction and care of public buildings.

Chap. 417. Senator O'Sullivan's bill, providing that the mayor of each city of the State may issue certificates of transportation to policemen and firemen and telephone certificates for use in the performance of official duty.

Chap. 418. Senator Mullin's, to amend Laws of 1886, entitled "An act to provide for the taxation of fire and marine insurance companies."

Chap. 425. Mr. Ainsworth's, to amend Laws of 1881 providing for the raising of taxes for the use of the State upon certain corporations, joint stock companies and associations.

Chap. 426. Senator Guy's, to amend the Code of Civil Procedure relative to judicial settlement of accounts of execution and administrators.

Chap. 427. Mr. Gardiner's, to extend time for the completion of the New York, Boston, Albany and Schenectady Railroad Company.

Chap. 428. Mr. Fuller's, amending the act incorporating the New York Northern Railroad Company.

Chap. 429. Mr. Siebert's, amending an act to incorporate the River Bridge Company.

Chap. 430. Mr. Cutler's, to provide compensation for the members of boards of health in incorporated villages.

Chap. 435. Mr. Niles', incorporating Charles A. Dana, Oswald Ottenendorfer, Andrew H. Green, William H. Webb, Henry H. Cook, Samuel D. Babcock, Charles R. Miller, George G. Haven, J. Hampton Robb, Frederick W. De Voe, J. Seaver Page, Rush C. Hawkins, David James King, Wager Swayne, Charles A. Peabody, Jr., Charles E. Whitehead, Charles R. Flint, Samuel Parsons, Jr., Morray Williams, Henry E. Gregory, Isaac W. Macray, Isaac Rosenwald, Hugh N. Camp, Andrew D. Parker, Cornelius Van Cott, William F. Havemeyer, Frederick Shannard, William W. Thompson, Alex. Hadden, Edward L. Owen, John H. Starin, Rush S. Haidekofer, William W. Goodrich, Albert H. Galatin, Frederick S. Church, Edward C. Spitzka, Robert L. Niles, Madison Grant, C. Grant La Farge and William Van Valkenburgh as the New York Zoological Society to establish a zoological garden in the city of New York.

Chap. 454. Mr. Percy's, amending the railroad law relating to foreclosure and sale of property under decree of United States courts.

Chap. 457. Mr. Rogers', amending the act in-

corporating the Beet Sugar Cooperative Community.

Chap. 459. Mr. Wilds', amending the act providing for the supply of hospitals with pure water.

Chap. 460. Mr. Brush's, raising the age of consent to 18 years.

Chap. 462. Mr. Schoepflin's, amending the law for the incorporation of villages.

Chap. 469. Mr. Sherwood's, amending the law providing for the supply of villages with water.

Chap. 473. Mr. Howe's, providing that the State lunacy commission, in place of the president of the State board of charities, shall be a member of the commission to determine the value of articles manufactured in the State prisons for use in public institutions.

Chap. 477. Senator Mullin's, providing that the presiding officer of each of the legislative branches may designate five persons to remain for thirty days after adjournment to do clerical work.

Chap. 480. Mr. Nixon's, amending the county law relative to the compensation of supervisors.

Chap. 485. Mr. Ballard's, amending act authorizing towns to raise funds for celebrating Memorial day.

#### THE RIGHTS AND RESPONSIBILITIES OF PARENTS.

IT is pleasing, in reviewing the legal nature of the bond between parent and child, to discover that, except in the feudal times, the welfare of the child has been the guiding influence of our statutes and leading cases in deciding the difficulties and disputes that have arisen. It is, on the other hand, a disappointment to realize that these difficulties and disputes have arisen more often than not through the inability of husband and wife to agree. Indeed, the revenge often adopted by the husband or wife to punish his or her partner in life has generally been the attempting to gain the exclusive possession of the children of the marriage, to wean away their affections, or to instil into them some form of religion known to be the special abhorrence of the other parent. The history of the relation of parent and child may be divided legally into three periods: (1) Feudal; (2) 1656-1857; (3) 1857 to our own times. First of all, there are the feudal relations arising from the tenure of lands. In these cases the lord stood *in loco parentis* to the child under the following circumstances: One of these relations was called "guardianship in chivalry." It could only arise where the estate vested in the infant by descent, and provided that the male infant was under the age of twenty-one, and the female infant under the age of fourteen. (These ages were not settled in Bracton's time, but were finally determined in Littleton's.) It embraced the power

over the person of the child, and also the right of administration of its lands and tenements. As it gave to the guardian the rents and profits of those lands, it was more of a profit than a trust, and was saleable. Where the lord was king, he took the guardianship of the person of the child, no matter what was the age of the tenure; but if there were several lords, of which the king is not one, then the lord whose tenure was most ancient took charge of the person of the child by priority. This lasted until the male infant was twenty-one, and the female infant was sixteen or married. But here note the most important point. This guardianship of the person of the child was entirely subject to the rights of the father (but father only; it did not extend to any other relation), if the infant was the father's heir apparent. The only obligation of the guardian was one of maintenance. It is somewhat incredible that the ghastly idea of selling this moral responsibility with the rents and profits of the infant's estates continued up to the reign of Charles II.

This right of the father over the child, greater than the right of the lord of whom other lands were held, was called the "guardianship by nature," it alone in its primary condition appertained to the heir apparent of a father; but this is in a measure contradicted, because it is said that the existence of the writ of trespass, *Quare consanguineum ei heredem cepit*, which could be issued by the mother, seemed to infer that the power possessed by the mother to gain guardianship signified the survival of such an office in the mother on the death of the father. As time went on the idea of "guardianship by nature" relaxed its limited meaning until we find that the father was only guardian by a right superior to that of all other relations. On his death a mother, and failing her the other relations in turn of their degree of consanguinity, could obtain the office. This natural guardianship, it must be remembered, only applied to the heirs apparent, and only to female heiresses apparent on a presumptive basis that at any time an heir apparent could be born. Whatever was the character of this relation of "nature," it, in its exclusiveness as only applying to the eldest son or daughter, was feudal. The relation between the parents and the other children was on different basis, it was called "guardianship by nurture," and lasted until the child, male or female, was fourteen, and not a day longer; it only applied to the father or mother, and no other relation could hold it. When we remember the early age of marriage, the early age at which sons went out into the world to do knight's service, we can well understand that the age of fourteen was to the generation we are now speaking of a relatively much more advanced age than it is to the one we our-

selves live in. Two other relations of this nature were in existence in the very early feudal times. "Guardianship by soccage," which was dependent upon the infant becoming entitled to soccage lands and took place by descent only. That is, the infant must have inherited *qua* infant soccage lands. It differed from guardianship in chivalry in that it was a personal trust for the benefit of the child, was not saleable, and gave the ward a right to call upon the guardian for an account of the profits of the lands. The other office was one accruing by custom of the manor, where the infant inherited copyhold land. The nature of it was entirely dependent upon the custom of the manor. If now any infant found itself without any guardian, that is, if all these four relations failed, there were four others which could supply the infant with a protector. The first was the election of a guardian by the infant itself, which took place generally by application to the judge on circuit, but which might be by a deed, or even by parol appointment. Curiously, even in 1818, in a case (Anon. 2 Ves. Sen. 374), the judge is reported to have said: "If the infant has any soccage land and is of the age of twelve if female, or fourteen if male, they may choose their guardian, as is frequently done on circuit." In this case the judge allowed the rightful guardian to keep the management of the estate, and gave to another the custody of the infant. The second guardianship, failing all others, was an appointment by the lord chancellor, and the origin of this is unknown, it being alleged by some to be on the same basis as the case of lunatics, whose interests are in the hands of the lord chancellor. The remaining two appointments were by the ecclesiastical courts and by any court. These two only arose where there was an inheritance in dispute, and where a next friend was required to act in a suit. Up to the reign of Charles II, what was then the relation? We may say: (1) If the infant (males under twenty-one and females under sixteen) inherited by descent any lands in knight's service, and was not heir or heiress to any lands which his or her father held, and the lord of whom he or she held lands became his or her guardian, as guardian in chivalry, both as to person and estate. The guardianship ended when the male infant became twenty-one, when the female became sixteen or married. The lord was liable for maintenance. (2) If the infant was heir apparent to his father, the father took the custody of the child, which was called the guardianship of nature, and lasted in the case of males till twenty-one. (3) Infants who were not inheritors of land by descent were under the guardianship of the father, and if the father died, of the mother, by virtue of the guardianship of nurture. It ceased at the age of fourteen. (4) The guardianship of infants taking soccage lands by de-

scent differed from that chivalry in that it was not saleable and ceased when the ward became fourteen years of age. (5) Guardianship by the custom of a manor over infants taking copyhold lands. (6) Failing the foregoing, (a) an infant if under fourteen could apply for a guardian, if over fourteen was considered not to require one; (b) or it could have one appointed by the lord chancellor, and in case of litigation, (c) by the ecclesiastical court, (d) or by any court where a suit was entered.

Hence, we may say that, except in cases of land tenure by infants the early law only looked upon the necessity of a guardian up to the age of fourteen, and may we argue that maintenance would only be enforceable up to that age by the same reasoning? Now comes a great change which Lord Justice Lindley in *Thomasset v. Thomasset* (July 17, 1894), very rightly said was an extension of a parent's rights by statute. The statute of 12 Car. 2, ch. 24, § 8, gave the father right to appoint a guardian to his child up to the age of twenty-one. When Lord Justice Bowen reviewed the question he said, in *Agar-Ellis v. Lascelles*, 1883, 50 L. T. Rep. N. S. 161; 24 Ch. Div. 317, said: "The strict common law gave to the father the guardianship of his children during the age of nurture, and until the age of discretion. The limit was fixed at fourteen years in the case of a boy, and sixteen in the case of a girl, but beyond this, except only in the case of an heir apparent, the father had no actual guardianship, in which case he was guardian by nature till twenty-one. That was what was called guardianship by nature in strict law. But for a great number of years the term guardian by nature has not been confined, so far as the father is concerned, to the case of heirs apparent."

It seemed natural to Lord Justice Bowen, as it did to others before him, that what a man may grant by will he should himself possess, and no doubt custom long before the reign of Charles II. had enlarged the power of father from the age of fourteen to twenty-one. [Note—it is interesting to compare the case of alienation of land by will being more ancient than the alienation of land *inter vivos*.] We pass now from this part of the subject, assuming that at this date the father had by custom power over the person of his child until that child was twenty-one, to different classes of cases which arose by reason of the powers of a court of common law over the body of a subject under restraint, and of a court of chancery over an infant who was a ward of the court. The powers of a court of common law arose by reason of the *habeas corpus*, and had nothing whatever to do with the relation of parent and child. Counsel has in various cases attempted to argue that the decisions on *habeas corpus* cases are decisions on the relation of father and child. Every judge has,

however, pointed out that a *habeas corpus* can only be sued out where a subject is kept under restraint against its will, and to explain what "against its will" means, the court has had to determine at what age a child has a will. Judges have been careful to explain that precocity of intellect is not the evidence of will; but on the other hand, it shows a weakness tending rather to injure than to enable a child to say what is best for it. The courts have gone back then to ancient history to fix the age of discretion for boys at fourteen and for girls at sixteen in determining at what age they may be allowed to decide whether they are under restraint against their will or not, and that a boy under fourteen and a girl under sixteen is under restraint against its will when in the custody of a third person, unless it is with its natural protector. For this argument compare *Rex v. Greenhill*, 1835, 4 Ad. & Ell. 643, "where the custody of a child is in the hands of a third person a presumption arises in favor of the father," and this can be rebutted by special evidence of cruelty, etc. And again, *Reg v. Clarke*, 1857, 7 Ell. & B. 186, where the judge says that the court must consider what the father would have wished had he lived, as was the natural protector of his child. By *Reg. v. Howes*, 1860, 3 E. & E. 332, we get a decision in favor of the father in the case of a girl of the age of sixteen. *Rex v. Delavel*, 8 Bur. 1435, is very definite, for in that case the court freed a girl over sixteen from restraint, but refused to make any order as to custody, at the same time declaring that in that respect it had discretion. We should submit the court had no discretion at that time: cf. also *Re Spence*, 2 Ph. 247. And in recent times we have the doctrine fully explained by Lord Esher.

It was contended in *Re Agar-Ellis*; *Agar-Ellis v. Lascelles ante*, that because when a girl is sixteen the father cannot, by a *habeas corpus*, get a return of his child, that therefore at that age the father has no control; but the master of the rolls refused to accept such an argument, because that a *habeas corpus* is only granted where a person is in illegal custody and without his or her consent. Although the law gives a father absolute control over his children until they attain the age of twenty-one, the father, in order to sue out a *habeas corpus*, must prove that there is custody without consent. The law has fixed the ages of fourteen and sixteen for boys and girls respectively, at which they may consent. Hence, a father will only be able to use a *habeas corpus* while the child is under the age which the law says it cannot refuse or consent. By this process of argument the Court of Appeal held that the comparative argument of cases under a *habeas corpus* was not available. The father will have the custody of his child by right unless ther-

are grave reasons against it, reasons why the court think will imperil the future of the child. The annotator in *ex parte Hopkins*, 3 P. Wms. 55, very pertinently says, as regards the *habeas corpus*, "the court will not, in a proceeding of that nature, determine private rights, as the right of guardianship evidently is."

Passing then from the jurisdiction of the common law courts we turn to that of the Court of Chancery over a ward, and we find that this jurisdiction was far in excess of any other court, and Courts of Chancery have by a series of luminous judgments always regarded the equity of the cases brought under their notice. In *Hall v. Hall*, 3 Atk. 721, those courts indorsed the rights of a guardian to choose a school, and in one case the judge sent his tipstaff to take charge of a recalcitrant undergraduate to Cambridge. And coming to more recent times, the policy of a Court of Chancery is well reviewed in *Re Magrath*, 67 L. T. Rep. N. S. 636 (1893); 1 Ch. 143. A new era set in after the Judicature Act, 1873, when courts of common law assumed the powers of the old Courts of Chancery. By section 25, clause 10, it was especially laid down that, "In questions relating to the custody and education of infants, the rules of equity are to prevail." We cannot here do better than quote the words of one or two very enlightened judgments. It is by this section we have quoted that the judges will now, no matter what court they are sitting in, consider that the welfare of the child is the cardinal principle to be considered. Lord Esher said in *Reg. v. Gyngall*, 69 L. T. Rep. N. S. 481 (1893); 2 Q. B. 232, "The court is placed in a position, by reason of the prerogative of the Crown, to act as a supreme parent of the children, and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of a child. The natural parent in any particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate and careful parent would do; the court may say in such a case, although they find no misconduct, say that they will not permit that to be done with the child which a wise, affectionate and careful parent would not do." The master of the rolls added that the court had to consider (1) the position of the parent; (2) the position of the child; (3) the age of the child; (4) the religion in so far as a child can have any.

The reader is also referred to *Re Spence*, 2 Ph. 247, per Lord Cottenham, L. C.: "I have no doubt about the jurisdiction, i. e., of a Court of Chancery over infants. The cases in which this court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of any-

body who is suggested to be improperly detained. This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patrie*, and the exercise of which is delegated to the Great Seal," and the principle is very well put in general terms by Lord Bowen in *Agar-Ellis v. Lascelles* (sup.): "Judicial machinery is quite inadequate to the task of educating children in this country. It can correct abuses, and it can interfere to correct the parental caprice, and it does interfere when the natural guardian ceases to be a natural guardian, and shows, by his conduct, that he has become an unnatural guardian; but to interfere further would be to ignore the one principle which is the most fundamental of all in the history of mankind, and owing to the full play of which a man has become what he is."

The most remarkable feature in all the cases which we have recited, seems to be the absence of any case which ordered a father to maintain his child. This is explained by the fact that the court of equity never interfered with the father except the child was a ward of court, and in that case the child, having generally separate estate of its own, there was no reason to order maintenance. There seems to have been a common-law duty of a father to maintain his children if he was in a position to do so: *Andrews v. Partington* (1790, 8 Bro. C. C. 60), but this has always been left to the conscience of the parent, excepting as regard the scanty provision enforceable by the poor laws. So much, then, for the law which applies whilst the father and mother are living together, and whilst only one is alive. The statutes which regulate divorce upon a new era of possibilities. By 20 and 21 Vict., c. 85, s. 35, in any suit for judicial separation or divorce, etc., the court was granted power to make proper provision for the custody, maintenance, and education of the children of the marriage; and by 22 and 23 Vict., c. 61, s. 4, this power was extended to enable the court to make the same orders subsequent to the time of granting the divorce or judicial separation. This statutory power is far in excess, as we see, to any power which any court held before. It is a new jurisdiction, converting a moral duty into a legal duty by reason of any conduct justifying judicial separation or divorce. Lord Justice Lindley, in his judgment of the case, *Thomasset v. Thomasset*, *supra*, says at once that, had he interpreted these statutes apart from subsequent cases, he should have said at once that the welfare of the children, which was imperilled by judicial separation or divorce warrants the allowance of maintenance up to the age of twenty-one.

We have not paused to distinguish between custody, maintenance and education. The first only

differs from the last two, in that the happiness of the child may be imperilled by forcing on a child a custody unsympathetic to it after the ages of fourteen and sixteen for boys and girls respectively. But it is superfluous to point out that the welfare of the child demands maintenance and education where it may not demand custody. This was well brought out in *Rex v. Delavel* already quoted. Lord Justice Lindley was then hampered by the following decisions: *Ryder v. Ryder* (1861), 3 L. T. Rep. N. S. 678; 2 S. W. & T. R. 225, a case where the court declined to order maintenance for a child over sixteen, because it said it could not order custody, and the false reasoning of this case is well set out by the learned judge: "*Ryder v. Ryder* was a decision of the full court, consisting of Sir Cresswell Cresswell, Mr. Justice Willes and Baron Channell, and it was there decided that the court had no jurisdiction to make any order as to the custody of children over sixteen. The main ground for this decision appears to have been that courts of common law did not make orders disposing of the custody of children over sixteen, and the divorce court had not the children before it, and could not therefore enforce against them any order it might make. This reasoning does not appear to me satisfactory. The divorce court could decide between the parents which parent should have the custody of the children. And even if the divorce court could not bring the children before it and exercise jurisdiction over them, still, if the divorce court had made an order binding on the parents, such an order might, if necessary and proper, have been enforced by proceedings in chancery. The effect of *Ryder v. Ryder* (*ubi sup.*) practically was to enable a delinquent father to set up the age of his infant child as an answer to an application for an order for its custody. This was, in my opinion, an unfortunate decision, but it is one from which the judicature acts have, in my opinion, set us free. It was also wrong to hold, as a matter of law, that maintenance followed custody, and that the court had no jurisdiction to order maintenance for a child over sixteen. This was decided in *Webster v. Webster* (1862), 6 L. T. Rep. N. S. 11; 31 L. J. 184, although Mr. Justice Willes, in *Ryder v. Ryder* (*ubi sup.*) had pointed out that it did not follow from that decision that maintenance could not be ordered for a child over sixteen. Even before the Judicature Act, 1873, the cases, in my judgment, went too far. But after that act, I confess my inability to understand how it can be right to hold that the statutory discretion conferred upon the court is restricted within the narrow limits previously supposed.

The precedent in *Webster v. Webster* had been followed in *Blandford v. Blandford*, 67 L. T. Rep.

N. S. 392 (1892), Prob. 148. Now the learned judge saw no reason why the power of the divorce courts should be so restricted. If the welfare of the children was the one point considered by the courts of law and equity, and if that welfare did not allow an enforced custody of a child over sixteen, what was the reason to restrict maintenance to sixteen? He pointed out that the words of Lords Esher and Bowen, in *Agar-Ellis v. Lascelles*, and of Lord Esher in *Re Magrath* were not words which would limit the power to grant maintenance for children over sixteen, and that the most humane reasonings which those judges employed tended to give the judges the powers which *Ryder v. Ryder* had been the first to so narrowly restrict. The case, therefore, of *Thomasset v. Thomasset*, now reads the period of infancy to mean twenty-one years as regards maintenance and education, and the Court of Appeal has, in our opinion, swept away a great mass of false reasoning in those cases to which we have referred. The law of the courts of chancery of common law, and of divorce, is, therefore, this: The welfare of the child is the one and only consideration. Where the parents are not judicially separated or divorced, the courts will only interfere as a last resource to secure the health and happiness of the lawful issue. Where the parents have invoked the aid of the divorce court, then that court will secure to the issue the full benefit which a child has to expect from its parents. Up to the age of twenty-one a child requires maintenance and education, and the courts will secure for it these benefits. The growing litigation between unhappy married people requires that the object of marriage should be carried out, that society may not be shaken in its foundation, that the ills which misguided parents bring upon themselves should not be visited upon the innocent and unprotected offspring.—*Law Times*.

#### HER FIRST LAW CASE.

IN September, 1894, a farmer from the western part of our State came to me for advice. It appears that in December, 1893, he had entered into an oral agreement with a New York milk dealer to send him pure milk daily for and in consideration of being paid exchange price at the beginning of each month.

The farmer carried out his part of the contract faithfully, but the milk dealer did not. He failed to pay at the agreed time, and after the first month did not pay exchange price. Still the farmer continued sending the milk until May 1, 1894, at which time he failed to receive the usual check. He wrote to the milk dealer asking for an explanation. The milk dealer answered and said: "Unable to

pay until next month. Grandmother has just died, and I have all her funeral expenses to pay."

The farmer, a whole-souled, honest old Quaker, believing this tale, was willing to wait, and so began sending the usual quantity of milk. June 3 came, and no check. The farmer decided to wait a few days. On June 12 he stopped sending the milk and came to the city to see me.

The next day I sent my clerk to the milk dealer to interview him. I had warned that clerk not to choose his words, but talk plainly, and let that milk dealer know how little mercy he could expect if he did not pay up promptly. The milk dealer told a pitiful tale, and promised to call at the office in five days and square all up. Six days passed, and no milk dealer.

I felt I knew my man now, and would haunt him until that bill was paid. Each afternoon I sent some one to see him. One evening, it was October 4, 1894, I went to see him as agreed. I found him on the stoop smoking. When he saw me he walked to his front door and closed it; then came back and leaned against a post. He kept on smoking, and would puff the smoke right into my face.

At last, having cleared his throat several times, he condescended to speak. He said: "I can't pay you that money to-night, because a horse of mine died three days ago, and I have to use the money I intended to pay you to buy another. Now, I'll tell you what I'll do. If you'll come up next week Friday, I'll really have the money ready for you." I said very well. Just as I was passing outside of the gate he said: "If it was daylight you could see the straw they used to cover the horse."

I walked four blocks out of my way so as to go back and see that straw. I saw none. The next day I investigated about the dead horse and found out that no dead horse had been removed from that neighborhood within twelve days. The Friday agreed on came at last. I was anxious to see his next move. It was as good as a game of chess. I went to that house, and rang the bell. The milk dealer's wife opened the door. I asked for her husband.

She said in a very snappy tone: "My husband had to go to Albany on business and won't be back for three or four days." "Indeed," said I. "And if you write to him he won't get the letter either here or anywhere." "Indeed, and why not?" "Oh, I don't know, only you can't see him."

"Is that not your husband behind that door?" "No, that's my brother."

"Indeed; well, madam, your husband promised to see me to-night and to pay me that money. What a handy place Albany is for people who owe money. Has your husband gone to Albany on church business?" The wife looked very queer

for a moment but said nothing. "I believe your husband lost a horse the other day. Has anything else died since I saw him, such as a dog or a grandmother?" "Well," said the wife, "his horse did die."

"Is it possible? Well, what in the world did you do with him? You must have eaten him, or, perhaps, you sold him for sausage meat, because he was never carried away by the public cart." I heard a peculiar sound in the hall, and the wife tried to close the door a little more, but I wedged myself firmly against the framework of the door and determined to give my last shot. Before I could give it the wife said, "Well, I don't care what you say, that horse did die. What can you do anyway? We own nothing. We have mortgaged everything."

"Madam, it's not for you to say as to what I shall do. You must tell your husband what I will do if that bill is not paid within the next thirty days. I have ascertained the names of all the farmers who send him milk, and have also interviewed them by mail. They have promised not to send any more milk to your husband if he does not pay this bill, because they expect that he will treat them in the same way. Good evening, madam."

I walked away, delighted with my evening's work. Within ten days I had that money.

—*The World*.

MELLE STANLEYETTA TITUS.

### Abstracts of Recent Decisions.

**JUDGMENT — EVIDENCE.**—A judgment of a court of a sister State, authenticated as prescribed by act of Congress, is conclusive here upon the subject matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered. (*Snyder v. Critchfield* [Neb.], 62 N. W. Rep. 307.)

**MALICIOUS PROSECUTION—MAYOR.**—A mayor of a city who, in good faith, caused the arrest of a party under a city ordinance subsequently declared invalid, is not liable for malicious prosecution, though at the time of the arrest he had some doubt as to the validity of the ordinance, and its enforcement rested exclusively with the board of public works, which had refused to enforce it, because they believed it to be invalid. (*Goodwin v. Guild* [Tenn.], 29 S. W. Rep. 71.)

**MUNICIPAL CORPORATIONS—SPECIAL TAX.**—Land of a railroad company, used only for a right of way, may be specially taxed for a local improvement consisting of a sewer in an adjoining street. (*Chicago & A. R. Co. v. City of Joliet* [Ill.], 39 N. E. Rep. 1077.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

IT is always amusing to read an opinion of the legal profession by a doctor, for despite the effort to be pleasant when addressing a gathering of lawyers there is sure to appear a little flattery and some insinuation of the superiority of the men who ply the knife and administer the physic. Doctors of course have a niche in the field of usefulness, but it has an aroma peculiar to itself and as a rule, is not eagerly sought as a sweet abiding place, while it is doubtful if one could find a happier class of people than those clients who eagerly wait to press their retainer into the hands of the much sought after dispenser of justice. Still lawyers and doctors have need of each other which usually is strongest at the annual gatherings of one or the other of the professions. At a recent banquet of the Chicago Law Students Association Dr. Frank G. Lydston, who is one of the lecturers at the Kent College of Law, responded to a toast in part thus:

"I see about me nearly all the varieties of the genus lawyer. Judges, who run law dispensaries, where a dram of justice is so skillfully mixed with a barrel of law, that the unwary layman is fain to take his medicine without flinching. The law and the lady — the female lawyer against whom I shall enter a replevin suit to-morrow, cause — one lost heart. Law professors who toil not, neither do they spin, but make a business of professing. Patent lawyers, so called, I presume, like a country newspaper, they have patent insides — an attribute which is patent enough to one who has ever watched them irrigating or feeding the inner man. Real estate lawyers, who hold mortgages on cemeteries and fifteen-story buildings. Divorce lawyers, who act equally well as attorney, complainant or defendant, but would shine with effulgent brilliancy as co-respondent. Corporation lawyers, whose corpora-

tions are sometimes large, but often no larger than common mortals with good appetites. Last, but not least, that practical humanitarian, the criminal lawyer, whose clients are all angels in due time, and who could have proven an *alibi* for the devil himself, in that famous affair in the Garden of Eden. Then there is the coming lawyer who is largely in embryo this evening as the student of law.

"The profession has many advantages over that of medicine. No doctor was ever known to get himself patented. He may consider himself a good thing, but he dare not push it along. The ethics of the profession forbid it. We are highly moral people, and consequently they are no criminal doctors. Even our novelists are compelled to go outside of the medical profession to find their villains. Dr. Jekyll must become Mr. Hyde (who was probably a lawyer), in order to be interesting. We have no divorce doctors, because we are too familiar with both sides of such cases. We have lady doctors, but I object to them as a temptation, to overdosing, just as I am opposed to lady lawyer as tempting one to perpetually litigate. Corporations have no use for doctors, because when a man falls off a ten story building and sits down good and hard upon his antipodes, or in that immediate vicinity, we say that he has spinal concussion, and the poor fallen man gets big damages. You see we doctors are practical, moralistic philanthropists, and sympathize deeply with poor fallen men.

"The profession of law is more aptly termed a learned profession than either medicine or the ministry. It is in the profession of law that the man of broad culture and scholarly attainments receives his highest appreciation. My own profession is so tainted with modern so-called specialism, that the veriest dunce may achieve public notoriety and at least financial success. Too often does he receive the adulation of the body medical. The accomplished, scholarly, cultured physician is in danger of becoming lost in the race for wealth. It is easier to pander to a simple minded public by commercial shrewdness than to win appreciation of scholarly attainment by solid merit. So much the worse for medicine. Thank heaven that so many mistakes are hidden by good old mother earth. It is not surprising that the lawyer has so little respect for the medical expert.



Was it not a lawyer who divided witnesses into liars, d—d liars and medical experts? Fortunately the so-called expert is not always a fair criterion of the intelligence and honesty of the medical profession.

"The personnel of the professional man has greatly changed for the better within a few decades. Time was when the legal profession was supposed to be represented by a seedy looking individual, with a lurid nose and a breath which suggests the possibility of spontaneous combustion. This individual had a little den somewhere in town, the furniture of which consisted of much dirt and a few law books. Notwithstanding the fact that his admiring neighbors said he could try a case better when he was drunk than some men could when sober. This apostle of the law is now a relic of the past. The lawyer of to-day must be a clean, sober, cultured gentleman, or a charming woman, or he or she may not rise above the level of a shyster. It is no longer considered unprofessional to have a clean office and a decent library. The old time squire has been relegated to the valley of dead lumber, along with that good old besotted doctor, who was so awfully good for children when he was sober, and who in all his life never rose above the dignity of "Dock" the most opprobrious epithet ever applied to a medical man.

"In the profession of law, talent and scholarly attainments soon find their level in these modern days. I have noticed, too, that there is an *esprit du corps* among lawyers which is sadly lacking among doctors. I have observed that most lawyers have much that is good to say of each other. When a man distinguishes himself in law, his brethren vie with each other in doing him honor. In medicine, the great man's achievements are brilliant in inverse proportion to proximity to those who comment upon them. There is usually a qualifying clause, a sort of damning with faint praise. This is not true of the profession of law. It would be well if the sentiment of personal honor, which every lawyer worthy of the name cherishes so highly, could permeate every profession."

Judge Lacombe, in the United States Circuit Court for the Southern District of New York, recently decided another trade-mark case which

attracts attention because of the discussion of some of the defendants' claims in the opinion and the use of them in framing the determination of the issue. The case under discussion is *American Grocery Co. v. Bennett, Sloan & Co.*, and the opinion is as follows:

"In the year 1884 the firm of Thurber, Whyland & Co. devised and adopted a trade-mark for a blend of roasted coffee. The name thus adopted was 'Momaja.' This name is suggestive of a composition of Mocha, Maracaibo and Java coffees, but certainly is not sufficiently descriptive to invalidate it as a trade-mark under the decision. See the 'Cottolene' case, *N. K. Fairbank & Co. v. Central Lard Co.*, 64 Fed. Rep. 133, and cases there cited sustaining 'Maizena,' 'Cocoaine,' 'Valvoline,' 'Bromidia' and 'Bromo-Caffeine.' The brand was at once put on the market, was extensively advertised and largely sold and became well known to the trade. In 1891 the right to this trade-mark passed to a corporation known as the 'Thurber, Whyland Co.' That corporation passed into the hands of receivers in 1893 and on June 30, 1894, the complainant duly obtained the trade-mark 'Momaja' by purchase. From the time it was first adopted it has been in use, and sales of coffee under it have been made by the successive holders of the title.

"The defendants, who are charged with infringement, are engaged in business as grocers in this city; their western agent in Chicago, one Charles H. Smith, was for many years subsequent to the adoption of the 'Momaja' trade-mark in the employ of Thurber, Whyland & Co., and of the corporation of the same name. Defendants make a blend of coffee and wishing, as they say, to give their product a distinctive character, they devised a trade-mark about a year ago under which they have since been offering their coffee for sale. The answer and affidavits submitted by defendants deny any intent to simulate or infringe complainant's trade-mark 'Momaja,' which was well known to defendants. On the contrary, the defendants' affidavits with great unanimity assert that, at the time they undertook to devise their trade-mark, coffee sold under complainant's mark had deteriorated and had obtained less and less favor in the market, that complainant's

brand had no value, that the title 'Momaja' was rather a drawback and detriment, hindering and not assisting the sale of coffee, that because 'Momaja' had become so unpopular and unsaleable they intended to strictly differentiate in the selection of their own title, for, as the affidavits assert 'it would have been the poorest business policy, without considering the question of good morals or ethics, to have attempted to work up a new brand successfully upon the fading reputation of the 'Momaja.' The great object sought to be secured in the selection of defendants' trademark, as suggested on the argument, was 'to get away as far as possible from 'Momaja.'

"The result of defendants' efforts in that direction is somewhat startling. They selected the word 'Mojava.' Certainly they did not get very far away; in fact from the point of view of a court of equity it looks much less like a departure than it does like an approach, and it may well be apprehended that if defendants continue to use the word 'Mojava' they run considerable risk of confusion with the unpopular and unsaleable brand from which they wanted 'strictly to differentiate' their own title. In the light of decisions which find infringing resemblances between 'Cottoleo' and 'Cottolene,' between 'Collonite' and 'Celluloid,' between 'Wamyesta' and 'Wamsutta,' between 'Maizharina' and 'Maizena,' between 'Saponite' and 'Sapolio' (see citations in 64 Fed. Rep. 135), there is little difficulty in disposing of this case. In the period of rest and quiet which will be secured by a temporary injunction possibly defendants may renew their strength sufficiently to be able to *get farther away* from 'Momaja,' the next time they try 'to strictly differentiate' their own goods.

"The case of Manhattan Medicine Company v. Wood, 108 U. S. 218, has no application to the facts of this case; no misrepresentation as to who is the manufacturer of complainant's coffee, nor as to where it is manufactured is shown. The letters of Thurber referred to in defendants' affidavits are immaterial; they were written after the title to the trade-mark passed from the concerns in which he was interested."

The Kentucky Court of Appeals on May 24 decided the case of Stewart v. Thompson.

The opinion is written by Judge Guffy, and it is held that a creditor of Kentucky cannot levy on property exempt under the laws of that State, on the property, which was temporarily in Ohio, where it was not free from attachment. The facts sufficiently appear in the opinion of Judge Guffy, and the part of the decision in relation to the question, is:

"The important question involved in this appeal is, whether or not a citizen of this State who is an insolvent debtor may go into another State for the purpose incident to interstate commerce, social intercourse or special business without subjecting his property, exempt by the laws of this State, from execution and attachment which he happens to take with him, to the payment of debts due another citizen of this State, who may be watchful enough to follow and attach such property, and the debtor has no redress. It seems to us that the law will not allow a creditor to so evade and annul the laws of his own State. Exemption laws have no force beyond the territorial limits of the State enacting the same, hence a citizen of one State, when his property is levied on in another State, cannot plead with effect the laws of his own State, because the general if not universal rule is that exemptions are allowed only to citizens of the State enacting such law; hence by the laws of Ohio the appellant could not legally claim the benefit of the law of Kentucky, nor any exemption law of Ohio. If the contention of appellee is to prevail, it follows that any insolvent citizen of this State who takes his property into another State for any purpose or for any length of time, makes it subject to the demands of any creditor of this State, and the same may be said of any citizen of another State who might chance to come into this State with his property. The exact question under consideration has never been passed upon by this court so far as we are aware, but the Supreme Courts of some other States have considered the question. We concur in that part of the opinion of the Superior Court in *Brown v. Simmet*, 13 Ky. L. R. 331, which says: 'The weight of authority is that an injunction will lie by a citizen to restrain another citizen from instituting or prosecuting a suit in a foreign country or State where the plaintiff in such suit is fraudulently attempting to evade the laws of

this State by subjecting to the payment of his debt property temporarily in a foreign State, when under the law of this State the property is exempt from seizure for his debt.' The Supreme Judicial Court of Massachusetts, in *Dehon, etc., v. Foster, etc.*, 4 Allen, 535, in an elaborate opinion, held that an injunction would lie to prevent a citizen of that State from subjecting by attachment due in Pennsylvania to another citizen of Massachusetts, because the effect would be to give them an advantage over another creditor of the debtor, he having made an assignment.

"Chief Justice Bigelow says in his opinion: 'Inasmuch as the defendants in the present case are citizens of and residents in this commonwealth, there can be no doubt that the jurisdiction of this court over them is plenary.' 'Nor is the validity of the foreign law or of the lien acquired under it in any manner called in question.' 'An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done, it is none the less a violation of the law because it is effected through the instrumentality of a process which is lawful in a foreign tribunal.'

"The same case was again appealed to the court after final hearing in the court below, and the injunction was made perpetual. (7 Allen, 57.)

"The Supreme Court of New York, in *Vail v. Knapp*, 49 Barb. 301, enjoined a citizen of New York from prosecuting a suit in the court of Vermont.

"The Supreme Court of Georgia, in *Engel v. Scheurman*, 40 Ga. 209, sustained an injunction against Scheurman, a citizen of Georgia, restraining him from collecting a judgment obtained against Engel in the State of New York. The jurisdiction of the Court of New York to render the judgment was not questioned, but it was claimed by Engel that he had been sued in Georgia for the same debt and judgment rendered for part of the claim, which judgment he had paid off, and that Scheurman had led him to believe by word and act that the suit in New York, then pending, would be abandoned, but instead of doing so was about to collect the judgment in New York off Engel and his securities. We quote as follows from the opinion delivered by Justice Warner: 'The States of the American Union, except for all purposes as

specified in the Constitution of the United States, are in legal contemplations foreign to each other. The courts of one State or country cannot exercise any control or superintending authority over those of another State or country, but they have an undoubted authority to control all persons and things within their own territorial limits. In such cases the courts do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the question between the parties and decree, *in personam*.' Story's Equity Jurisprudence, Sec. 899.

"In *Cranston v. Johnson*, 3 Ves. Jr. 183, the master of the rolls said: 'I will lay down the rule as broad as this: This court will not permit him (the defendant) to avail himself of the law of any other country to do what would be gross injustice. This bill is not filed for the purpose of restraining the proceedings of the court of New York; the courts of this State have no jurisdiction to do that; nor would the courts of this State have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York between citizens of that State. There is a clear distinction as to the power and authority of a court of equity in this State to restrain by injunction the proceedings of a court in another State, and the power and authority of such court to restrain by injunction the personal action of a citizen of this State. In the language of the master of the rolls in *Cranston v. Johnson*, this court will not permit the defendant to avail himself of the law of any other country, to do what would be gross injustice.' The foregoing authorities establish clearly the power and duty of the courts to prevent citizens within their jurisdiction from evading the laws of such State by and through the machinery of the law or courts of a foreign State. In the case of *Snooks v. Snelzer*, 25 Ohio, 516, almost the exact question in this case was decided by the Supreme Court of Ohio. Snooks was a creditor of Snelzer. The Baltimore and Ohio Railroad Company owed Snelzer a debt in West Virginia, which was by the laws of Ohio exempt from garnishment or attachment. Snooks instituted suit in West Virginia, seeking to subject said indebtedness to the payment of his debt against Snelzer. Snelzer sued out an injunction in Ohio against

Snooks to enjoin him from proceeding with his suit in West Virginia. Snooks disregarded the injunction and prosecuted the West Virginia suit to judgment and collected the debt. Snelzer then sued Snooks in the Ohio court to recover back the sum so subjected in the suit in West Virginia, and recovered judgment. Snooks appealed to the Supreme Court of Ohio, which court after a careful and thorough consideration of the case and the authorities, affirmed the judgment."

A novel case recently was decided in England by the Chancery Division of the High Court of Justice in *Cunnack v. Edwards*, 72 L. T. Rep. 386. It appears that the Helston Equitable Annuitant Society was formed, the object of which was to raise funds to provide annuities for the widows of members. The last annuitant died and the suit was instituted by the trustees so as to have a judicial determination of the question as to the person who was entitled to the funds of the society since the rules did not provide for the disposition of the property after the death of the last beneficiary. Chitty, J., delivered the opinion, and the question is discussed in this way: "There is nothing in the rules or in any principle of equity applicable to the case in which this claim can be rested. It was said that the last surviving member might have held a meeting under section 26 of the statute of George IV, and voted the funds to himself. To this proposition, extravagant as it is, it is sufficient answer to say that the last survivor never attempted to do anything of the kind. The contention for the attorney-general was that the funds were *bona vacantia*, and that the Crown was entitled to them by virtue of its prerogative. It is in virtue of this prerogative right that the Crown takes the personal estate of a man who, being a bastard, dies intestate without leaving issue. Such a bastard can have no next of kin. The Crown's right attaches on proof of the bastardy and no lawful issue of the bastard — subject, of course, to the right of any widow he may have left. But in the case of the death intestate of a person born in wedlock the Crown does not take merely because there is a difficulty in finding the next of kin; an inquiry is directed, and sometimes repeated, to ascertain who are the next of kin, and it is not until every

reasonable step by advertisement and otherwise has been taken that the fund is ordered to be paid to the Crown. The mere fact that there will be great difficulty and expense in ascertaining the equitable owner of a fund is not of itself ground for declaring the Crown entitled. The claim of the person appointed to represent the deceased members generally is founded upon the doctrine of resulting trust. Where a man provides a fund by way of trust for payment of a specified annuity to his widow during her life and makes no further declaration of trust affecting the fund, the beneficial interest in the fund, or so much of it as is not required for payment of the annuity, results to himself. The same doctrine would apply to the case of several persons agreeing to provide and providing such annuities for their widows; there would be an ultimate trust in their favor when the purposes of the fund had come to an end. Nor can I see how any difference could justly be made by reason of their raising by common agreement such a fund in different but prescribed proportions as among themselves. Inasmuch, then, as all the purposes for which the funds of the society were raised by contributions of the members have been exhausted, and there is no indication to be found in the rules as to what was to be done with the funds when the specified purposes were worked out, I am constrained to hold, according to the principles of equity, that the doctrine of resulting trust applies. It is immaterial that no actual declaration of trust was made by the trustees in pursuance of Rule 17 of the society. Had any such declaration been actually made, the only trusts which could properly have been declared by the trustee would have been those manifested by the rules. Nor is it necessary to consider what could have been done by a general meeting of the members under section 26 of the Act of George IV; no such meeting was ever held. My reasons for saying I am constrained to hold that the doctrine of resulting trust applies are to be found in what follows. The books of the society prior to 1850 are not forthcoming, and apparently are lost or destroyed. The number of members of the society from the beginning, in 1810, is not known beyond this, that it exceeds several hundreds. The difficulty and expense of ascertaining who were members and who are their legal personal representatives will be enor-

mous. Besides this, inasmuch as the contributions were of varying amounts, the share of each representative in the funds will depend not merely on the amount of the contribution of the member whom he represents, but also on the various amounts contributed during upwards of eighty years by the other members from time to time. It requires no great experience in matters of this kind to foresee, as I do, that in the endeavor to discover who are the persons entitled, the greater part, and probably the whole, of the funds will be consumed in costs. There are no means at my disposal for cutting this gordian knot. I make a declaration that in the events which have happened the funds are subject to a resulting trust in favor of the ordinary members of the society from time to time or their respective legal representatives, in shares in proportion to the amounts contributed by each such ordinary member to the funds of the society. The amounts, if any, paid as fines or forfeitures and the annuities received by widows need not be taken into account.

One of the most powerful arguments made by Joseph H. Choate, Esq., against the income tax, was in relation to the doctrine of *stare decisis*. This principle naturally was adopted from the necessity of having fixed rules and maxims of law as precedents, but the utility of former adjudications exists only so long as the determinations of legal tribunals conform to the changing needs of the times. The clause in the argument to which we refer is as follows:

"The reason of the rule is, that it is often better on public grounds, where a question of law has been decided — where it has been repeatedly decided — that the court should let it remain rather than, by the declaration of another though a better rule, dispense with it. Where is that chiefly applied? Where ought it chiefly to be applied? Where has it always been applied? When the former decision has grown into a rule of property, and vested rights in a trusting community, relying upon the past decision, have become fixed, where rules of conduct have come to be governed by it, as in the making of contracts and other arrangements between man and man and between citizens and corporations, I acknowledge that there may often be cases where less damage to the

public, less injury upon the whole, arises from letting the bad rule stand. Everybody has acquiesced in the rule, everybody knows it to be the rule, everybody has acquired his property under the rule and made his contracts under the rule. But what right or reason is there for its application to a constitutional provision respecting the power of government in the matter of taxation? Let the learned attorney-general point to one man in the United States, to one woman, to one child, who will be affected detrimentally, whose rights will be in the least impaired, by a correction of that former error here — if such error has ever been committed, and I do not believe it has been."

The case of *Roberts v. Northern Pacific R. Co.* decides the question that the United States courts will not adopt the decisions of State courts as to the rights of corporations created by a law of the United States for national purposes and interstate commerce, and subjected by its charter to important public duties and to the control of Congress. A portion of the opinion, which is written by Mr. Justice Shiras, is as follows:

It is contended, on behalf of the plaintiffs in error, that where the question involves the powers of a State corporation, and the meaning and effect of the constitution and laws of a State, it is the duty of this court to adopt the decisions of the courts of such State. But we do not perceive that the doctrine of *Whiting v. Sheboygan & F. du L. R. Co. supra*, and of the cognate Wisconsin cases, is fairly applicable to the case before us. There are two very important particulars in which the present case differs from those adjudicated by the Wisconsin courts, and which, we think, warrant an opposite conclusion. In the first place, the transaction between the county of Douglass and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes. The ratifying act of the Legislature of Wisconsin, alone con-

sidered, avails to remove any doubt upon that point. Nor can the plaintiffs in error consistently deny such a power in the county, as their only title is based on its exercise. It is, indeed, urged that the county authorities could only sell its lands for money. We do not accede to this proposition. If they possessed the power to sell for money, we are pointed to no express provision of law that restricts them from selling for money's worth. Even upon such a narrow view, it may well be contended that the consideration received by the county included a money payment. The deed recites the payment of money by the company to the county at the time of the conveyance, and it is a conceded fact that the lands since they came into the possession of the company have yielded considerable sums as taxes to the county. It is straining no principle of law or of good sense to regard the payment of an annual tax as equivalent, for the purpose of our present inquiry, to the payment of a rent. The amount, as well as the nature of the consideration received by the county in exchange for its lands, if it had the power to sell them, was a matter that concerned the county only. The State, as we have seen, did not only not complain, but fully ratified the sale.

The courts of Wisconsin have, in a series of decisions never overruled, held that it is competent for municipal corporations, if authorized so to do by the Legislature, to aid the construction of railroads by subscribing to the stock of companies formed for that purpose, and paying therefor by bonds, and, of course, to raise the means of paying the latter by taxation. The task of reconciling this class of decisions with that holding that municipalities, even with legislative sanction, cannot promote railroads by donating money or credit to them, is not ours. It may, perhaps, be said that what is forbidden is a resort to the taxing power where the municipality has received no consideration. But, as we have shown, the county in the present case paid no money and issued no bonds requiring any exercise of the taxing power. It was the case of a sale, in consideration of money paid down and to be paid in the form of taxes, in addition to the great advantages to enure to the public.

There is a second important feature that distinguishes this case from those relied on by the plaintiffs in error, and that is the character of

the railroad company, as a corporation created for public and national purposes. The Wisconsin courts were dealing with corporations of their own State, and they went upon the proposition that the construction and maintenance of railroads did not constitute a public purpose, because the corporations created to build and run railroads were strictly private corporations formed for the purpose of private gain. If the making and maintaining a railroad in Wisconsin by a State corporation was not a public use, it was thought to follow that such an enterprise could not receive municipal aid. And it may be conceded that, when we are called upon to pass upon the legal rights of a Wisconsin railroad company, we should follow the law laid down by the State courts. But the question now arises whether such a proposition is applicable to the case of a corporation created by a law of the United States, and subjected by its charter to important public duties. The Northern Pacific Railroad Company was incorporated by an Act of Congress approved July 2, 1864. (15 Stat. at L. p. 365.) It was authorized to lay out, construct, and maintain a continuous railroad and telegraph line, with the appurtenances, from a point in the State of Minnesota or Wisconsin on Lake Superior to some point on Puget's Sound, and "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, munitions of war, and public stores over the route of the said line of railway," there was granted a large amount of public lands and a free right of way through the territories of the United States. It was made the duty of the company to permit any other railroad which should be authorized to be built by the United States, or by the Legislature of any territory or State in which the same may be situated, to form running connections with it on fair and equitable terms. The company is authorized to enter upon, purchase, or condemn by legal proceedings any lands or premises that may be necessary and proper for the construction and working of said road. It is enacted that all people of the United States shall have the right to subscribe to the stock of the company until the whole capital is taken up; that no mortgage or construction bonds shall ever be issued by said company on sai-

road, except by the consent of the Congress of the United States; that said railroad, and any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation, and that said company shall obtain the consent of the Legislature of any State through which any portion of said railroad line may pass previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the Legislature.

By an act approved April 10, 1865, the legislature of the State of Wisconsin declared that for the purposes set forth in said act of Congress, and to carry the same into full effect, the Northern Pacific Railroad Company was vested with all the rights, powers, privileges, and immunities within the limits of the State of Wisconsin, which were given by said act of Congress.

It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and subject, in important respects, to the control of Congress. That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or territories. Whatever respect may be due to decisions of the courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the great transcontinental railroads were constructed under Federal authority, through territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained.

Congress has power "to regulate commerce with foreign nations and among the several States," and to "establish post-offices and post-

roads." (Const., art. 1, § 3, par. 3 and 7.) As was said in *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 10: "The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all;" and it was held that a law of the State of Florida which attempted to confer upon a single corporation of its own the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another State, where Congress had enacted "that any telegraph organized under the laws of any State should have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postroads of the United States," and where such other corporation had secured a right of way by private arrangements with the owners of the land. This principle has been repeatedly recognized by this court in numerous decisions. *Western Union Teleg. Co. v. Texas*, 105 U. S. 460.

In this issue we print the address of Carrie Carrington, M. L., on "Master and Servant," delivered at the woman's law class of the University of the City of New York, at Madison Square Garden, on April 4, 1895. The rapid increase of the members of the gentler sex in professions and business in America has been watched with great interest by the rest of the world, and it is recognized that in a great majority of cases the success of women has been the result of tireless energy and careful attention to their occupations. We have been observant, and have perceived that some men can more deftly rock the cradle and better attend to domestic pursuits than practice physic and law, while there exists a considerable number of women who possess peculiar abilities to follow the recognized callings of the sterner sex. This proportion of one or the other sex who could more properly follow the occupations of the other is not so considerable as to necessitate an evolution of the sexes so far as their work is concerned, but is large enough to attract attention and to increase the earning capacity of the country if the change is consummated. It is, therefore, with pleasure that we print this address of one of the graduates of a woman's class in a law school.

# ADDRESS AT THE COMMENCEMENT EXERCISES OF THE BUFFALO LAW SCHOOL.

BY GEORGE B. WELLINGTON, Esq., Troy, N. Y.

THE privilege of participating in these, the Seventh Commencement exercises of the Buffalo Law School, is deeply appreciated by me. I take pleasure in congratulating the graduating class upon reaching the intermediate goal of their student life, which, while it recognizes and honors their fidelity appropriately, is most valuable because it marks their matriculation into the larger university of life, in which they will find their struggles for supremacy endurable by reason of the discipline of their school days. I congratulate the school because of its honest and efficient work in education, and that it has the services of so many busy lawyers freely given for its advancement. At this time of felicitations and of that unspeakable pleasure, mingled with chastened regrets, which absorbs the mind of a man who feels that his student days are over, that the time of his dependency is at last past, and that the stern work of life, with its exhilarating ambitions, is finally his "for better for worse" in an indissoluble bond, it seems almost out of place for one to attempt to interest a graduate, whose attention is fixed upon his diploma, in any of the sober problems which will soon be thrust upon him for solution. But although our student days in school are numbered, yet in a larger sense we are students still, and should ever so continue; and remembering that our future depends upon our aptitude to learn quickly and accurately from every source, whether books recording the past experiences of men or the present signs of the times, it may be that a glance around us just now will be useful, and, if we understand what we see, will suggest a principle of action both ennobling and profitable.

It might be interesting at this time to review the career of some great lawyer, and try to learn the rule or rules of life which he followed in his ascent to the vantage point of fame or prosperity. It might be profitable to discuss the various principles of action bearing upon a successful lawyer's practical life. It might be inspiring to set forth the high ideals of the law which is founded upon eternal justice, and has for its object the sway of justice among men. It might be in the interest of truth to picture that side of life which is turned toward the lawyer's office, though probably it would be worse than valueless to those whose buoyant hopes have idealized life, and have never known through actual contact with men the selfishness and sordidness which govern so many, and which are the occasion of so many of the disputes which engage a lawyer's time. It might perhaps be worth while, as it would

be truthful, to assure a lawyer entering upon the practice of his profession, that there are no ideal courts, or ideal judges, or ideal lawyers; but that human sympathies and passions and frailties are to be found even upon the bench which a young lawyer is apt to fancy stands for and actually manifests invariably rational and ideal justice. It might be said, with the intention of saving one from disappointments, to assure one about to enter upon the practice of the law, that practical law—that is, the law of legislatures and the law of judges—is not always to be known in advance by any process of strict logic; but that a practical element, learned only by experience, must be considered by every lawyer who ventures an opinion to a client. Some of these things, I say, might be pleasurable and profitable, and some might be truthful and scientific, though, perhaps, almost disheartening to one who has not learned devotion to an ideal which can never be realized upon this earth; yet, for various reasons, chiefly the immediate practicability of the theme that I have chosen, I shall pass them by and beg to draw your attention and fix it upon the duty of a lawyer, as a citizen, to his State and country.

What does the State expect and demand from you, an educated citizen? What do you owe to it? What has our civilization done for you? What will you do for it? You have enjoyed up to this time exceptional privileges. You have been breathing the strong, pure air of civil and religious liberty, with perhaps no more than a passing thought as to its source, with possibly only the feeling that that which seems so eminently just and right, and which is so freely enjoyed and on the surface so easily maintained, must always have been the possession of civilized communities—unmindful of the frightful struggles between freedom and oppression, between right and might, which made heroes and martyrs possible and necessary in the too often forgotten past. It took heroic industry to conquer the savagery of nature and the savagery of man, and it has taken ceaseless toil and indomitable steadfastness to keep for the uses of man that which was gained. The savagery of the world's aboriginals has passed away only to make place for the selfishness of unscrupulous and designing men, who find the institutions of freedom calculated to increase their power and widen their blighting influence. The liberties which you enjoy are a bequest charged with a trust. Your privileges are not yours absolutely, to be enjoyed or squandered, or neglected, or sold, or given away at your pleasure; but you are charged to hold and use them so that they shall increase in power and beneficence for the sake of your fellow men and posterity, and for your stewardship a strict account will be demanded.

It has been felt in the past, and perhaps may be now, that an exhortation to men to regard seriously



the duty which they owe themselves and others is the work of a religious teacher merely; that if a demand were made upon a man, for example, to be honest and sincere, that would be preaching; but it is no longer so in fact. In the name of science the strongest emphasis is laid upon certain prerequisites in arriving at one's duty as a citizen, and among them integrity is fundamental. Recently a dozen prominent lawyers in New York city were interviewed by a newspaper reporter as to the conditions of success in their profession and all agreed that integrity, "bomb proof integrity," as one expressed it, is absolutely necessary. Industry, common sense, influential friends, and what is called "luck," may seem to have had an important influence in the success of many; but whatever else may be lacking, integrity is absolutely essential. If I were to attempt to direct you toward true success I would emphasize more than any other virtue in your professional life intellectual and moral integrity; and in directing your attention to your duties as a citizen I start with integrity as the first, the most important element. It is needed to-day in public life as well as in private affairs; it should determine every man's attitude toward the public as well as toward his private friend and client—not alone fidelity in handling public funds, for important as that undoubtedly is, it is common and comparatively of easy fulfillment; but honesty in molding public opinion, in discussing public measures and public men, which, desirable as it is, is unfortunately not common and is most difficult to cultivate and maintain.

There has been forced upon our attention lately the dangers which beset the onward march of a democratic republic in which the rights of the individual have been emphasized and recognized to an unprecedented degree. Unlimited suffrage, with unlimited immigration, has put our faith in the people to severe tests, and has made possible the growth of extremely dangerous power in the hands of unscrupulous politicians, which has become a serious menace to our institutions, and which, unchecked, would surely ruin the republic. But this should be far from dispiriting; for great dangers call forth great patriotism and heroism. The greatest blessings are won in the face of the greatest evils. Without gigantic struggles great progress has never marked the upward course of humanity. It is toward the establishment of a pure government—in order that the liberties left us by our noble ancestors shall not perish—that every individual citizen with any appreciation of the dignity of his citizenship is called to struggle. The result is not doubtful. All the analogies of the various departments of human activities point to success, however discouraging intermediate and temporary failures

may be. In every department of intellectual, moral and material activity, progress is to be seen; for science has invaded every system. It has created the physical sciences and has constantly advanced them by overturning old theories and suggesting and establishing new ones. It has penetrated the sacred retreats of religion and has demanded that the pestilential atmosphere of superstition be driven out by opening doors and windows to the pure air of nature and of truth. It has revealed the hidden things of life and has constructed a history of the by-gone ages, ignoring the formerly uncertain boundary between the historical and the prehistorical past. It has dissected morals and social relations, and would even dare to look into the future and predict the result of the forces at work on our development. That which hitherto has been demanded and advised in the name of religion is not now necessarily so presented. From a purely scientific standpoint, ethical rules are now prescribed as essential to proper development—not because they have a supernatural origin or a divine indorsement, but because man has discovered working upon humanity—molding it into families, tribes, states, nations—ethical forces quite as real as gravitation and as persistent as physical motion. It is because science has revealed the greatness and importance of the future of the race in this world that every man's attitude in society becomes to him full of dignity and seriousness. Fundamental convictions are thus important. A danger perfectly evident is oftentimes easily avoided. There is one for example, strangely enough, clearly seen in the extraordinary conceit of some really scientific men; those who see no hopeful future for the race. The present drift in certain places towards pauperism and ignorance; the slow advance towards a better civilization, stamp it all as a failure, in the minds of many; and for the future there is no hope. They lose sight of some very evident facts. Life started in cells without organization. It has developed from practically nothing to the present civilization, which is surely better than that, say, of the cave dwellers. Life is still at work. It has had the help of no man. Its law of progression was not the handiwork of any man. Indeed, for ages it was not consciously recognized much less studied. The present bewildering mass of struggling humanity is to work out a future, and some scientists cannot see how it can be done; as though they had it all to do. Man may collect facts, suggest hypotheses, establish theories, but he cannot create a single force.

Man then must not despair. That which brought out of chaos the glories of the past and present civilizations will be able to produce and will produce in the future correspondingly greater results. Our business is to do our duty, and let that be de-

terminated by a hopeful, not a desponding, philosophy. What could be more unhealthy than the position of those who would even crowd all reverence out of our lives. "Reverence!" cries one, "it is the offspring of superstition!" How dreary and hopeless such a conviction! Go back in thought to the nations living on the shores of the Mediterranean before our era. Art, philosophy, literature, oratory and religion—all were there flourishing and reached perfection before the scientist was born into the world. Toward those ideals actually realized by the great Ancients we have ever struggled. They have seldom been equalled, never surpassed. Hope, faith, courage were not then dying under the torture of scientific scrutiny—but were they not real elements of life? They exist to-day. They have their evident design, to keep men from despair and the race from extermination.

The growth since so-called classical times has not been in philosophy, literature or art; it has been perhaps alone in altruism, as some moderns think, and in the physical sciences. But the reason for that is clear. If the modern method of some scientists had come first there would have been no art, no literature, no oratory; for there would have been no myths, no religions, no imagination, no faith, no hope, no love, no race. I mention these things in order that we can see from this hasty glance, at the past that it was not intended that we should despair. We stand linked to that past and to the future. Our present is noble and serious. In the evolution of society a republic with civil equality and liberty has grown to be the most important of any of the forms which organized human life has taken. It has developed out of the aspirations, struggles and sacrifices of our ancestors. It is ideal in its thought. That it may not be too perfect for the imperfect beings who are its subjects is the hope and desire of every lover of his fellow man.

What has all this to do with a lawyer's duty as a citizen? It has this bearing: As a citizen he is first to be honest, and second, he is to be hopeful, with a profound faith in the evolution of humanity toward a higher and nobler civilization. These things are fundamental. If he has not integrity and has not faith, he will fail in his duty as a citizen. With them he will be able to know his duty; he will be qualified to judge as to measures and will know whom to follow, and, if a leader, how to lead. Without faith in the people he can not read aright the signs of the times; and since faith in the people means simply confidence in those forces which have developed mankind out of unconscious, non-intelligent protoplasm; and since faith that those forces will continue to work, developing man and society, is in kind not different from the faith that teaches us that the sun obedient to gravitation will shine on

our side of earth to-morrow; and since the forces which have developed man are righteous, the man who has no faith in the people—that is, the man who does not believe that righteous principles should govern in all work done for mankind, and who has no confidence that according to the laws of nature those principles will produce the best results—is simply ignorant and incompetent and unworthy to be followed. You will often hear from some of our poor deluded "practical" politicians, who think a trick is better than the ten commandments in politics, their bitter scorn when they hear of men insisting that their party should be true to righteous principles. As though these were only advocated by theorists who know nothing of the real but only of the ideal state. Poor mortals! They can foretell the weather from a red sunset, but they have never so much as thought that the powers of nature, often disappointing in the matter of the weather, act with terrible certainty in the realm of morals, and that no individual or party or people can long exist if the moral laws are defied. This is known to science, for history teaches it. The "practical" politician who laughs at it simply shows his pitiable, though at times exasperating ignorance.

Upon the lawyer of to-day is thrust a large measure of responsibility in this matter. The history of our country shows the importance of that profession in molding and directing public opinion, legislation and the government itself. For evident reasons, the lawyer is called upon to act for the larger client—the public—as well as for the private litigant. He becomes at once an important factor in political life. From his intelligence and moral enlightenment he knows what is wrong, what is indisputably vicious and corrupt, and what is right and helpful. Will you denounce the wrong? Will you avoid deceit? Will you hate hypocrisy? Or will you, for money or advancement, or power, or position, or office, or anything, publicly declare what you do not believe, or what you know to be false? If you go to a caucus will you support an unworthy candidate because you think thereby to gain some politician's favor? If you do, you will be dishonest. You will never, in that way, get satisfying success, and you will be aiding those forces at work to demoralize society and disrupt the State. Will you go to a convention and help to nominate for office anyone that you would not, in a private conversation with a friend, say was free from serious objection? Will you take the stump and advance arguments which you know are not sound, and so deceive the people? If you do, it will be because of some object in view which could not be attained if fully known. To do that, is to be intellectually and morally an infidel. If you go to the legislature will you, for party reasons, oppose measures which

you know and your party knows are just and beneficial, and will you advocate, in the name of reform or otherwise, legislation which you know is vicious and which has no ultimate object except temporary party advantage? The man who does this is not only a hypocrite, but a fool. He is sowing dragons' teeth which will spring up suddenly into an overwhelming host, but which cannot, by any stratagem, be turned from crushing him.

Why should any man try to aid his party by dishonesty, by hypocrisy? One's party will be helped best and strengthened permanently by the truth, not by a lie. It is only the time-servers, the intellectual dwarfs, who think that this universe is founded on deception, and that the path to life's goal must be so crooked that no one could ever follow and overtake an ambitious man to rob him of his success. It is the truth that makes men free and powerful and great. The intellectual imposter, the hypocrite, the man who knows what is right and advocates the opposite, whether he be a clergyman, editor, statesman or lawyer, is unworthy the dignity of living in this age. The extraordinary distrust exhibited by many men charged with leadership, of the reliability of nature to work out desirable results in men and in communities, has fortunately no parallel in the material affairs of life; else we should find farmers neglecting their ploughing and sowing because they cannot have the control of the marvelous metamorphoses in earth's laboratory, fearful lest without their constant manipulation the richest soil would be barren. "What will be the result of such a step?" exclaim they, when some eminently fair and honorable course is advocated. "It is right in the abstract, but we shall estrange this one and that one, and this body of citizens and that large horde of voters, and we shall lose." Thereupon some unprincipled make-shift is advocated, calculated to deceive somebody, and just how every rank weed will shelter the timid and sickly grain next to it until maturity, and how absence of sunlight and warmth will keep the fields from drying up, and how a steady drought will keep vegetation from rotting, and how the harvest will be secured according to their denaturalized methods, will be glowingly and wisely set forth. As the gentle dew, the pure sunlight and its invigorating warmth are furnished by nature, or, if you prefer, by nature's God, to bless and make fruitful the earth, so are honor and truth and devotion to the people's highest good provided by the same Creator to vivify and magnify the human race. What do you say of the intelligence, to say nothing of the moral sense, of a man who would disregard, or of a party which would spurn, these means in the attempt to gain fame, or power, or the control of public affairs? It is true, and you will find it out,

that many, very many politicians, while they would make good farmers, and as such would have a very profound respect for nature and her laws, have absolutely no conception of the realm of morals in which the spiritual forces of nature are ceaselessly ready to operate upon the minds of men if only given a chance—and so these blind leaders attempt to invent a nature all by themselves, in which any plausible scheme, however dishonest and unnatural, may be adopted successfully. They think it must be practicable, inasmuch as they cannot see, being blind, how the honest method of nature will work. The result, in the end, is invariably absolute failure. Of course, how could it be otherwise? A wise man once said, and if you forget everything else spoken to night, do not forget Dr. Johnson's words: "Man cannot so far know the connection of causes and events, as that he may venture to do wrong in order to do right."

The danger of being disingenuous in public affairs is very great to a lawyer. In his private practice he is expected to protect his clients' civil rights, and too often to advance his clients' civil wrongs. So long as any plausible argument, whether believed in or not, can be made, he makes it. This is the actual working of a lawyer's profession as a rule. However indefensible it is, it is very generally practiced. A lawyer wants to win his cases, and if a sophistical argument will do it, that argument is employed. When the lawyer becomes a politician, he fancies that the way to become famous is to win every time, otherwise his client will think him unskillful; or, at any rate, if he does win every time, his client will think him very clever. Just there he misses the distinction between the selfish, hard-fisted, soulless client, who only applauds every personal advantage, and the public, which cannot be deceived for any length of time, and which counts the clever lawyer or politician who wins by trickery only a clever rogue. The people love justice and truth. The man who would gain their confidence and respect and the honor of their admiration must be of "bomb-proof" intellectual integrity. The lawyer who takes part in political affairs, whether to a large or small extent, whether in important or in trivial matters, owes to the State, to the public, to his party, a solemn debt of honor to be sincere, to be honest, to be truthful. If he does not discharge it—if he, for any reason, plays the demagogue—he belittles himself, and the people know it; he is false to patriotism, and an injury to his party. So I submit integrity as a lawyer's first duty as a citizen.

—A second duty which a lawyer owes to the State is to take an interest in public affairs. He need not become a politician; he need not run for any office; but he can be interested in what is doing politi-

cally. If he be a man of integrity and of moral grit his influence will be felt. There is no excuse to a man who can advance by a little effort the welfare of his community, but who will not make the effort.

A third duty which a lawyer, as a citizen, owes his commonwealth is to hasten the abolition of feudalism. Feudalism has never gained recognition with us as to estates in land. We boast that all tenure in this country is allodial; that is, is not subject to a superior lord. But all that the feudal lord could claim was work or military service, or rent; he could not and did not claim his tenant's soul. But there is a feudalism in our midst more degrading than that which, under monarchies, was almost a necessity; it is feudalism in politics. You know that formerly a tenant of land, even though a freeman, holding an estate under the lord of a manor, was known as "the lord's man," and to keep his property he had to render certain service. That is all abolished with us, but, now, our chosen representative in government is too frequently some "boss's man." His tenure of office is conditioned upon his rendering service or paying tribute, or both, to his boss; and under the "people's representative" are serfs and villains (in the modern sense) who perform such service and pay such tribute as their superior may require. These services are often of a demoralizing sort. They are adapted to one sole end — the establishment of the boss's supreme power. To that everything, everything must give way. The test of fitness is displaced by that of subserviency; one's loyalty to party comes to mean one's loyalty to one's immediate superior in the system, and resistance is party treason. The first sign of an independent, intellectual life, which, allowed to develop, might grow into a genuine fitness for the position held, is looked upon as dangerous to the monarchy, and a more pliable tool soon takes the protester's place. Independence, integrity, common honesty are the rent given up under this, our modern American feudalism, and it is not too much to say that under it a man is expected to give up his soul. Do not imagine that the occasional protests of the people, as shown by one year's vote, render future activity unnecessary. So long as we have a large illiterate and ignorant vote in our cities, just so long will scheming political "leaders" ply their trade, and just so long will they have an organization, and at its head will be the king of bosses. His effrontery will grow with his power, and shortly he will take, not unkindly, Agamemnon's title, "King of Men."

This brings about a revolt and he is overthrown only to be succeeded by some one else of the same breed. Down with the feudal system in politics.

Let us have for bosses, that is men who are to give us our laws, men whom we elect for that purpose. Then we can turn them out when they do ill. But a monarchical boss, who has often more power than any constitutional monarch in Europe, holds no office; and as votes did not put him into his "bed of justice," votes alone cannot turn him out. Agitation will do it. Citizens can do it. But so long as citizens for the sake of a nomination to office will submit to such debasing slavery, and for such a bribe will make no protest against any menace to our institutions, just so long will we suffer from the natural effects of intellectual and moral serfdom. This is work to which every young lawyer is called. It is the call of the people. You can heed it if you will and if you are brave.

The invitation to you as citizens at this time is then to integrity; to an active interest in public affairs; to political freedom. The brave man will respond quickly. The loyal man will not look back. The honest man will not accept a bribe. Who can refuse to respond without shame? The results of such an enlistment can be very surely predicted — honor, self-respect and the gratitude of posterity. Because the evolution of society is in the hands of God, working through the forces which are superior to us and against which we are powerless; because this onward development is to be accomplished by righteousness and can be delayed only, not defeated, by cowardice, hypocrisy and selfishness; because you owe it to your country, your homes and yourselves, I urge you all to bear in your minds and hearts at this early but critical time in your careers the sacred obligations which rest upon you as citizens of our republic.

#### MASTER AND SERVANT.

An address delivered at the Woman's Law Class of the University of the City of New York, by *CARRIE CARRINGTON, M. L.*

THE relations between employer and employed have been productive of most important discussions and decisions as regards the law of master and servant which have arisen in this country. There is great confusion upon the question *who is a fellow servant*, not only among the courts of the various States of the Union, but even among the various courts of this State. In fact, it is somewhat difficult to reconcile the decisions of our own Court of Appeals upon that question. It has generally been held that a master is not responsible to his servant for acts done by a fellow servant in the same line of employment.

In *Filbert v. D. & H. Canal Co.*, 121 N. Y. 207, the Court of Appeals, reversing the Superior Court of the City of New York, held that a servant who

was repairing the roadbed of a railroad was a fellow servant of a servant who was coupling cars on the road; while the same court, in another case, held that a train despatcher and a man working on a train were not fellow servants (see 53 N. Y., 549); and in *Potts v. N. Y. Central*, 136 N. Y. 77, the Court of Appeals held that a brakeman who was on a train of cars which was coming into a station was a fellow servant of a man who was inspecting cars in the station.

It is difficult to see why, if the man that despatches a train is not a fellow servant with a man who is working on the train, it should be held that a brakeman on a train of cars was the fellow servant of a man who was inspecting cars in the station. In view of the conflicting decisions and the different distinctions made by the courts, a law should be passed to the effect that a corporation or other employer should not avail itself or himself of the defense that the injury was caused by the negligence of a fellow servant.

There is no logical reason why such a law should not be passed. The distinction at best was an arbitrary one and was not invented or even discovered until 1837, when the case of *Priestly against Fowler* was decided by the Court of Exchequer in England (see 8 Meeson & Wellsby, p. 1) upon, as Lord Abinger says, "General Principles." The reason assigned by the learned Chief Baron for the decisions of the case bring a smile to the face of a modern lawyer. He started off by saying that it was admitted that there was no precedent for the present action by a servant against the master, and, therefore, the question was to be decided upon general principles, and in doing so, the court was at liberty to look at the consequences of a decision one way or the other. He proceeded to look at the consequences of a decision, if it was in favor of the servant.

"If the master said he be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. \* \* \* If the owner of a carriage is responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, his harness-maker, or his coachman. The footman who rides behind the carriage may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect or want of skill in the coachman. The master, for example, would be liable to the servant for the negligence of the chamber-maid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence

of the cook in not properly cleaning the copper vessel used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins."

In none of the instances cited by the learned Chief Baron would the servant have a cause of action against the master. When the question first came up in this State, in *Coon v. Syracuse & Utica R. R. Co.*, it was decided without discussion on the authority of *Priestly against Fowler*; in fact, *Priestly against Fowler* is the authority for all the cases in this country on that subject. In this connection, it may be well to call attention to contracts limiting the liability of the employer for negligence to his employee. Surely such a contract should be held to be invalid. In fact, such a contract was held to be void as against public policy by the Supreme Court of the United States. The question has never been determined by the Court of Appeals in this State. That court said, in *Purdy v. Rome, W. & O. R. R. Co.*, 125 N. Y., decided in 1891, that upon that question it desired to express no opinion at that time. In that case, the contract of exemption from liability was made after the contract of employment, and the court held that it was void for want of consideration, and then said: "In thus deciding, we do not intimate that if defendant had given some kind of consideration it would have been valid." And in the case of *Mynard v. Syracuse R. R. Co.*, 71 N. Y., the court said that a contract of shipment by which the defendant, a common carrier, in consideration of a reduced rate, was released from all claim for any damage or injury from whatsoever cause arising, did not include a loss arising from the carrier's negligence, and that for such loss it was liable.

As the law now is, it is the duty of a master to furnish reasonably safe appliances for the use of his servant; to provide a reasonably safe place for him to work in, and to supply competent and skillful servants, and a sufficient number of them, for him to work with, and he should not be allowed to avail himself of the necessities of his servant in order to escape liability for his neglect in performing the duty imposed upon him by law.

If a master can escape liability through such a contract, he will not use that degree of care required from him by the law; and through failure to use such care, the safety of the citizens of the State will be endangered.

It is for the interest of the State that the lives and limbs of its citizens should be protected; and a contract that takes away such protection is against public policy, and void.

## Abstracts of Recent Decisions.

**ADMIRALTY—JURISDICTION.**—Admiralty has no jurisdiction of a tort where the injury was received on the land, though the wrongful act was done on a ship. (*Price v. the Bell of the Coast* [U. S. D. C., La.], 66 Fed. Rep. 62.)

**ASSIGNMENT—HUSBAND AND WIFE.**—Where the words of an assignment to husband and wife leave in doubt the question of whether it is to them in severalty or as tenants by the entirety, the circumstances of the assignment and the character of the entire transaction may be considered. (*In re Young's Estate* [Pa.], 31 Atl. Rep. 378.)

**CARRIERS — SEASON-TICKET HOLDERS.**—In an action by a railroad company to recover the fare for a certain trip to which defendant claims he was entitled under his season ticket, a schedule of trains in force at the time is admissible to show that the train upon which defendant rode did not regularly stop at his destination, and that he did not have the right to ride on it under the contract in his season ticket. (*New York & N. E. R. Co. v. Feely* [Mass.], 40 N. E. Rep. 20.)

**CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—Comp. Laws Utah 1888, § 2087, providing that any person who drives a herd of certain animals over a highway constructed on a hillside shall be liable for certain damage done by such animals to the highway, does not deny the equal protection of the law, or deprive persons of property without due process of law, within the inhibition of Const. U. S. Amend. 14. (*Brim v. Jones* [Utah], 39 Pac. Rep. 825.)

**CORPORATION—STOCK—DELIVERY.**—An indorsement of a certificate of mining stock by the holder thereof, at the request of the owner, to a third person, as security for his indorsement of the owner's notes, constitutes an actual delivery of the stock to the owner, and relieves the one indorsing it from liability for a conversion of the stock in not delivering it to the owner in person. (*McDonald v. Mackinnon* [Mich.], 62 N. W. Rep. 560.)

**DIVORCE—COLLUSIVE AGREEMENT.**—An agreement between husband and wife, executed pending divorce proceedings, in regard to the division of their property and the custody of their children, based on the consideration that the husband withdraw his counter charges, and make no defense to the action, is void as against public policy. (*Loveren v. Loveren* [Cal.], 39 Pac. Rep. 801.)

**ESTOPPEL—IN PAIS—ASSIGNMENT OF JUDGMENT.**—Where the owner of a judgment transfers the same by an unconditional assignment, but really for purposes of collection only, and the assignee fraudulently assigns it to an innocent purchaser, the principle of estoppel applies in favor of the latter,

upon the ground that the real owner placed it in his assignee's power to commit the fraud. (*Baker v. Wood* [U. S. S. C.], 15 S. C. Rep. 563.)

**INSURANCE—ACTION ON POLICY.**—In an action on a fire insurance policy, a variance between the declaration and the evidence as to the date of the policy is not fatal, proofs of loss having been made within the time required. (*Lum v. United States Fire Ins. Co.* [Mich.], 62 N. W. Rep. 562.)

**JUDGMENT—COLATERAL ATTACK.**—An administrator's sale of land cannot be collaterally attacked on the grounds that complainants did not contest the probate proceedings for the sale because of their ignorance of their rights, and that the debt for which the land was sold was barred by limitation, and alleging fraud and collusion generally. (*Cobb v. Garner* [Ala.], 17 South. Rep. 47.)

**LANDLORD AND TENANT—INSOLVENCY OF LESSEE.**—An assignee or receiver has a reasonable time in which to elect whether he will accept or reject a lease, wherein the party whose estate he represents is lessee, and, during such reasonable time, he may enter upon and occupy the demised premises for the purpose of selling, under the direction of the court, personal property thereon belonging to the trust estate, without thereby accepting the lease for such estate. (*Nelson v. Kalkhoff* [Minn.], 62 N. W. Rep. 385.)

**MARRIAGE PROMISE—EXCESSIVE DAMAGES.**—A contract to marry entered into between parties, one only of whom is qualified to make such a contract, is void. (*Eva v. Rodgers* [Ind.], 40 N. E. Rep. 25.)

**MASTER AND SERVANT—INJURIES TO EMPLOYEE—DEFECTIVE APPLIANCES.**—In an action by a servant against the master for injuries received through the bursting of a water valve, the evidence was that the appearance of the valve did not indicate to one without special knowledge that the valve was defective, and there was no evidence that defendant possessed that special knowledge, nor any evidence inconsistent with the supposition that the valve had been properly tested before defendant accepted it. *Held*, that the burden being on plaintiff to show that defendant knew, or by proper care might have known, that the valve was unsafe, a nonsuit was proper. (*Deane v. Roaring Fork Electric Light & Power Co.* [Colo.], 39 Pac. Rep. 846.)

**MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS.**—The fixing by board of city water commissioners, in specifications for work to be done of a minimum price to be paid for labor, and the awarding of a contract on the basis of such specifications, is a violation of a statutory provision requiring such work to be awarded to the lowest responsible bidder, and void. (*Frame v. Felix* [Pa.], 31 Atl. Rep. 375.)

**MUNICIPAL INDEBTEDNESS—BASIS OF LIMIT.**—Under Const., Mo., art. 10, § 12, declaring that no city shall incur an indebtedness exceeding five per cent of the value of its taxable property, "to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness," an assessment cannot be considered which has not passed the State board of equalization. (*Prickett v. City of Marceline* [U. S. C. C., Mo.], 65 Fed. Rep. 469.)

**NEGOTIABLE INSTRUMENT—NOTE—CONSIDERATION.**—A partner gave a note to a person to whose business the firm succeeded, and for five years made no demand for surrender, though a demand had been made on him for payment. A branch of the business was established without the payee's knowledge, and the maker's partner submitted to a judgment on a like note given by him. *Held*, sufficient to show that the note was given for the interest in the business. (*Browning v. Kempton* [N. J.], 31 Atl. Rep. 380.)

**PARENT AND CHILD—CUSTODY OF CHILD.**—As against the claim of a child's maternal grandparents, and in the absence of any deed to them of the custody of the child, its father, who is morally and financially fitted to care for it, is entitled to the custody. (*Latham v. Ellis* [N. Car.], 20 S. E. Rep. 1012.)

**PARTNERSHIP—POWER OF MEMBERS.**—A chose in action accruing to a partnership from a transaction in the ordinary course of its business may be transferred by a single member of the firm. (*Gerli v. Poidebard Silk Manuf'g Co.* [N. J.], 31 Atl. Rep. 401.)

**RAILROAD COMPANY—INJURY—NEGLIGENCE.**—When entering into the railway service in such a latitude, an employe assumes such risks as are usually and customarily incident to the falling of snow, the forming of ice, and the removal of the same from tracks and places where employes are required to work, when the removal or disposition thereof is done in a proper and reasonable manner, in the exercise of due and ordinary care for the safety of employes. (*Lawson v. Truesdale* [Minn.], 62 N. W. Rep. 546.)

**RECEIVERS—CORPORATION.**—Officers of a corporation, appointed its receivers because its business was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scattered through several States, will not be removed from the receivership because of former imprudent investments, and other mismanagement of the business of the corporation, as its officers, no fraudulent practices which would disqualify them being shown. (*Fowler v. Jarvis Conklin Mortgage Trust Co.* [U. S. C. C., N. Y.], 66 Fed. Rep. 14.)

**RECEIVERS—RAILWAY REORGANIZATION SCHEME.**—It is not improper for the receiver of a railway corporation to promote any reorganization scheme which offers the prospect of securing the largest measure of protection to all persons concerned in or connected with the property and assets in the custody of the court, but in so doing he must not promote one interest at the expense of others equally entitled to the court's protection. (*Clarke v. Central Railroad & Banking Co. of Georgia* [U. S. C. C., Ga.], 66 Fed. Rep. 16.)

**RES JUDICATA—DIFFERENT CAUSE OF ACTION.**—An action against a receiver for failure to collect a judgment out of certain bonds and other property, alleged to have belonged to the judgment debtor, is not barred by a judgment in a former action by plaintiff, to which the receiver was not a party, in which it was adjudged that the debtor was not the owner of the bonds, and in which the other property was not involved. (*Turner v. Rosenthal* [N. Car.], 21 S. E. Rep. 198.)

**WATER RIGHTS—PUBLIC LANDS.**—One desiring to appropriate the water of a stream on vacant public land of the United States may take possession of and use a ditch already constructed on the land, and not in the actual possession of another. (*Utt v. Frey* [Cal.], 39 Pac. Rep. 807.)

**WILLS—CONSTRUCTION.**—Stocks were devised to testator's son, to be held in trust ten years, then to be delivered to him; if deceased, then to his son; if both were deceased before the ten years have expired, then to be transferred to his daughters, L. and M.; if either daughter was deceased, her portion was to be transferred to the remaining daughter; if both were deceased, then to certain others: *Held*, not to create a trust which suspends alienation for a longer period than two lives in being. (*Montignani v. Blade* [N. Y.], 39 N. E. Rep. 719.)

**DEFEASIBLE FEE.**—Testator devised a farm in trust for J., with power in the trustee to collect the rents thereof for the support of J., and provided that the farm should go, after the death of J., to his children, if he had any, but that, if he had none, it should go to any person whom J. might devise it to, and that it should be "theirs" forever. *Held*, that J. was vested with a fee which could be defeated only by his having bodily heirs. (*McCallister v. Bethel* [Ky.], 29 S. W. Rep. 745.)

**TESTAMENTARY POWERS.**—Where the will of the donee of a power does not refer to the power, nor specifically to the property controlled by it, but merely devises all her estate, real and personal, it being shown that the realty subject to the power was vested in the donee's father, who survived her, and that she had personal, but no real property, such devise was not an execution of the power. (*Mason v. Wheeler* [R. I.], 31 Atl. Rep. 426.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ONE of the most interesting and thoughtful articles that has recently appeared is a paper on "Uniform State Legislation," by Frederic J. Stimson, of Boston, Mass., which was submitted to the American Academy of Political and Social Science, of Philadelphia. This is undoubtedly a subject which is of increasing importance to Americans, and the necessity of making some radical change to make the laws of the different States operate in a like manner and with similar force on the citizens of the country is becoming more and more appreciated by students of law. In opening his paper Mr. Stimson says:

"We are living under a fourfold system of law; there is in every State (1) the common law of the State as interpreted by its courts; (2) the common law as interpreted by the United States courts; (3) the statutes of the State, and (4) the statutes of the United States.

"Can the complication which thus arises be abated? I, for one, have no desire to touch our system of State and Federal government, with the resulting system of State and Federal courts; still less have I any desire to touch the Federal Constitution, or to alter that great principle of local self-government under which our sovereign States legislate for themselves on their own affairs — 'a method which so well combines Roman power with Saxon freedom.' But by voluntary and simultaneous action — the same action which led to the adoption of the Federal Constitution — it is hoped that the several States may gradually be brought to enact the same statutes on all purely formal matters, on most matters of trade and commerce, and in general on all those subjects where no peculiar geographical or social condition, or inherited custom of the people demands in each State a separate and peculiar statute law. In other words, we think that the confusion which

results from contradictory statutes may in large measure be obviated without any great modification of the statute law in any one State; by merely passing, under the general head of 'acts to promote national uniformity of law,' new and simple chapters of laws in cases where the uniform law is different from the law as already existing in the State. In most cases they will be the same; for, other things being equal, we shall, of course, recommend for adoption the law existing already in the greatest number of States.

"Now how does this diversity of statute law arise? Let us consider the statute law of the original thirteen States, and the extent to which they have simultaneously adopted the common law of England and its statutes. The inherited body of English laws, as existing, let us say, July 4, 1776, was already somewhat complex. It consisted: (1) of the common law of England so far as each State had tacitly adopted it as suited to their condition; and, further, so far as they had expressly adopted it by statute at this or a subsequent time; (2) of the statutes of England, or Great Britain, amendatory to the common law, which they had in like manner, that is, tacitly or expressly, adopted; and (3) of the colonial statutes themselves.

"Here we may observe two reasons for diversity: (1) In English statute law, as the States differed very widely in the completeness with which they adopted it, and the date to which they brought such adoption, and (2) the difference existing among the colonies in their own statutes. This, however, is not so great as would be supposed; for nearly all colonial statutes were more in the nature of ordinances, and concerned such matters as the treatment of Indians and the financial system rather than the general common law; and, moreover, after the revolution there was a distinct tendency to adopt the same laws, even though the colonial laws had differed. For instance, in the case of the inheritance of land, some States had, before the Revolution, the rule of primogeniture, some States—like Massachusetts—gave the eldest son a double portion; and some States had already adopted, under the lead of Georgia, the system universal at present, by which all persons shared equally.

"Considering first the common law of England, Franklin said of it, 'The settlers of colo-



nies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for the payment of tithes and others. Had it been understood that they were to carry these laws with them, they had better have stayed home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of the laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others as they should think necessary, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England.'

"The common law of England has, in thirty States, been expressly adopted by a statute of the present State, the statute being adopted in most cases soon after the Revolution. Thus, in Maryland, the people are declared entitled to the common law of England by the Maryland declaration of rights. In twenty-four other States the common law of England so far as applicable and not inconsistent with the constitution and laws of the State, or such part of it as is adapted to the condition and wants of the people, whatever that may mean, is adopted and declared to be in force. In five other States such parts of the common law as were in force in the colony or in the territory previous to the adoption of the State Constitution, are declared in force if not inconsistent therewith.

"This accounts for thirty out of forty-six States and territories. Only in Florida and Dakota there is declared to be no Common Law cases where the law is declared by the codes. In the other fifteen States and territories the statute-books are silent; but I will presume that in all the common law of England prevails; for the only States about which there will be any doubt, namely: Texas, Louisiana, New Mexico and Arizona, originally French or Spanish States, belong to the class which have expressly adopted the common law. We see, therefore, that there is no great ground for diversity here.

"Taking up next the English statutes: Here we find a great diversity. Professor Colby, of Dartmouth, says,\* 'By English Constitutional usage acts of parliament passed after the settlement of any American colony were not deemed to bind it unless it was named therein.† Long before the Revolution public opinion in America ordained and declared that no act of parliament passed after the settlement of any American colony ought to have force therein, even if applied to it in express terms, unless adopted in it, at least, by tacit consent. When, therefore, independence was proclaimed and State Constitutions were adopted, English statutes amendatory of the common law, only 'so far as applicable and not inconsistent with the laws of the United States or the State' were declared to be in force in the different States. But in this matter the original States, and later the new States, have acted with true English irregularity, and so added to the diversity of the American law.'

"Indiana, Illinois, the Virginias, Missouri, Arkansas, Colorado and Wyoming, adopt all English statutes which were enacted prior to the fourth year of James I., with certain specified exceptions even there; while Rhode Island and Florida adopt all statutes up to the time of the Declaration of Independence; and Pennsylvania all which were in force on May 10 of the year 1776; and New York, on the other hand, expressly denies any effect to any English statutes in New York since May 1, 1788. Thus in Pennsylvania practically all English statutes enacted before May 10, 1776, are in force, while in the neighboring State of New York none are.

"Nevertheless, I think that the courts of all States — including the vast majority which are silent on this point — do in fact enforce those important English statutes which have grown to be considered as part of the common law. I do not believe, therefore, that there is any great cause for diversity here again.

"Taking up next the colonial statutes: In Massachusetts there are a great many colonial laws which are very interesting; especially the collection known as the 'Body of Liberties,' and which have probably some effect on the

\* Address of James F. Colby before Grafton & Coos Bar Association, January 29, 1892.

† Blackstone, Vol. I, p. 108.

present decisions of courts in that State; but the bulk of them are of interest rather from the sociological point of view. It comprises ninety-eight sections, the first of which is identical with the civil rights provision of the English petition of right to Charles I. Twelve other sections concern similar rights. Section 9 regulates monopolies and patents; and section 10 declares lands free of all feudal systems of tenure. Section 11 gives power to will; and there are forty other sections concerning 'rights at law.' Twenty-one sections are called 'Laws concerning liberties, more particularly concerning freemen;' four sections concerning 'liberties of children,' four 'of servants;' four 'of foreigners,' while only two consider the 'liberties of women.'

"From a general glance at the Massachusetts colonial laws, it appears that substantially all matters now covered by statute were treated of in them, and also many other matters concerning which statute regulation would now be indefensible; for, as we all know, the Puritan commonwealth interfered with the liberty of the citizen to a far greater extent than we would suffer the State to do nowadays.

"As an example of the sort of colonial statute which is still in force to-day, one may mention that statute which was universally adopted throughout the colonies providing that all conveyances of land shall be by deed, and not by livery of seisin; and establishing the relations within which a person may not marry.

"The laws of New Hampshire and Rhode Island were much like those of Massachusetts, and are quite as bulky. The laws of Connecticut are still more so. The laws of New York are contained in statutes at large; they are bulky and not digested; but most of them were, after all, mere ordinances or regulations of government; not statutes affecting the common law. In Maryland we find an official volume of English statutes in force running from the ninth of Henry III.—the statute of dower—down to the eleventh of George III.—the renewal of leases; and in South Carolina we find an act of 1712 giving a similar list of the statutes of the kingdom of England, or South Britain, which were in force in that colony, running from Magna Charta ninth Henry III., to the twelfth of William III. This list, curi-

ously enough, is not identical with the Maryland list; but includes a greater number of statutes, although many statutes were adopted in both.

"The only constitutional bodies of law which left any trace on our present States, were the body of liberties of Massachusetts; and the declarations or bills of rights of Virginia, Rhode Island, and Connecticut, the last of which is claimed to be the first independent constitution ever adopted in writing by an English state. For the most elaborate of all the colony constitutional documents, the celebrated scheme of government drawn by John Locke for the settlement of South Carolina, although printed still in the first volume of that colony's laws, so far as any effect or trace of it now goes, has vanished from the face of the earth."

After discussing the subject with great clearness and conciseness, Mr. Stimson, in conclusion, writes of the laws of marriage thus:

"As a result, the conference suggested the age of eighteen in the male, and sixteen in the female. Undoubtedly there are climatic reasons for not making this rule the same in all parts of the country; nevertheless, the difficulty of establishing a sort of Mason-and-Dixon's line on the ability to marry will be obvious to the most flippant observer. The recommendation, as a recommendation, does no harm; but the reader will probably think that it had better stay a recommendation, that the several States, while perhaps increasing the common law age, should nevertheless be left to determine such precise needs as their own experience warrants, and that in all States no marriage should be impeached for non-age which is followed by the birth of a child. One may apprehend in all seriousness that the question of marriage and divorce cannot be settled. This is not saying that it is not well to agitate it and improve the laws where we see them at fault—notably in matters of divorce; and on this point the conference made the following recommendations:

*'Resolved,* That it is the sense of this conference that no judgment or decree of divorce should be granted unless the defendant be domiciled within the State in which the action is brought, or shall have been domiciled therein at the time the cause of action arose, or unless the defendant shall have been personally served with process within said State, or shall have voluntarily appeared in such action or proceeding.

'Resolved, That where a marriage is dissolved both parties to the action shall be at liberty to marry again.'

"This will at least prevent what is undoubtedly the greatest abuse now, namely, the procuring of divorces easily and without publicity in foreign States, which have no proper jurisdiction, and without notice to the defendant party, who is usually, in such cases, the innocent party. But it would seem that the question of marriage is one which not only varies at a given time in different sects, in different communities, in different civilizations, and in different races, but is one upon which any one community is not at a point of stable equilibrium. Unquestionably this most important relation is undergoing a change, a change at least in the point of view from which it is regarded, if not in the statutes embodying it. Democracy, the modern view of property, the other modern movement — which only began with Mary Wollstonecroft in the early part of this century, and is known as the emancipation of women — is certainly, in its last result, not going to leave the relation of the sexes where it found it. And yet, so far, there has been on the statute book very little change. All the debates of conferences such as this, while interesting, as the conversation of any intelligent person must be on this subject, are nevertheless entitled to little more consideration than — perhaps not so much as — that great unconscious public sentiment, which does not rise to that point of conscious intellectual consideration, but which, behind the manners and movements of mankind, dominates the action of humanity, forms society, and only afterward appears in laws and statutes."

At Newport, there will be given this summer a course in international law by the war college. In view of the recent international difficulties, this subject has become one of interest and importance, and it is becoming more and more recognized that the growth and development of well-recognized principles of international law will greatly facilitate peaceful settlements of controversies between nations. The problems which have been offered for solution at this court are herewith given. In preparing answers to these question, each person is required to furnish authorities and precedents wherever possible.

Situation I.—In command of a United States man-of-war, cruising along the west coast of South America, you arrive in the vicinity of the port of Talcahuano. When five miles off the coast, you discover that an American merchantman is being chased at that distance from the nearest land by a public vessel of the nationality of the port. She is arrested and taken into port, and, upon inquiry, you ascertain that it was for landing Chinese coolies in violation of a local law. You follow these vessels into port, and, after making inquiries concerning the matter, take up a certain line of conduct, which please state.

You find that the American vessel is foreign built, with a properly made out and registered consular certificate. Does the fact that she is not a regularly documented vessel of the United States prevent any protection to which a legal vessel of the United States would be entitled?

After the captured merchantman is anchored in the port, the United States flag is hauled down from her and one of the port substituted. Do you object, and if so, why?

The newly arrived American minister sends you written directions to seize the captured vessel in port and take her to a home port. What is your answer to this communication?

A native boatman attacks the coxswain of your gig while it is lying astern of the seized merchantman. He defends himself in the struggle, throwing the boatman overboard out of the gig. The boatman goes ashore and secures a warrant for the arrest of your coxswain, and the police come off to the ship under your command to arrest him. What do you do?

The endeavor is also made to arrest him from your gig, when he brings you ashore next day. He is finally arrested on liberty on shore. State your attitude in the latter cases.

Situation II.—While passing through the Straits of Magellan, in command of a small cruiser, you come to anchor off the Chilean settlement of Sandy Point. This town has no consular or diplomatic representative of the United States, and has no telegraphic communication with the civilized world. You find detained at anchor off Sandy Point a number of merchant vessels — American, English, and German — whose masters inform you that they

are denied a passage through the straits. This prevents any mail communication with the outside world.

The Chilean governor on shore informs you that the straits are considered by his government as exclusively territorial waters of Chile, and that he has, for what he deems sufficient reasons, closed the straits to passage by merchantmen, and that the merchantmen, having refused to go back, were detained by force by his order. He further states that he does not feel authorized to deny passage, however, to men-of-war. At this time no war exists, and there are no belligerent operations in the vicinity. What action do you take in response to the appeal from the American merchantmen? Please explain in full the situation and the reason for your action.

After taking action toward vessels of your own nationality, the masters of the English and German vessels also appeal to you for similar action on their behalf. What response do you make, and why?

You deem it your duty to remain at Sandy Point, and while there the aborigines (savages) threaten an attack and massacre. The governor begs you to land a force, and otherwise come to his aid in repelling such an attack. What do you do, and why?

There are several American citizens residing at Sandy Point, transacting business, and owning property there as aliens. The governor compels them to join a military company to defend the town. They question his right, and appeal to you. What answer do you make, and why?

Finally a large military detachment arrives from Chile, convoyed by the Arturo Prat and two fast protected cruisers. The trouble with the Indians and the danger from revolt on the part of the convicts at large, being imminent and serious, the governor, who is also senior military officer, declares martial law, and, among other things, proceeds to seize the property of the American residents for military purposes. Upon their violent resistance to this action, they are arrested, tried, and punished by a military commission, the civil courts being suspended. What action do you take as to this?

Finally, the military and naval commanders

announce that they have orders, under certain contingencies, which have now arrived, to request your departure at once from Sandy Point and the straits. They regret to tell you that, if necessary to enforce this request, they will have to use the superior force under their command. What do you do?

What instructions are likely to be sent by our government to our representative in Santiago in regard to this matter?

The Supreme Court of the United States just before adjournment handed down a decision which establishes the principles of the right of self-defense. The decision was given on the appeal of Babe Beard from a judgment of conviction and sentence of eight years' imprisonment for manslaughter. The facts of the case, it seems, were, that Beard had three brothers-in-law who came to his house with the express determination of driving away a cow, the ownership of which was in dispute between the parties. One of the brothers-in-law advanced upon Beard, who had a gun in his hands, and made a motion as if to draw a revolver from his pocket. Beard struck this brother-in-law over the head, inflicting a wound from which he died. On the trial the judge instructed the jury in regard to the law of self-defense, and said that Beard was compelled by that law to avoid danger at the hands of the person who threatened him by going away from the place, that the only place where he need not retreat further was his dwelling place. Judge Harlan, in delivering the opinion of the court, says that the charge was defective in point of law on several grounds, and in discussing this question in his opinion, he says:

"The court, several times in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business, that is, doing what he had a right to do, when, after returning home in the afternoon, he went from his dwelling house to a part of his premises near the orchard fence, just outside of which his wife and the Jones' brothers were engaged in a dispute—the former endeavoring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do, when, keeping within his own premises and near his

dwelling, he joined his wife, who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him? We have no hesitation in answering this question in the affirmative.

\* \* \* In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person, went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused.

"The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

"As the proceedings below were not conducted in accordance with these principles, the judgment must be reversed and the cause remanded, with directions to grant a new trial."

In England in the case of *The Hong Kong Land Investment and Agency Company* a decision has been reached in regard to the rights of a lessor of property where the lessee is winding-up the business of the corporation. The court holds that where at the date of the winding-up of the company the corporation is the lessee of premises for an unexpired term of years, the lessor is entitled to prove in the winding-up for the amount of the rent then due, and to enter a claim for the full amount

of the rent which will become due under the lease. In deciding the case, Mr. Justice Williams says :

"What is a lessor's right of proof in respect of an unexpired term of years at the date of the commencement of the liquidation? If the lease is still subsisting, how can he prove immediately? He cannot have both the rent and possession. What right can he have to re-enter and have the premises again? There must be a surrender or an accepted repudiation of the lease. Then it would be the same thing as in bankruptcy. In fact, unless there is a disclaimer, I do not see how *Hardy v. Fothergill* can apply. As the liquidator will not accept the terms offered by the land company, I cannot make him do so. I must, therefore, deal with the matter on the basis of there being a subsisting lease. The land company's rights will be those under the old cases, which are rightly contended to be good law. I cannot make the bank say they will give up the premises at the end of the seven years. All that I can do is to allow a proof for breaches of the lease up to the present time. According to my view, if the company in liquidation remain in beneficial occupation of the lease and premises, that is, if they are occupying and get the benefit of the lease, or get the rents and thus get the benefit of the lease, I shall do my very best to make them pay rent and not a dividend. If the people get the benefit of premises after the liquidation has commenced they must pay the rent. In my opinion, the principle of *Re Haytor Granite Company* and *Horseys's Claim* applies to this case, but if the bank are in beneficial occupation. I go further and say that the land company can enter a claim for the full rent. The reasonable thing is that the bank should surrender the lease at once and allow the land company to prove for the rent on the basis of that surrender. As, however, the land company decline to accept a surrender of the lease, I direct that they shall be at liberty to prove for the rent actually due and to enter a contingent claim for the present value of the future rent and obligations in the lease, following the cases of *Re Haytor Granite Company* and *Re London and Colonial Company; Horseys's Claim.*"

**THE COURT'S OPINION—FULL TEXT OF  
THE IMPORTANT DECISION ON THE  
BANK TAX CASES.**

**KENTUCKY COURT OF APPEALS.**

**O**PINION of the court delivered by Chief Justice Pryor, Judges Hazelrigg, Grace and Eastin concurring:

The Bank of Kentucky, the Northern Bank, the Farmers' Bank and other State banks, the National bank of Covington and other national banks, are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxation for county and municipal purposes, and others standing as appellees in cases relieving them from such local burden. The legislation imposing such burdens is found in the Kentucky statutes under the title of "Revenue and Taxation," and is based on sections 174 and 175 of the present Constitution. Section 174 provides:

"All property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

It is manifest, by reason of section 175, the right of the Legislature no longer exists of surrendering the power to tax property; or, by contract, to bind the State to any other mode of taxation than that found in the Constitution; and all property, whether belonging to corporations or individuals, must pay the same rate of taxation. The appellants in these cases (the banks) are claiming that, prior to the adoption of the present Constitution, a contract had been entered into between them and the State by which, in consideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid, or their charters required, the State agreed not to impose upon them any local burden, and the important inquiry in these cases is, was such a contract entered into between the banks and the State, based on a consideration binding the State on the one side, and the banks on the other?

The statute under which this contract is claimed to have been made, is found in the general statutes under the title of "Revenue and Taxation," sections 1 and 4 of article 2, known as the "Hewitt Bill." Counsel for the banks, in the discussion of these cases, classified the banks as follows:

First. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter, or reserved by any general law.

Second. Banks chartered after that date, when, by a general law, the right to amend or repeal the charters was expressly reserved.

Third. The national banks.

We shall treat all the cases as one, in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present Constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation, and require them to pay a larger tax to the State upon their property than that paid by the individual taxpayer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the Constitution, not approving of this policy, established a fixed rule of taxation, and made all taxation alike upon property, whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed and like institutions in more favored localities where lighter or no local burden exists; and, while the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred, under the present system (local and State), and those in an adjoining town or county only one per cent, may work a hardship, and prevent competition, or drive the bank thus heavily taxed to locate elsewhere, yet this, under the old system, was a question of policy only, and the framers of the present Constitution, in adopting the *ad valorem* system, left no room for classifying property so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the Legislature in framing the Hewitt act and that of the banks in accepting it.

It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856) with reference to taxation, and the circumstances attending the legislation resulting in the passage of the Hewitt bill, in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation, and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contract by which a tax of fifty cents on each share of \$100 of stock could only be imposed. The national banks claimed they were entitled to be taxed like the State banks and were not liable for

local burdens, and besides, that their surplus, if in greenbacks, or other non-taxable securities, could not be taxed under their charters from the Federal government. The State claimed that the old banks were taxed for too small an amount, and, the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks. Under these circumstances, the Legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all the banks, State and national, we will impose a tax of seventy-five cents on each share of your capital stock equal to \$100, and in addition a tax on your surplus, and this shall be in full of all tax, State, county and municipal, provided, you will accept the act imposing the tax, with the conditions annexed. This act reads:

"Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock shall be taxed seventy-five cents on each share thereof equal to \$100 of stock therein, owned by individuals, corporations or societies, and such banks, institutions and corporations shall, in addition, pay on each \$100 of so much of their surplus, undivided surplus, undivided profits or individual accumulations, as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The seventh section of the act further providing that "Nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business; but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of the act provided:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement with the State of Kentucky shall be evidenced by writing, under the seal of such bank, and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said

tax shall be paid during the corporate existence of such bank."

Section 5 of the act provided:

"The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly, provided they pay the tax provided for in section 1 from the passage of the act."

Section 6 provides:

"This act shall be subject to the provisions of section 8, chapter 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act, and filed their written acceptance with the governor under their corporate seal. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of \$100. The national banks yielded their right to deduct from the value of their stock their surplus, consisting of non-taxable securities, and their claim to be taxed as the old banks; and most of the State banks uniting to prevent any discrimination, all accepted the proposition made by the State, and agreed to pay seventy-five cents on each share of stock of \$100 in value, and the additional tax mentioned in the article.

It is conceded (and we think it clear) by counsel for the city of Louisville, that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of \$100, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in section 6 of article 11. Again, it is contended by counsel for the city of Frankfort that the grant to the banks was without any consideration, and the renewals of the charters of the old banks, as they are designated, placed them within the provisions of the act of 1856; and, by the attorney-general, that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court, in the case of the Franklin County Court against the Bank of Kentucky, reported in 87th Kentucky, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant; and, if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals. At the date of the passage of the Hewitt bill, the the Franklin Circuit Court had decided that the charter contract still existed; and, after the acceptance by the banks of the provisions of the

Hewitt bill, this court affirmed that judgment. It is apparent that Article II. in the Hewitt bill was adopted by the Legislature with the view of equalizing the burdens of taxation as between the banks, and to relieve them from the burden of local taxation during their corporate existence; but it is insisted there was no consideration for this partial exemption.

If there was a binding contract between the old banks and the State to pay a tax of only fifty cents on each share of stock, and the banks surrendered their contract, or their rights under it, and agreed to pay seventy-five cents to the State, instead of forty-two and a half cents, it seems to us this would be a consideration sufficient to uphold any such contract with the State, if the power existed with the State to make it; and the fact that such a power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights, not only to settle the question as to local taxation, but to prevent competition, or any discrimination, between banks located in the commercial centers of the State and those outside of such localities, where no heavy burdens for local taxes were being levied; and, therefore, the consideration, moving from the old banks, was for the benefit of all the banks accepting the terms of the contract. The Legislature was attempting to avoid all discriminations between these moneyed institutions, and, therefore, its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after, as well as before, the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute imposing the tax of seventy-five cents, and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it. No reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that, if a contract was entered into, the provisions of the present Constitution, and subsequent legislation under it, operated to repeal not only the statute, but the contract made by virtue of its provisions; and this power existed by reason of the sixth section of the article, making it subject to the provisions of Section 8 of Chapter 68, General Statutes, declaring that:

"This shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be plainly expressed."

Provided: "That, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, and, as we think, was the legislative intent, the word "act" in section 2 of the Hewitt bill was used as synonymous with the word "article," and, therefore, the reservation of the power on the part of the Legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the Legislature. The distinction between the power of the Legislature to repeal an act and the right to annul by appeal or otherwise a contract made under it is manifest; and, while, under our present Constitution, the State can make no contract by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former Constitution property might not only be classified, in imposing taxation, but the State could discriminate between the classes, when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court, and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is, that one legislative body can not bind a subsequent Legislature by its action, in purely legislative matters; but, when it comes to matters of contract, if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens; and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution which provides that:

"No State shall pass any law impairing the obligation of contracts." (Section 10 of article 1, United States Constitution.)

That the State may enter into such contract was held by this court as early as the year 1839, in the case of Johnson against the Commonwealth, reported in 7th Dana, 442, where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract, and this court held that the contract placed a limitation on the power. In the case of the Farmers' Bank against the Commonwealth, reported in 6th Bush, it was held that the bank could not be taxed beyond its charter rate as fixed by the contract; and in the late case of the city of Frankfort against the Bank of Kentucky and others, reported in 87th Kentucky, the same doctrine was announced. The question, then, arises, did the reservation of the power to amend or repeal this article of the Hewitt law empower the Legislature, or the framers of the Constitution, to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this



question, that the parties making it never contemplated, or intended, that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The Legislature, at the time this contract was made, recognized the right of the Bank of Kentucky and the banks chartered prior to 1856 to stand upon their charter rights, or, if not, the right of the banks as against the State on this subject of taxation had found its way to the court, and had been decided adversely to the State. The Legislature thought the tax of fifty cents too small; the old banks claimed an irrevocable contract; the National banks could only be taxed as authorized by the Federal Congress; the new State banks were subject to such taxation as the State might see proper to place upon them, and, to make them liable for these local burdens would be to end their existence, or cause them to seek shelter under the Federal Banking Act; and, with the view of placing the entire matter at rest, and placing the banks on an equal footing, the Legislature said to all the banks, "If you will agree to pay seventy-five cents on each share of stock equal to \$100, it shall be in full of all tax, State, county and municipal." It said to the old banks, "You must relinquish your right to a smaller rate of tax, and this must be done not by your president and directors, but by the consent of the stockholders, in writing, and delivered to the governor, as evidence of your good faith." The banks accepted the proposition made them, in the manner pointed out by the act; and from that time to the adoption of the present Constitution, the contract was adhered to by both the State and the banks. It is now argued that the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights, and agreed to pay a higher rate of tax under an act that authorized any subsequent Legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business men at the head of these institutions would relinquish any right they had acquired under their charters, that an increased burden might be placed upon the banks they represented. In the contention that the sixth section of the article reserved this power of repeal, counsel overlook the fact that, by the express terms of the section by which this reserved power is retained, it is provided that:

"No amendment or repeal shall impair other rights previously vested."

The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself, connected with its acceptance by the banks, vested in the latter rights

of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence. The State waived its right to tax these banks for local purposes (except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way, the State granting the franchise, derived the benefit instead of the municipal government, which, under the present system, the difference between forty-two and a half cents and seventy-five cents, with tax on surplus, amounting to \$125,000, is taken from the revenue proper and applied to the municipalities where the banks are located.

In the case of the State against the Green and Barren River Navigation Company, reported in 79th Kentucky, this court held, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and the repeal of the charter to the extent that it deprived the company of its contract rights acquired under it, was in violation of the Constitution. In that case that court said:

"We cannot assent to a doctrine that will allow the State to alter or abolish such contracts whenever, in the opinion of the Legislature, the necessities of the public or the interest of the State requires it."

The case of the Commonwealth against the Owensboro Railroad Company, to be reported in 96th Kentucky, determines in effect the question involved here. In the year 1884 the Legislature passed an act to encourage the construction of railroads, and, in doing so, relieved them from taxation for a limited period. The act provided:

"That all said railroads which may hereafter be built within this Commonwealth, under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of this Commonwealth for the period of five years from the date of the beginning of the construction of the new roads."

The State claimed the right, under the act of 1856, to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes when the five years from the beginning of construction of these roads had not expired. The court, in response to the argument to exact the tax, and the application of the act of 1856 to its provisions, said:

"It is sufficient to say of this proposition, which, even at first blush, strikes us as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State and expended their money on its exemption pledge, that the act of 1856 reserving the right to repeal or

amend charter privileges, has no application to the law of 1884, which, as said before, was a general law, and affected all alike who accepted its provisions, or acted on the strength of them."

Connseil for the local governments argue the questions involved as if there was a perpetual grant to these corporations, and, therefore the power of repeal must, of necessity, have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence, the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the Constitution, in adopting that instrument were not looking to past legislation on this particular subject, but were creating an organic law for the future welfare of the State, leaving the rights of those protected by either the State or Federal Constitutions undisturbed; and if the attempt to repeal vested rights had been made, the framers of the present Constitution would have been as powerless to accomplish such a purpose as the Legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the Court of Appeals of New Jersey, in the case of *New Jersey v. Yard*, reported in 95th United States, 110. By an act of the Legislature passed in March, 1865, the Legislature of New Jersey enacted that the Morris and Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amounted to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open and in use to Phillipsburg, and annually thereafter, "which tax shall be in lieu and satisfaction of all other taxation and imposition whatever, by or under the authority of this State." The twentieth section of the original act of incorporation reserved to the Legislature the right to alter, amend or repeal the act whenever it should think proper. The act of 1865 was an amendment to the original grant, and in regulating the amount of taxation contained this proviso:

"Provided, That this section shall not go into effect or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller, in delivering the opinion in that case, said:

"The main question here is: Did the Legisla-

ture intend to make such a contract; that its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States."

And in like manner will the contract in question be upheld, and, as said by Mr. Justice Miller in *New Jersey v. Yard*:

"The Legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms, but they required of the company a formal, written acceptance within sixty days, else to become wholly inoperative."

And it may be said in the *New Jersey* case there was no consideration other than is found in ordinary railroad charters. It is said, however, in that case, the repealing clause, or what is known in this State as the act of 1856, was appended to the original charter, and when amended formed no part of the amendment, as is found in this case, and, therefore, the court concluded the amendment was not subject to repeal. The question is asked, Why the necessity of making the act of 1856 apply to article 2, if the Legislature did not intend to reserve the right of annulling the contract? In response to this, it might be asked, If such was the legislative intent, why the necessity of having a formal, written acceptance from the banks surrendering all their respective charter rights, and in consideration therefor, agreeing to tax them seventy-five cents on the one hundred dollars, so long as their charters continued, if the power was reserved of abrogating the contract at any moment? If such was the legislative purpose, there could have been no necessity for any consideration moving from the banks, or any formality attending the execution of the contract. The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the *Dartmouth College* case, reported in 4th Wheaton, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the Legislature, without such a reservation; but under this act of 1856 it has been held by this court, as well as every other court having the question before it, that property rights or contract rights acquired by virtue of the charter in exercising the privileges conferred could not be interfered with by legislation, and, in fact, the act expressly provides "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights sustained by the adjudication of the courts of the State that exempted them from local taxation, and the same

adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill, *City National Bank of Paducah v. City of Paducah*, 10 Ky. L. Rep.; *Covington City National Bank v. City of Covington*, 21 Fed. Rep.

The Legislature saw the obstacle in the way of increasing the taxation on these banks, and the national banks, standing on the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks, that equality as between them might exist, and, at the same time, increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the Legislature to repeal or amend the charters; the State was attempting to enact a general law, entitled "Revenue and Taxation," applying to all subjects of taxation, and to all kinds of property. The tax in regard to banks, under this general law, was fixed at seventy-five cents as to all banks, and to all corporations required by law to be taxed on their capital stock; and as to the old banks and the national banks, the surrender of their rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill and be released from further taxation so long as their charters continued. Why, then, did the Legislature annex to Article II, of the revenue bill, the provisions of the act of 1856? No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the Legislature was the contract consummated. It was provided in Article II that the acceptance had to be made before the Legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition, if within the period fixed there was no acceptance by any of the banks of its provisions. The right to the franchise, or the exercise of the privileges granted, was not involved in the legislation, but the banks, with their charters in full force, were asked by the Legislature to make an agreement as to a rate of taxation that could not have otherwise been enforced against either the old banks or the national banks. The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted the terms and conditions offered in good faith; and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract, without the consent of the banks. The right of the State to repeal the franchise or amend the charter is not here questioned, when subject to the act of 1856, but the repudiation

of the contract will not be sanctioned. There was, in fact, a necessity for the State to apply the act of 1856 to Article II; other corporations, as well as banks, organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not, and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and, at the same time, placing all the banks accepting its terms on the same footing; if no acceptance had been made, there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856; but neither the banks nor the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper. The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity. The case before us is much stronger for the banks than that of *Yard v. New Jersey*. Here the old banks had contract rights, sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation; and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there was any doubt as to its meaning, that doubt would be construed for the State; but, when considering the entire article, the intention of the Legislature, it seems to us, is manifest. This increased tax, under the former Constitution, as before stated, went to the State and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying, amounting to \$125,000 annually, and transfer it to the cities to aid in discharging local burdens. It requires no judicial utterance to show that, under the National Banking Act, where the rate of interest is fixed at six per cent, or, as the State law provides, and a forfeiture of the entire interest if more is charged, that these banks, by the imposition of local burdens, cannot be taxed as much as 2½ per cent in any locality, when the average taxation of State banks will not exceed half that sum.

In the case of *Lionberger v. Rouse*, reported in 105 United States, after the national banking system went into effect, the Legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks, and

two of them refused to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent, and the State was powerless to increase the tax. The assessment of the plaintiff's shares of stock in the national bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said that this national bank, or its shares, was not taxed for a greater sum than any other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere. While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern Bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches, were at the passage of the Hewitt bill, and are now, regarded as the prominent banking institutions of the State, and, if with their capital and business rank, placed before the Supreme Court, with a tax of only one per cent, and the tax on the national banks placed at two per cent, the judgment of the Supreme Court upon such a state of fact doubtless would have been similar to the decision of this court in the case of the National Bank v. City of Paducah.

The case of *Lionberger v. Rouse* has no bearing on this question or contract. Here the State was not powerless to remedy the evil or prevent the discrimination complained of in the Missouri case. The Legislature devised a mode by which this discrimination could be removed, however great or even insignificant the difference in taxation might have been. The national banks, recognizing the fact that they could be taxed as other moneyed capital, and desiring uniformity of taxation, and not one rate for one bank and a different rate for another, surrendered their right or claim to be taxed as the old banks were taxed, and entered into this agreement by which a uniform system of taxation was adopted for all banks, such as the State desired. The claim of the old banks and the national banks as to the mode of taxing them was certainly not without foundation, for the reason already given, and the proposition by the Legislature to settle these differences, and this acceptance, was a wise and just solution of the whole question.

The question presented by this legislative repeal is the opposite of the legislation in the Missouri bank case. In the one case there was no legislation making the discrimination, while in the case before us the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the

contract, is now insisting upon a legislative rescission of the contract, and placing the old banks at least in a position where they are to pay only fifty cents on shares of \$100, and leaving the national banks subject to a greater rate of taxation. This repeal, if sustained, is, in effect, the creation of three or more new banks, with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions, at the time the Hewitt bill passed, will be relegated to the condition they were in when the contract was made, as was held by the Supreme Court in the case of *Clark v. Water Company*, reported in 143 U. S., and that is an exemption from local burdens with a tax of one-half of one per cent to the State. The national banks with a capital of ten millions when the Hewitt law was enacted, and now increased to twenty millions, will also be exempt from local burdens, because the State, in the exercise of the power now claimed, has abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination, when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities, or the Legislature for them, without power to impose on national banks local burdens. The banks have all practically accepted the provisions of the Hewitt bill, and the legislation repealing or cancelling the contract, being in violation of both the State and Federal Constitutions, leaves the Hewitt bill, as to the banks, in full force, and they must be taxed under its provisions, until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and realty, eighty cents, or about that sum, on each share of stock of \$100, while the citizen taxpayer is paying only forty-two and a half cents; and, at last, it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old Constitution, or to the municipalities under the new Constitution. In the absence of this contract it would go to discharge local burdens, but with this contract in full force, it must be paid as to the amount and manner, as provided by the Hewitt bill of 1856, into the treasury of the State.

Judgment against the banks reversed, and remanded for further proceedings consistent with the opinion.

Judges Lewis, Paynter and Guffy dissenting. Judge Paynter delivered dissenting opinion.

## DECISION IN THE PULLMAN CO. CASE.

ON June 1 Judge Baker handed down a decision in the case of Attorney-General Maloney v. The Pullman Palace Car Co., in which the plaintiff claimed that the company had violated its charter by conducting enterprises other than those for which the State granted it a charter, and that the charter should therefore be forfeited. The court sustained two of the charges against the company. One was that the company had exceeded its power in becoming the owners of twenty-three acres of land in the town of Pullman, which had been put to no use, and the other was that it violated its charter in becoming the owner of a part of the stock of the Pullman Iron and Steel Company.

The court holds that the company had the right to erect a ten-story office building in Chicago and rent the greater part of it to tenants; that it has the right to sell intoxicating liquors in its cars, and that in the purchase of land upon which the town of Pullman is built and the erection thereon of 2,200 dwelling-houses, to be rented to its employes, the company did not violate its charter, but only took upon itself powers which were implied in the grant of the Legislature. The company is also sustained in the erection of schools and a church in the town of Pullman, and the sale to the tenants of its houses of water and gas for the plants which the company owns.

The twenty-three acres of land which is unoccupied the company will be compelled to sell under the decree of the court, and it will be compelled to dispose of what stock it owns in the Pullman Iron and Steel Company. These two interests in which the company was defeated by the court involved only about \$50,000.

If the Supreme Court sustains Judge Baker, the company will go on with its business undisturbed, and with its methods of business practically unchanged by the suit of the attorney-general.

#### NO LIMITATION OF AMOUNT RECOVERABLE IN AN ACTION FOR THE DEATH OF A PERSON—DECISION OF GENERAL TERM. COMMON PLEAS.

IN the case of Maria Isola as administratrix of Agostino Isola, who was killed in the construction of the Havemeyer building, in May, 1892, to recover damages from J. & L. Weber and Michael Powers, contractors, the General Term of the Court of Common Pleas has decided that by the new Constitution unlimited damages may be sued for in case of deaths due to defendants' negligence, although the deaths occurred before the new Constitution was adopted. This is the first determination of the

matter on appeal. Judge Pryor followed Justice Gaynor in denying a motion of Col. George H. Hart, for plaintiff, to raise the amount of damages originally prayed for, which, under the old law, was \$5,000. The decision reversing him is written by Judge Bischoff, with Judges Daly and Bookstaver concurring. Judges Patterson, Dugro and McAdam in other cases have decided as the General Term of the Common Pleas has now decided. The court, after quoting the provision of the new Constitution that "the right of action \* \* \* shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation," says:

"The clear import of this is to attach the inhibition of any limit to all future recoveries, and so comprehends recoveries under rights of action which had accrued at the time when the Constitution went into effect, as well as recoveries under rights of action which might thereafter accrue. That the language is sufficiently comprehensive to include a retrospective as well as a prospective effect affords no plausible ground for holding that the latter effect was intended to be exclusive of the former. To restrict, therefore the operation of the provision under review to recoveries under future rights of action requires distortion of the apparent and unambiguous sense of the language used, that sense in which the people must be presumed to have understood the provisions when it was adopted by popular vote. We are not permitted to consider any alleged and resultant hardship from such a provision or to question the wisdom of its adoption, our office being at all times to give effect to the supreme will of the people."

An effort was made to show by the debates on the provision at the Constitutional Convention that no such effect was intended, but the court says the debates are not pertinent, as it has only to consider what the people meant by voting the provision.

#### Abstracts of Recent Decisions.

**ADMIRALTY—SHIPPING—GENERAL AVERAGE.**—The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only. (*Ralli v. Troop* [U. S. S. C.], 15 Sup. Ct. 656.)

**CARRIERS—DELIVERY TO BROKER.**—Where goods were shipped over the lines of connecting railways to a consignee designated in the bill of lading, and on arrival at destination the receivers of the railway company which completed the transportation tendered delivery to that consignee, and he declined to receive the goods, the liability of the receivers as common carriers thereupon ceased, and they became liable as warehousemen only, and as such were chargeable with the duty of notifying the consignor

of the consignee's refusal to accept the goods, and with the further duty of holding the same subject to the order of the consignor. (*American Sugar-Refining Co. v. McGhee* [Ga.], 21 S. E. Rep. 383.)

**CARRIERS — PASSENGER — NEGLIGENCE.**—A passenger alighting from a moving train at the direction of the conductor is not, as a matter of law, guilty of contributory negligence, where there was no appearance of danger either in the locality where he alighted, or the rate of speed of the train. (*Watkins v. Raleigh & A. Air-Line R. Co.* [N. Car.], 21 S. E. Rep. 409.)

**CONFLICT OF LAWS—ASSIGNMENT FOR CREDITORS.**—An assignment for the benefit of creditors, made in another State, under a statute providing that creditors shall receive no benefit under the assignment, nor any part of the debtor's estate, unless they first file a release of all claims other than such as may be paid under the assignment, will not be enforced in Iowa. (*Franzen v. Hutchinson* [Iowa], 62 N. W. Rep. 698.)

**CORPORATIONS — EFFECT OF CERTIFICATE UNDER SEAL.**—It seems that, where a corporation is not required by law or by its by-laws to keep official minutes of the proceedings of the board of directors, neither such corporation, nor any one claiming under it, can go behind a resolution, certified by the secretary under the seal of the corporation, and show that such resolution was not, in fact, passed. (*Prentiss Tool and Supply Co. v. Godchaux* [U. S. C. C. of App.], 66 Fed. Rep. 284.)

**CRIMINAL EVIDENCE — ARSON — CONFESSIONS.**—The consent of a defendant to the amendment of an indictment to meet a variance in the proof being a matter of record, the terms of his consent are to be determined from the record, and not from a bill of exceptions. (*Stone v. State* [Ala.], 17 South. Rep. 114.)

**CRIMINAL LAW — HOMICIDE — SELF-DEFENSE.**—Where deceased was killed while engaged, with others, in an attack on defendant, with sticks and clubs, an instruction withdrawing the question of self-defense from the jury, on the ground that sticks and clubs are not deadly weapons, is erroneous. (*Allen v. United States* [U. S. S. C.], 15 S. C. Rep. 720.)

**DOWER—DEED OF RIGHT OF WAY.**—A widow has no dower in land which her husband, by an absolute deed, in which she did not join, conveyed for a right of way. (*Chouteau v. Missouri Pac. Ry. Co.* [Mo.], 30 S. W. Rep. 299.)

**HUSBAND AND WIFE—PAYMENT OF WIFE'S MONEY.**—A husband, acting as the general agent of his wife, cannot direct payments which he makes with her money to be applied to his debts. (*Gleaton v. Tyler* [S. Car.], 21 S. E. Rep. 333.)

**INSURANCE POLICY—ISSUE BY AGENT.**—An insurance policy issued by an agent of the company to a corporation of which he is a stockholder and officer is void. (*Greenwood Ice and Coal Company v. Georgia Home Ins. Co.* [Miss.], 17 South. Rep. 83.)

**SPECIFIC PERFORMANCE—PARTIES.**—In an action to compel conveyance to complainants of certain property, one who has disposed of the legal title to all his interest in the property, and against whom no relief is demanded, should not be made a party to the action. (*Burrill v. Garst* [R. I.], 31 Atl. Rep. 436.)

**VENDOR AND PURCHASER—STATUTE OF FRAUDS.**—When a purchaser of land goes into immediate possession and gives his vendor a note for the price, which contains a description of the land and all essential terms of the contract, the sale is taken out of the statute of frauds. (*Reynolds v. Kirk* [Ala.], 17 South. Rep. 95.)

**WILL—EVIDENCE.**—Evidence that a testatrix was quite sick at the time her will was executed, and that after her recovery she stated that she could not remember anything that happened during her sickness was not sufficient to prove a want of testamentary capacity. (*Henry v. Hall* [Ala.], 17 South. Rep. 187.)

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tional Stock Subscriptions; Effect of Fraud on Stock Subscriptions; The Surrender of Shares and Release of Shareholders; Payment of shares; Assessments and Calls; Forfeiture of Shares for Non-payment of Assessments; Actions by the Corporation against Shareholders for assessments; Evidence in such Actions; Defense to Actions for Assessments; Limitation of Actions against Stockholders; Powers of the Corporation in relation to its own Shares; Increasing and Decreasing Capital Stock; Dividends, Interest-Bearing, Preferred and Guaranteed Stock; Transfers of Shares; Bona Fide Purchasers of Shares; Pledges and Mortgages of Shares; Others Dealing in Shares; Execution and attachment against Shares; Taxation of Shares and Dividends.

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rectors to Strangers and Creditors of the Corporation Outside of Statute; Statutory Liability of Directors and Officers to Creditors; Contribution and Subrogation; Compensation of Directors and Officers.

These are the only three volumes which we have received, as we understand the remaining three are not yet complete, but will be published within a short time. The arrangement of the work into sections, with the number of pages at the foot of each page, appears to us to be an admirable plan, which will greatly increase the practical utility of the book. It will be with great pleasure that we shall review the remaining three volumes and give an opinion of the work in its entirety. Published by the Bancroft-Whitney Co., San Francisco, Cal.

A MANUAL OF PUBLIC INTERNATIONAL LAW. BY THOMAS ALFRED WALKER, M. A., LL. D.

This is a very interesting manual on a subject which has received more than the usual attention and consideration from the public during the past year in view of the war between China and Japan, and other international disputes which have occurred. The author of this work is a fellow and lecturer at Peterhouse, Cambridge, and the work was originally from the English press. The first chapter deals with the definitions of International Law, and is followed by chapters on International Law of Normal Relations, International Law of Abnormal Relations, and Neutrality. Each of these parts is subdivided into several chapters which makes it most complete. The index of cases is very large for a subject of this kind, with references to the English and American reports. A very great advantage of the work is the marginal notes, while the index of contents gives an additional value and makes the work of practical use to students of this subject and to lawyers. The work is written in an easy, interesting and pleasant style, and really has more of the qualities of a history than a legal textbook. Published by MacMillan, 66 Fifth avenue, New York city. Price, \$2.50.

AMERICAN RAILROAD AND CORPORATION REPORTS, VOLUME 10. EDITED AND ANNOTATED BY JOHN LEWIS, AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

This is the tenth volume of a series which will hereafter be published two in a year, and which contain in full the most important decisions of the year pertaining to railroads and corporations and kindred subjects. Careful discrimination is shown in the choice of decisions reported and care and preparation of the cases reported in the index. Published by E. B. Myers & Co., Chicago.

# The Albany Law Journal.

ALBANY, JUNE 22, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

Since last we commented upon current topics in the legal world many events have transpired which are worthy of more than usual attention. Mayor Strong has appointed the new police magistrates; Elihu Root, Esq., has given a most brilliant opinion on the constitutionality of the question raised by Mr. Aldrich, State Superintendent of Public Works, which seems to us to be beyond controverting; Governor Morton has signed chapter 1045 of the Laws of 1895, which is the last statute of the year; Charles A. Collin, Esq., ex-commissioner of statutory revision, has formed a partnership with ex-Lieutenant-Governor William F. Sheehan; the Court of Appeals have affirmed Judge Landon's opinion in which he holds that a concurrent resolution is neither a law nor a statute, and that the board to award the contract for legislative printing, except the printing of the session laws and slips, must exclude all extra bills not ordered by statute; Laidlaw has recovered \$40,000 by a verdict of a jury against Russell Sage, and the Governor has appointed A. Judd Northrup, Charles Z. Lincoln and William H. Johnson commissioners to revise the statutes and the Code of Civil Procedure.

In the Laidlaw-Sage case the Honorable Joseph H. Choate again displays that brilliancy of argument, keenness of wit and cleverness in examination which has placed him among the leaders of the bar in the city of New York. How appropriate it was for Mr. Choate in summing up to rise with that benign expression which is never forgotten by those who have seen it, and read from the Bible the parable of Dives and Lazarus. Continuing, he said, "Dives in the Bible is punished though he had nothing to do with the sores of Lazarus. We prove in this case that Dives caused the sores of this Lazarus, that he did it deliberately and impul-

sively." This is perhaps one of the most important trials that has ever taken place and involves a most delicate construction of the law of assault. It is easily remembered that this is the fourth time that Laidlaw has gone to court in this matter, to recover damages for acting as an involuntary shield for Sage when the crank, Norcross, dropped the dynamite bomb at the feet of the millionaire in December, 1891. The first trial was before Judge Andrews, who dismissed the cause because it was not shown that Laidlaw would not have been hurt if he had not been interfered with by Sage. This holding was reversed by the General Term, and on the second trial by Judge Pattison the plaintiff recovered a verdict of \$25,000. On account of the judge's charge and other errors the verdict was set aside and on the third trial before the same judge there was a disagreement. It is, as has been remarked, a very delicate question as to the force which Sage used in placing Laidlaw between himself and the cause of the injury, to the detriment of Laidlaw; the statements of the parties seems to be the only evidence on this point, and they naturally are rather contradictory, being given by interested parties. The principle involved has undoubtedly been carried to the extreme in the present case, and on appeal to the appellate courts the progress of the cause and the principles laid down by the appellate courts will be watched with considerable interest.

The appointment by the governor of the commissioners for statutory revision to revise the Code of Civil Procedure and to report to the next Legislature was made on Saturday, June 15. This has been a subject on which we have been silent, that is, as to the selection of the persons who are to accomplish what seems to us an even more important reform than the changes made in the judiciary article by the new Constitution. It is apparent that no increase of judicial force will be able to cope with a still greater proportionate volume of work made necessary principally by the complicated system of procedure and intricate rule of practice. It is unfortunate that much of the clamor about delay in reaching the Court of Appeals in this State comes from those who fail to see that the chief difficulty of



the court in disposing of this work is that there are many petty questions of practice which are dragged up to be heard by the court of last resort. It is only necessary to examine carefully a volume of the Court of Appeals reports to ascertain that a large amount of the valuable time and attention of that court is given to the determination of questions which, of themselves, are of little value to the parties to the proceedings, and that the chief difficulty of the court is to properly discriminate between questions which should be dismissed and those which should receive the consideration of the court. It is amazing to open the annotated Code of Civil Procedure and to observe the enormous volume of decisions which have been made alone on rules of practice in this State. What then is the difficulty? The answer is not hard to give, but the manner in which to carry out the reform is a matter which we would not suggest to the three learned counsel who are to perform this work. The Code, instead of laying down general rules which should govern all actions has not only a tendency but a fatal fault of attempting to provide procedure for any cause of action which may arise. It is besides clothed with many forms of principles which have long ago lost their usefulness in the failure of its complicated phraseology and methods, and it reeks with the unfortunate taint of useless redundancy and verbosity. In short the code is just the opposite of what it should be, namely, a short, concise work containing general rules applicable to all actions and which would give greater and better final results with less legal proceedings to attain an end. Let us take an example. In the case of mandamus it is absurd for the judge issuing the peremptory writ first to grant an order and then to cause the writ to issue in addition. The order should most properly contain a paragraph ordering the defendant to perform the work, and the issuance of the writ is surplusage. Much, however, of the difficulty which has arisen from the use of this code has come from the annual tinkering which it receives at the hands of the Legislature. If a code, such as we suggest, should be enacted, no amendment to it should be allowed except after the most careful and deliberate consideration. This attention to the amendments to the

code has never been properly bestowed by the Legislature and hence few of the amendments have been of material and lasting benefit. It is well known that when a result must be accomplished or an end attained, no matter how great or how small, that it is a common occurrence to pass or to attempt to have passed an amendment to some section of the code, and this to gain a law suit at the expense of the statute law of the State. These amendments have in them at times the semblance of respectability and merit which gives them some support in the Legislature and some recognition by the executive. But in a majority of cases the result of enacting these amendments recognizes a nefarious practice but is doing great damage to the laws of the State. Some halt must be called in the progress of such a state of affairs and no revised code, unless such a precaution is taken, will after any length of time be of material benefit to the advancement of the law of the State. If the revision shall give a code short and concise and do away with out of date legal technicalities of practice it will be received with favor, otherwise its failure will damn for many years, any further attempt to conform our present monstrosity of a code to a reasonable work to govern legal procedure.

Two of the most important opinions which have been handed down in some time in England are given in the cases of *Wharton et al. v. Masterman et al.*, and *Chilton v. The Progress Printing and Publishing Company*. The first case affirms the determination laid down in the case of *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240, and is reported in 72 L. T. Rep. 455. In the *Wharton* case it is held that where an absolute vested right is made payable at a certain future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for the accumulation when a bequest to a charitable institution is made. The facts are found in the opinion of the Lord Chancellor, in which he says:

"The trust being 'to pay and divide the residue unto the several charities hereinafter named according to the amounts set after their respective names,' it seems to me impossible to suppose that the testator intended to limit

their rights to the specific sums mentioned. The only reasonable construction is, I think, that which has been put upon the clause. The other questions raised by the next of kin, who are the present appellants, are not so simple. The testator directed the surplus income of his residuary estate, after satisfying the annuities which he provided for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon the trust, the terms of which I have quoted. Some of the annuitants are still living. It is contended for the appellants that they, as next of kin, are entitled to all the accumulations which have accrued subsequently to the period for which, under the provisions of Thellusson's Act, accumulation could lawfully be directed. It has first to be determined whether, upon the true construction of the will, the surplus income accumulated and the interest accruing from these accumulations when invested were charged with the payment of the annuities. This depends, of course, upon the intention of the testator, to be derived from the language used in his will. He bequeaths to trustees all the residue of his personal estate, which he thereafter calls 'the said trust moneys, stocks, funds and securities,' and directs them, 'from and out of the annual income of the said trust moneys, stocks, funds and securities,' to pay the annuities which he specifies, subject to a proviso in the following terms: 'Provided always that in case the annual income of the said trust moneys, stocks, funds and securities shall not be sufficient for the payment of the whole amount of the said annuities, then it is my will and desire, and I direct my said trustees or trustee, when and as often as the same shall happen, to apportion the deficiency between and amongst the said annuitants according to the amount of their respective annuities and so as that the same shall rateably abate accordingly.' Then follows a further trust: 'In every year after my decease to invest the surplus income, if any, of the said trust moneys, stocks, funds and securities, and from and after the decease of the survivor of the annuitants to convert into money all such parts of the said trust moneys, stocks, funds and securities, and the accumulations thereof respectively as shall not consist of cash, and to stand possessed of the money to arise from the conver-

sion, and also such parts of the trust moneys, stocks, funds and securities, and the accumulations thereof as shall consist of cash, upon trust to pay and divide them' (as has been decided) 'amongst the charities named.' Having regard to the language used, I do not think it is possible to hold that the annuitants have any claim to be satisfied out of the accumulations of surplus income. But for the provision for abatement it might have been contended (and probably successfully contended) that such a right existed, but it seems to me to be expressly excluded by the abatement clause. It is true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word 'accumulation' in the clause which precedes the ultimate trust; but whether this be so or not, I think that the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it results. For these reasons it appears to me that the charities have a vested interest in the surplus income, and the accretions resulting from the investment of that surplus income. The testator, however, undoubtedly intended to postpone the enjoyment of his bounty by these beneficiaries until the death of the last annuitant. The courts below have, notwithstanding this, determined that the beneficiaries are entitled to the immediate enjoyment of all that is not made by the will subject to the payment of the annuities. This is, to my mind, the only point of any difficulty. The courts proceeded on the doctrine acted upon in *Saunders v. Vautier*, Cr. & Ph. 240, which has been since often recognized. Wood, V. C., in *Gosling v. Gosling*. John. 265, expounded the doctrine thus: 'The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one, and upon that principle, un-

less there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator that any of his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years." The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period. It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it. Wickens, V. C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders v. Vautier* was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favor of individual beneficiaries.

So much has recently been said about the decision of Judge Goff over the registration law of South Carolina that it should be remembered that many cases have arisen where federal judges have interfered with or prevented the

execution of State laws which were unconstitutional. In speaking on this subject, the *Nation* cites the case of Yick Wo, and gives a very interesting summary on this subject, which we print.

"Now that it is settled that the controversy over the registration laws of South Carolina will be carried up to the Supreme Court for a final decision on Judge Goff's ruling, it is worth while to recall the judgment of that tribunal in the case of Yick Wo v. Hopkins, nine years ago, as showing its view of the scope of federal interference in matters of State and even municipal legislation.

"Yick Wo, a native of China, went to California in 1861, and engaged in the laundry business, which he carried on from the first in the same premises, under licenses from the fire and health officials. In 1880 there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China. Of the whole 320, about 310 (Yick Wo's among them) were constructed of wood, like nine-tenths of the houses in the city. The capital thus invested by Chinamen was not less than \$200,000 and they paid annually, for rents, licenses, taxes, gas, and water, about \$180,000.

In 1880, ordinances were enacted making it unlawful for any person to establish or carry on a laundry within the corporate limits of the city and county "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone;" and punishing any violator of the ordinance by a fine of not more than \$1,000, or by imprisonment for not more than six months, or by both. Yick Wo and 200 countrymen who carried on their business in wooden houses, under licenses from the fire wardens and health officer, petitioned the supervisors for permission to continue in the same premises which they had been occupying in some cases for more than twenty years. All such petitions of Chinamen were denied. At the same time, all petitions of laundrymen who had wooden buildings, but were not Chinese, were granted, with a single exception. Scores of Chinese laundrymen were then arrested for carrying on business without the required legal consent, and their business was practically

ruined. Yick Wo was tried in a police court, found guilty of violating the ordinance, and sentenced to pay a fine of ten dollars, and in default of payment to be imprisoned at the rate of one day for each dollar of fine until the fine should be satisfied.

"The case was carried to the State Supreme Court, which sustained the local ordinance. Appeal was taken to the federal Supreme Court, which pronounced judgment on the 10th of May, 1886, the late Justice Matthews delivering the opinion. The court reversed the judgment of the State court, and rested its decision upon that clause of the fourteenth amendment to the federal Constitution, which says:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"This provision was held to apply equally to Yick Wo and other Chinamen in like case, because the treaty between the United States and China guarantees to the latter's subjects in this country the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens of the most favored nation; and the Revised Statutes provide that all persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to have the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. It was contended by Yick Wo's counsel that the ordinances for the violation of which he was sentenced were void on their face, as being within the prohibition of the fourteenth amendment; and, if not so, that they were void by reason of their administration "operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them." This latter position was sustained by the Supreme Court.

"The Supreme Court of California had held that the city had the right to make ordinances

to regulate laundries with a view to the protection of the public against such dangers as those of fire, but the federal court found nothing in the ordinances under review which pointed to such a regulation. On the contrary, the supervisors were granted a purely arbitrary power. Yick Wo had complied with every requisite deemed necessary by law for the protection of neighboring property from fire or as a precaution against injury to the public health. No reason whatever except the will of the supervisors was assigned why he and his two hundred fellow-countrymen should not be permitted to carry on their business in wooden buildings while eighty others not Chinese subjects were allowed to carry on the same business under similar conditions. The fact of discrimination against the Chinese was admitted, and no reason for it could be imagined except hostility to their race and nationality.

With reference to the principles that govern such cases, the Court said:

"The cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment of the Constitution of the United States. Though the law itself is fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the amendment. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the Constitution. The imprisonment of the petitioner is therefore illegal, and he must be discharged."

This seems to be a broad assertion by the highest court in the land of the power to investigate the workings of any local law, and to interfere for the protection of a citizen against the unjust administration of any statute. The South Carolina registration law requires any man whose name has never been on the list to make an affidavit setting forth his full name, age, occupation, and residence when the act of 1882 was passed, or at any time thereafter when he became old enough to vote, "and the place or places of his residence since the time when he became entitled to register," and this must be supported by the affidavits of two "reputable" citizens who were each twenty-one years old in 1882, or at the time when the applicant became entitled to register. The registrar is given authority to determine whether the citizens who make the supporting affidavits are "reputable." If it should be established that this discretionary power has been abused, the decision in the case of Yick Wo would indicate that the Supreme Court of the United States might claim the right of the federal authorities to interfere.

Chief Justice Fuller of the United States Supreme Court, with Judges Hughes and Seymour, constituting the Circuit Court of Appeals, recently at Richmond, Va., overruled the injunction granted by Judge Goff to prevent the election of the constitutional convention in South Carolina on the principle that it was not within the province of the Federal judiciary to interfere in the conduct of elections when there is no evidence to show that the constitutional rights of a citizen have been infringed, or that the matter in issue has anything to do with the federal election and when it does not properly distinguish between protection and privilege. While the court might afford relief in the case of an individual, the injunction in question comprehended more. Judge Hughes read the opinion of the Court, which is a clear and emphatic determination of the rights conferred by the Constitution and is an explicit expression of the true functions of the various departments of government. On this subject Judge Hughes says:

"The division of our government into the legislative, executive and judicial departments is a distinguishing feature of our American

policy, and it is essential to its existence that each of these departments shall be independent of the other. The division is fundamental and organic. It would be just as dangerous to its stability for the judicial department to override the others as for the executive or legislative departments to do so. Hence, while the right of the judiciary to pass upon the constitutionality of the laws is undoubted, it has that right simply as an incident to its protection of private rights. It has not that right as a mere means of sealing abstract questions; and even in the enforcement of private means of settling abstract rights it has not the power to interfere with the discretion vested in the other departments in the exercise of the political powers of those departments. It seems to me that it is a dangerous encroachment upon the prerogatives of the other departments of government if the judiciary be intrusted to exercise the power of interfering with the holding of an election in a State. If the supervisor of one county can be enjoined from the performance of the duties imposed upon him by the election laws of the State from whom he holds his commission, those of the other counties can be also.

"Thus a single citizen in each county (and in the case at bar he is not even a qualified voter) can enjoin an election throughout the entire State, and thus deprive thousands of their rights to vote. If a court has power to do this, free elections are at an end. If elections are improperly held, their are appropriate means provided by law for questioning their results, and remedying wrongs, without the exercise of this dangerous power by the courts. A candidate who has been defeated may contest; a voter whose right to register has been denied may proceed to compel the enforcement of that right, and these privileges give what the Legislature deem sufficient protection to the injured; but, in my judgment, one citizen cannot, under pretense of righting his own wrongs, disfranchise others. I do not think a court has jurisdiction to interfere by injunction or otherwise the enforcement of laws by officers holding and deriving their powers from these laws; certainly not to the extent in which it is attempted to be done by this bill."

By this decision it is clearly set forth that elections in this country are the business of the

people and that it is not the province of the federal courts to interfere with or hamper in any way the right that so belongs to the citizens, for as Judge Hughes says, once the power to do this is assumed, "Free elections are at an end."

A case which has aroused considerable interest was argued before the Court of Appeals in the early part of June. It is undoubtedly one of the most novel causes that has ever been argued before the court of last resort. The case was the outcome of suits brought by Elser C. Foster against Salvator Cantoni. The facts of the matter appear as follows:

"According to her statement, Mrs. Foster, as she calls herself, has five daughters dependent upon her. Three, she says, are her daughters by a husband from whom she has obtained a divorce and the remaining two are the defendant's children.

"Her present sole income, as she gives it, is derived from keeping a boarding house. On the other hand, it is alleged, the defendant is a banker of large wealth. Mrs. Foster says that she formed the acquaintance of Mr. Cantoni in July, 1884. At that time she was twenty-two years old and living in Brooklyn with her husband, David C. Brennan.

"They had three daughters, and were a contented and happy family. Mr. Cantoni represented himself to her as an unmarried man, and vowed that he was desperately in love with her. He begged her to get a divorce from her husband, and as an inducement told her that he was a banker and a millionaire. He promised if she would leave her husband to give her \$5,000 a year, take care of her and her children as long as she lived and provide in case of his death for the payment of the same annuity to her as long as she lived.

"Enticed, as she further says in her complaint, she began proceedings and in 1887 received a decree from Judge Dyckman at White Plains. Mr. Cantoni furnished the money for prosecuting the divorce suit, and at his solicitation no application was made for alimony. The decree being obtained, they began living together. She supposed that she was his wife, but at his wish they assumed the name of Mr. and Mrs. Fortunay. They lived together seven years and had four children, only two of whom

are now living. In May, 1892, Mr. Cantoni told her that he had a wife living and that their marital relations would have to cease.

"At this stage a son-in-law of the defendant, whose name is not given, came to Mr. Cantoni's, and she charges the two with having conspired to get rid of her. The conspiracy was to get her to go with the children to California, in the belief that an account of her death would soon follow. She, however, lived to come back and bring the present action, and she claims, on account of her present 'miserable and wrecked life,' \$100,000 damages. The plaintiff also demands \$70,000 more for alleged services for the defendant as his house-keeper for seven years.

"The answer to the complaint is a general denial of the allegations in the complaint. It is asserted that the defendant is not only a wealthy Italian banker, but that he has been specially honored by the King of Italy in being knighted and made a cavalier of the Order of the Crown. As the story goes, he was a courier in his younger days in Italy, and acted as courier for Mrs. Ben Halliday when her husband was running his transcontinental 'pony express.' He afterward, it is said, became the private secretary of Mr. Halliday, and thus laid the foundation of his present fortune."

In *Chilton v. The Progress Printing & Publishing Co.*, 72 L. T. Rep. 442, the opinion is of more than usual interest on account of the increasing number of cases arising in this country at the present time over infringements of copyrights. The defendants had published the names of horses which the plaintiffs had picked out to win in a number of races and which he daily made up and issued in a pamphlet. In the opinion of Lord Halsbury he says:

"If you look at what is the real thing here, you find that it is not the casting into printed words the result of the plaintiff's investigation which has enabled him to form his opinion. It is not that which is sought to be protected. What is really sought to be protected is the plaintiff's opinion, and he had published his opinion. It is admitted that that opinion is susceptible of being handed down in any way except in writing. If the plaintiff chooses to print his opinion, and thereby make a copy of it, can that be protected from infringement? Is

the thing subject-matter of copyright? I am of opinion that it is not. It is nothing in the nature of literary composition. Then comes the extended interpretation of what a "book" is to be for the purposes of the act. I can find no provision which properly indicates that such a matter as we are now dealing with is to be subject-matter of copyright. I, therefore think that there is nothing here which can be treated as protected by the language or by the policy of the act. There is no subject-matter of copyright. That is the view which appears to me to be the true view of this case. Then with reference to the question of infringement I have very great difficulty in dealing with it; not that in this case I have the least doubt, for I have not. But the difficulty is to give in dogmatic form a proposition which will justify my refusal to consider what the defendants have done an infringement by any rule of law. The real difficulty arises in this way: Assume a copyright to be protected. What is or is not an infringement of that copyright must in all cases depend upon the particular facts with which you are dealing. Any attempt to give in spoken or written language a definition which will include all cases must be a failure from the very nature of the thing with which one is dealing. I observe that Jervis, C. J. remarks, in the case to which I referred in the course of the argument of *Sweet v. Benning*, 16 C. B. 459, that it is undoubtedly exceedingly difficult, and perhaps absolutely impossible, to lay down any general rule upon this subject. He says (at p. 481), "I do not assent to the argument urged by Mr. Lush that every publication of a portion of a work in which there is subsisting copyright will afford a ground of action. It is a question of degree which must depend upon the circumstances of each particular case." That I believe to be emphatically true, and it supports the reason which I said rendered it impossible for me to give any abstract proposition which can comprehend all cases. All that I say in this case is, that there is no subject-matter of copyright; but that, if it was the subject-matter of copyright, I think that there has been no infringement of it.

The death of the Earl of Selden on the 4th of June brings to an end one whose life has

been actively engaged in legal work, and reminds us of the work he has performed for the English bar. He was born on the 27th day of November, 1812, in Oxfordshire, and in 1830 received a scholarship at Oxford. There he acquired a reputation as a scholar, and won many prizes and awards. He entered the chambers of Mr. Booth, a well-known conveyancer, and later on was with several large legal firms. At the bar he rose rapidly, and quickly made his mark. In 1872 he succeeded Lord Hatherley as lord chancellor. In this office he carried out many important changes which were of great aid to the English judicature. He made an effort to reform legal education, but in this he did not succeed. He took an active interest in the founding of the Legal Association, of which he was the first president, and at all times strove most earnestly to raise the standard of legal training at the bar. The effort which was later made for improvement in this direction was the result of his efforts, though he really took no active part in the reformation. He was a scholar of rare ability, and was an earnest student of the classics.

Sir James Bacon, having reached the age of ninety-seven years, is another of the distinguished jurists who have recently died in England. His death recalls the fact that many of the members of the English bar have reached an extreme old age. Sir Edward Coke died in his eighty-third year; Sir John Maynard lived to be eighty-nine; the Rt. Hon. James Fitzgeralds was over ninety years old at the time of his death; the Rt. Hon. Thomas Lefroy, who was lord chief justice of Ireland, died in his ninety-first year; Lord Norbury, an Irish chief justice, died at the age of ninety-two years; Lord Plunkett, lord chief justice of Ireland, died in his ninetieth year, and the Hon. Francis Blackburn was in his eighty-sixth year when, in 1866, he was appointed for the second time to the office of lord chancellor of Ireland.

In *McCarthy v. Roswald* (Ala. Sup. Ct.) it was held that, where persons converted property on which a landlord had a lien for rent, the latter's failure to repudiate their action, or to reply to their letter proposing to pay for what they had appropriated, was not a ratification of their act.

THE MINORITY OPINION OF THE KENTUCKY COURT OF APPEALS IN THE BANK TAX CASES—OPINION DELIVERED BY JUDGE PAYNTER.

WERE this a case simply affecting the rights of two citizens of the State I might content myself with dissenting without expressing my reason therefor.

Involving as this does the sovereignty of the people, and denying, as I conceive it does, to have their will to assume the form of law on such a vital question as that of taxation, and their right to demand and enforce equal and just taxation, I feel constrained to give my reasons for dissenting from the views expressed by the court.

The effect of the opinion of the court is to destroy a principle engrafted in the laws of the State nearly forty years ago. One so important that it was declared by the General Assembly to be in effect written in every act of incorporation granted by it. So important was the reservation of the right to amend or repeal such act of incorporation that the General Assembly was unwilling to run the risk of inserting it in each act, but declared by general law that it should be understood to be written in all of them.

The opinion, in effect, denies the power of the people through their organic law to declare what are just principles of taxation; that the same rate of taxation shall be imposed on the property of corporations as on an individual, and the authority of the General Assembly to execute that constitutional mandate.

I believe that corporate rights should be held as inviolate as those of the citizen; that each citizen should bear his full share of the common burden of taxation; "that all freemen, when they form a social compact, are equal, and no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." I do not believe in the State passing laws impairing the obligation of its contracts with corporations or individuals when the contracts are made by virtue of the provisions of the Constitution; nor do I believe in denying the right to the State to withdraw from a contract when in express terms the right to do so is reserved, as in such case it cannot be said to impair the obligation of the contract.

While I regard there is a vast difference between granting a corporate franchise authorizing the acquisition of property by donation or otherwise for the purpose of educating and spreading the Gospel among the Indians and affording an opportunity to the youth of the land in the days of the early settlement of the country to obtain an education, as was the purpose of the charter to Dart-

mouth College, and between granting immunity from taxation to an institution operated solely for private gain, yet the courts of the country, taking the principle enunciated in the Dartmouth College case as authority therefor, have held that immunity from taxation granted in the act of incorporation is a contract with the State, and is irrevocable unless the right to do so is reserved in the act of incorporation or in a general act, which must be treated as part of the act of incorporation.

In considering these cases I shall accept that as the rule to govern in the determination of the question involved. Indeed, it is unnecessary to take any other view of the law in order to reach the conclusion, which I have done in these cases.

However, I cannot forbear quoting what Justice Miller said in delivering the opinion of the court in *New Jersey v. Yard*, 95 U. S. 114, to-wit: "The writer of this opinion has always believed, and believes now, that one Legislature of a State has no power to bargain away the right of any succeeding Legislature to levy taxes in as full a manner as the Constitution will permit. But so long as the majority of this court adheres to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such contract has been made."

I agree with Justice Miller that in the matter of taxation one Legislature of a State has no power to bargain away the right of a succeeding Legislature to levy taxes in as full a manner as the Constitution will permit.

Such a power could be exercised to such an extent as to almost destroy the government or to grievously burden one class of its citizens.

Instead of having the Dartmouth College case under consideration, had Chief Justice Marshall a case coming from Kentucky, wherein it was claimed the Legislature has sought to impair the obligation of a contract it had made with one of the old banks by passing a statute providing it should pay an amount of tax in addition to that specified in its charter, I cannot believe in view of the constitutional provision prohibiting the granting of exclusive privileges from the community, except "in consideration of public services," he would have held the bank had an irrevocable contract with the State.

From the Dartmouth College case to the present time (and the right was in that case recognized), the Superior Court of the United States has uniformly held that whenever the Legislature granting the charter reserved the right to amend or repeal it, either by so providing in the charter or by a general law or the right to amend or repeal such charter exists and to do so is not an act impairing the obligation of a contract.



The charter being accepted with the full understanding that the right of repeal is part of the contract and to the exercise of which right the grantee has consented.

Many of the States after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created, and to make sure such power was being reserved, they passed general laws expressly reserving such powers and which statutes became a part of every act of incorporation as fully as if written therein unless a different purpose was therein plainly expressed in the act.

The Legislature of this State being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the statute of 1856, which is section 8, Chapter 68, General Statutes.

It reads as follows: "All charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It seems so plain that charters and grants since 14th February, 1856, are subject to amendment or repeal at the will of the Legislature unless a contrary intent is plainly expressed therein, that it is needless to discuss it.

The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it.

The character of acts of 1856 have uniformly been held to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and that they were as much a part of the charters as if incorporated into them.

Any other interpretation would render the statute inoperative and wholly deprive it of its power to accomplish the purpose of its enactment. In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Southeastern Railroad Company was incorporated in 1851. In 1855 an act was passed to amend its charter and exempted the railroad company from taxation. In 1868 the State adopted a new constitution in which it was declared that the property of the corporations then existing or thereafter created should be taxed.

The Legislature of the State passed an act to enforce that provision of the Constitution.

The question involved in *Tomlinson v. Jessup*, 15 Wallace, 454, was as to the enforcement of such legislation.

"The reservation affects the entire relation between the State and the corporation and places under legislative control all rights, privileges and immunities derived by its charter directly from the State.

The same doctrine is enunciated in *Railroad v. Maine*, 96 U. S. 499; *Railroad Company v. Georgia*, 98 id. 359; *Hoge v. Railroad Company*, 99 id. 348; *Greenwood v. Freight Company*, 105 id. 13-21; *Spring Valley Water Works Company v. Schottler*, 110 id. 347-352; *Clore v. Greenwood Cemetery Company*, 107 id. 464-476; *Louisville Gas Company v. Citizens' Gas Company*, 115 id. 688-696; *Gibbs v. Consolidated Gas Company*, 130 id. 369-408; *Sioux City Street Railway Company v. Sioux City*, 138 id. 98-108.

It must be conceded from the authorities cited that the Supreme Court of the United States has repeatedly held that the Legislatures of the States have the power when reserved in the charter or by general law to change or repeal acts granting corporate privileges or franchises.

These opinions are in accord with the decisions of this court.

The case of *Griffin v. Kentucky Insurance Company*, 3 Bush, 592, has been quoted with approval in the case of *Louisville Water Company v. Clark*, 143 U. S. 14, and in that case the court held that in all cases of charters or grants of corporate franchises where the intention of the Legislature was not "plainly expressed" not to exercise the power reserved by the statute of 1856 to amend or repeal at the will of the Legislature, such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

In the case of *Cumberland and Ohio Railroad Company v. Barren County Court*, 10 Bush, 604, in reference to the act of 1856, the court said: "The act was intended to preserve to the State control over all acts of incorporation thereafter passed. Experience has demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly-expressed will of the Legislature for the courts to resort to technical rules of construction or finely drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal "unless a contrary intent be expressed."

I conclude that the Legislature in 1886, when it passed the Revenue bill, had the right to amend or repeal at will all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, "unless a contrary intent was plainly expressed."

In view of decisions of the court I also concede

that as to the charters of banks granted prior to the 14th of February, 1856, unless the acts extending them reserved the right to amend or repeal their charters, any act of the Legislature increasing their tax would be invalid as to such banks unless in the acts extending them the right to amend or repeal was reserved.

The national banks were subject to have the same tax imposed on their shares of stocks as are imposed on State banks, doing business under charter granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their actual value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of the Covington City National Bank v. City of Covington, etc., 21 Federal Reporter, 491, Justice Mathews, discussing this subject, said: "When therefore a statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits. The interest which Congress has left subject to taxation by the State under the limitations prescribed, and which is a distinct independent interest in property held by the stockholder, like any property that may belong to him, is that interest as defined in *Van Allen v. The Assessors*, 3 Wall, 573, which entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter in proportion to the number of its shares, and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts," and (page 587) it includes for taxation the whole interest of the stockholder, such as would pass to the purchaser of the share of his certificate. So, when a State law taxes shares of national bank stock it taxes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value, or at any other rate of appraisalment which does not violate the act of Congress."

To the same effect are the cases of *People vs. Commissioners of Texas*, 94 U. S., 415; *Mercantile Bank vs. New York*, 121 U. S., 138. In the latter case the court said (page 155): "The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks, was to render it possible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The Legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for county, school, municipal and local purposes. The Supreme Court in *Hepburne vs. the School Directors*, 23 Wallace, 480, held the statute valid.

It has been decided that it is competent for the States to tax the shares of national bank stock, notwithstanding the capital of the bank was invested in bonds of the United States, which were not subject to taxation.

It is not discrimination against them because they are required to pay a greater tax on their shares of stock than is paid by banks enjoying special privileges under their charters. *Leverberger vs. Rouse*, 9 Wallace, 468.

The court should endeavor to ascertain the legislative intent in the act of 1886 with reference to the taxation of banks, as all depends in this controversy as to what was that intent.

To aid in reaching a conclusion as to what the intent was it is well to recall some official facts within the knowledge of the members of the Legislature.

The 1st of July, 1885, was the date of the last report of the capital stocks of the banks in the State before the enactment of the revenue law of 1886. From that it is learned that the capital stock of the fifty-nine National Banks amounted to \$9,708,900.

The capital stock of the sixty-five State Banks, doing business under charters granted subsequent to 1856, amounted to \$8,224,891.

The capital stock of the four State Banks—Farmers' Bank of Kentucky, Bank of Kentucky, Northern Bank and Bank of Louisville, incorporated prior to 1856, was \$5,144,500.

It will be seen from this statement that the capital stock of the National Banks and of the State banks chartered since 1856 amounted in round numbers to \$16,000,000, while the capital stock of banks whose charters ante date 1856 amounted to about \$5,000,000, being less than one-third of that of the other banks named.

It must be presumed that the Legislature knew that the banks claiming irrevocable contracts to pay only 50 cents on each share of their capital stock equal to one hundred dollars, paid less than one-third of the revenue coming from the banks under the then existing law.

It can hardly be said that the Farmers' Bank of Kentucky was in a condition to claim an irrevocable contract, because the act extending its charter, which became a law on March 10, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto.

It reads as follows: "That the charter of the Farmers' Bank of Kentucky as amended be extended for a period of twenty-four years from the

termination of its charter as therein fixed: Provided, That said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act. That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously voted."

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract.

This left but three banks in the State which could claim an irrevocable contract, and one hundred and twenty-five without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them, and excluded certain other acts from the repealing clause, and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith were thereby repealed. The revenue law is not Chapter 92 General Statutes. The only part of the act relating to the taxation of banks and other institutions of loan or discount is Article 2, Chapter 92, General Statutes. Section 1 of the article relates to the amount of tax which the banks shall pay and designating the method of levying the tax.

Section 2 imposes certain duties on the cashier of the bank with reference to making a report to the auditor of public accounts.

Section 3 exempts banks having certain money invested in bonds or funds of the United States from taxation named in the section.

Sections 4, 5 and 6 of article 2 are as follows:

"Sec. 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting, may give its consent to the levying of said tax; and agree to pay the same as herein provided, and waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatever so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act.

"Sec. 6. This act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes."

Section 7 provides that if the banks fail or refuse to make the consent and agreement as provided in section 4, then they are to be assessed and the same tax, State, county and municipal, shall be imposed, levied and collected, etc., as is imposed on the assessed, taxable property in the hands of individuals.

Without section 4 the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article treats of nothing except the taxation of banks.

It seems there can be no further question of the power of the Legislature at that time to impose a tax on such banks for State, county and municipal purposes.

It was wholly useless for the Legislature to ask the consent of the banks chartered since 1856 to make any consent to the imposition of tax on them for that purpose.

The national banks were subject to the payment of taxes for State, county and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose. It was needless to ask this class of banks to enter into the agreement. The Legislature may have entertained some doubt not as to the right to tax banks for State, county and municipal purposes, but as to the method prescribed and desired to remove all doubt by obtaining the consent of such banks to that method. It was greatly to the interest of the national banks and the State banks chartered subsequent to 1856 to enter into the agreement because they were thus released from the payment of county and municipal taxes. In agreeing to pay the amount provided in the article for State purposes they were released from local burdens, which, in some instances, are two or three times as great as that which they agreed to pay the State. It was greatly to their interest to accept the proposition of the State. As a matter of fact these banks were relinquishing no rights. They were apparently yielding a right which the State in its sovereignty already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the State to not only retain the control of corporations and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment which was understood to be written in every act of incorporation. It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned as shown by revenue act, as their charters were declared repealed so far as they were inconsistent therewith. It was the evident purpose of the Legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired

that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State.

The Legislature had been renewing their charters, and if they were again renewed an appeal must be made to the same power. These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable to the acts renewing their charters. However, it is needless to speculate further as to the reason which induced them to enter into the contract with the State by which they released any irrevocable contract which they had under their charter against increased taxation. Then banks had the right to give their consent to the increased taxation. The courts had always recognized the right of a corporation to consent to legislation or accept its provisions, and be bound thereby, though it may have the effect of depriving such corporation of a vested right. This brings me to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country. The contract is brief, simple and without ambiguity.

In short the State agreed to accept and the banks agreed to pay seventy-five cents annually on each share of this stock equal to \$100, and in consideration thereof be exempt from all other taxation whatsoever so long as this tax shall be paid during the corporate existence of such bank. If these were all the terms of the contract then it might be contended with some reason that it was irrevocable during their corporate existence. Being mindful of the policy which had been pursued for thirty years it said in effect to the banks it is desired that the contract be signed in the formal way described, but it must be understood that the right to alter, change or abandon the contract is reserved to the State. That its purpose might be fully understood the Legislature placed in the article Section 6, which in terms makes the statute of 1858 a part of the contract.

In view of the plain provision of the statute about the meaning of which there should be no doubt, and the intent of the Legislature being fully explained by its record, it seems to me there should be no hesitation in concluding the act of 1856 should be read as part of the contract, hence not irrevocable contracts. The fact that a written consent was asked and secured does not alter the application of the act of 1856. To this effect is *New Jersey vs. Yard*, 95 United States, 104

The facts of that case were as follows: The *Morris and Essex Railroad Company* was created a

corporation by an act of the Legislature of New Jersey passed January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted to seven per cent. on its cost it should pay a State tax of one-half of 1 per cent. on the cost of the road, and no other tax should be levied upon it.

The twentieth section reserved to the Legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed on March 2, 1836, in which the right to repeal or amend was reserved. On the 14th of February, 1846, the Legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856.

Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built and by which the company was vested with all the powers and franchises given by original and supplemental acts, etc. The third section of the last-named act read as follows: "Be it enacted that the tax of one-half of 1 per cent. provided by this said original act of incorporation to be paid by the said company to the State whenever the net earnings of the said company amount to 7 per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatever, by or under the authority of this State or any law thereof; provided, that this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal and filed in the office of the Secretary of State, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of the act, or this act is void." The instrument required by the section was duly executed by the company. In the act of 1865 there was no reservation of the right to repeal or amend it. Acts of the Legislature imposed a more burdensome tax on the railroad company than that provided for in Section 3, *supra*. The sole question in *New Jersey against Yard* was whether the act of 1865 and its acceptance by the railroad company constitute a contract which could not be impaired by any subsequent Legislature of the State.

The court held that it was an irrevocable contract, because the Legislature had not reserved the right to amend or change it. It is plain from the opinion that had the Legislature reserved the right to alter or change the contract or act by which it was made the court would have held the act of the Legislature doing so did not impair the obligation of the contract.

From the language of this opinion and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, etc. In order to hold that the right to alter, etc., the contract made under Article 2 does not exist it is absolutely necessary to eliminate Section 6 from the article. No such rule for the interpretation of statutes can be found, as the meaning of the section is manifest and clear. Besides, by the very terms of the act of 1856 a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof and all 'other statutes,' shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed. It is proposed now by those representing the banks to disregard the statutory rule of construction. It is now in effect insisted that in order to reserve the right claimed it must be 'plainly expressed' in the act that it is reserved; this being done it is still disregarded. The Legislature, doubtless anticipating such contention and versatility, 'plainly expressed' in the article that whatever was done thereunder or in pursuance thereof could only continue during its will." If section 6 was not for this purpose, I would like to have had the court to suggest some reason as to why it was placed in the article. The doctrine that when it is asserted that a State has bargained away her right of taxation in a given case, the contract must be clear and can not be made out by dubious implication. *New Jersey v. Yard supra*. The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. *Bradley v. McAtee*, 7 Bush, 667. It is a familiar rule of construction of statutes that effect must be given to every provision except in cases of absolute and irreconcilable incongruity. *Dazey v. Killan*, 2 Duval, 407.

If one statute refers to another for the power given by the former the statute referred to is to be considered incorporated in the one making the reference. *Nunes v. Wellisch*, 12 Bush. 365. Mr. Cooley in his work on Taxation (page 204) says: "As taxation is the rule and exemption the exception the intention to make an exception ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain."

For the interpretation of statutes this court in *Nichols v. Wells*, Sneed 259, said: "That the most natural and genuine way of construing a statute is to construe one part by another part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another;

and if it can be prevented no clause or sentence or word shall be superfluous, void or insignificant."

As there is a clear expression of the legislative intent in the statute no rules are really necessary to aid in its interpretation.

It certainly was a very advantageous contract for them to enter into. When these banks paid more than two-thirds of the taxes paid by all the banks with the power in the Legislature to increase the amount if they should so desire, what reason can be suggested as to why the Legislature would desire to reverse the policy which had been steadfastly adhered to for so long and enter into an irrevocable contract with such banks. Why should it want to surrender a power which it had been so jealous to preserve?

The contract was made subject to the right of the Legislature to withdraw from it whenever it regarded the public interest demanded it should do so.

Whenever the banks accepted the provisions of the act of 1886 they surrendered any rights to immunity from increased taxation which their charters gave them.

The acceptance of the act of 1886 was a consent of the repeal of so much of their charters as was inconsistent therewith. Hence they stood in such a relation with the State as to future taxation as the Legislature saw proper to impose. If the provisions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such provisions were no longer in force. It is unreasonable to say that the provisions of the charter fixing the rate of taxation on the banks at fifty cents on each share of the capital stock of the banks equal to one hundred dollars can be in force if the act of 1886 fixing such tax at seventy-five instead of fifty cents on shares in force. The court admits the latter is in force. In doing this it must be admitted the charter privilege has been repealed.

If repealed then by the act of 1886 surely the only way in which the provisions of their charter could be restored would be by the Legislature so providing in same act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of the charter. Section 464, Kentucky Statutes, provides: "When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained the old banks will be restored to the former privileges under their charter.

It has been suggested that the provisions of their

charters with reference to taxation were vested rights and, although they consented to the legislation of 1886 and became subject to the provisions of the act of 1856 still as the charter privilege as to taxation was a vested right, therefore it was saved to them by the provision which preserves "other rights previously vested." The purpose of the act of 1856 was to reserve in the Legislature the power to destroy the privileges and franchises granted in the charters.

If it does not have this effect it would be entirely inoperative, and the effort to retain control of corporations would be abortive. The claim that the privileges granted by article 2 can be repealed, but without the right to terminate the contract with the banks, is not founded in reason.

The only privilege which the banks enjoyed was to pay the seventy-five cents on each share in lieu of all other taxes.

To say that the law granting the privilege can be repealed because the right to do so was reserved as is admitted by the court and still leave the bank in its enjoyment (as is the effect of the opinion of the court) is to employ logic that has never been in common use by this or any other court.

This logic gives the banks the substance and the State the shadow.

The preserved rights then are not privileges and franchises granted by the repeal charter, but "other rights" which had rested previous to the act amending or repealing the charter.

Other rights are such as the beneficiaries under the charter may have acquired in property, choses in action, real and personal property or interests of every character which they could acquire in operating under the charter and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise in the property belonging to the corporation.

My construction has been recognized as correct in all the decisions of this court in passing upon the act of 1856. The Supreme Court of the United States has so construed the act. It was said in *Griffin v. Kentucky Insurance Company*, 3 Bush, 594, "the proviso was intended to secure the right of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise."

To the same effect is *Cumberland and Ohio Railroad Company v. Barren County Court*, 10 Bush, 609. Section 174 of the Constitution recognized a just principle when it declared that all property whether owned by persons or corporations should be taxed in proportion to its value unless exempted thereby and that all corporate property should pay the same rate of taxation paid by individual property.

The Legislature in obedience to that provision of

the Constitution enacted the law for levying and collecting tax from the banks of the State, the validity of which is in question in these cases.

For the reason already given I conclude that the obligations of no contracts were impaired by the action of the Constitutional Convention or the succeeding Legislature.

Some of the best lawyers in the State were members of the convention which framed our Constitution, who gave an earnest consideration to the questions involved in those cases, and the conclusions which they reached were chrysalized into section 174 of the Constitution. I believe that their conclusions are correct.

The opinion of the court denies the power is in the Legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the Legislature to compel them to bear any of the burdens of county and municipal government.

I cannot believe the Legislature did or intended by article 2, of the act of 1886 to reverse its policy so earnestly pursued for a generation and surrender to sixty odd banks of the State its right previously reserved to control them in the matter of taxation and to give up its power to increase or diminish the taxes imposed on 125 banks, this including the national banks.

Emergencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet however great the emergency may be or imperative the demand for money to meet such wants, the Legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporative existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expense to support the county governments, to pay for bridges and public highways and support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks, yet the court concludes that the Legislature has no power to compel the banks to contribute their fair share of such expenses.

In this view I cannot concur.

Whether or not an indictment sufficiently charged the crime of murder in the first degree was for the State court to determine, and the decision will not be reviewed on *habeas corpus* in the Federal court. (*Bergemann v. Backer* [U. S. S. C.], 15 S. C. Rep. 726.)

## New Books and New Editions.

### CODE AMENDMENTS OF 1895.

This book is one of the most practical that has been published this year, giving as it does two days after the governor signed the last law of 1895 all the important changes made in the procedure law of the State of New York, many of which were made necessary by the revised and amended Constitution of 1895. There were over 270 amendments to the Code of Civil Procedure alone, many to the Penal Code and over 115 to the Code of Criminal Procedure. In some cases, of course, the only change was that rendered necessary by the changed nomenclature of the courts, but in many cases the amendments, though apparently slight, in reality affect greatly the law of the State. As already stated the governor signed chapter 1045, which was the last law of this year, on Saturday, June 15, and the book appeared with over 160 printed pages on the following Monday. In other years when the amendments were few in number this would not have been a very difficult task, but with the enormous amount of matter which had to be printed this year it was almost miraculous that the book appeared at such an early date. The work is arranged on the Mayer's plan, with perforations around each amendment so that they can easily be detached and pasted in the code in their proper places. This system is not only unique but of material advantage to the practicing lawyer, giving him a handy and speedy way of arranging his code so that the existing law is apparent. Nearly all the amendments which were enacted to the Civil Code by chapter 946, and which was to make the Code of Civil Procedure conform to the amended Constitution, do not go into effect until the first day of January, 1896. The book shows at page 117 that chapter 96 of the laws of 1854, chapter 57 of the laws of 1874, chapter 242 of the laws of 1888, chapter 219 of the laws of 1883, chapter 248 of the laws of 1888, were repealed by chapter 946 of 1895. Under this the general law, which is section 3 of the last named chapter, and which relates to pending proceedings in certain courts, is given and following this it is shown that sections 94, 232, 262, 793, 1836 and 2342 were amended not only by chapter 946, but also respectively by chapters 724, 376, 580, 410, 595 and 746 of 1895. The Penal Code is not materially changed this year; it might be noted, however, that the work shows that seventy-one sections of the Civil Code were repealed by chapter 946 of 1895, and that sections 39 and 528 of the Code of Criminal Procedure were amended by chapter 580 and also respectively by chapters 889 and 119 of 1895. The work is printed on one side of the paper so that the pages can be detached and pasted in the Civil Code as already suggested

and seems most complete in every respect for the purpose for which it was published. Published by Banks & Bros., New York and Albany, price \$1.50.

## Abstracts of Recent Decisions.

### CRIMINAL LAW—MURDER—PROOF OF MOTIVE.—

Where the court, at defendant's request, instructs the jury that they have a right to consider the absence of any proof of a motive for the crime, it is not error to qualify the same by stating that proof of a motive is not necessary to conviction. (*Johnson v. United States* [U. S. S. C.], 15 S. C. Rep. 614.)

**DEED—ACKNOWLEDGMENT.**—In the absence of fraud or duress, parol evidence is not admissible to impeach the certificate of acknowledgment of the wife to a conveyance of the homestead, voluntarily signed by her in the presence of a notary, although ignorant of his official character, with knowledge that her signature made in his presence was deemed essential. (*Jingwright v. Nelson* [Ala.], 17 South. Rep. 91.)

**FEDERAL COURTS—JURISDICTION.**—The Federal courts have no jurisdiction of a suit to set aside a decree of a State court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the court which made the decree, is the proper and sufficient remedy. (*Little Rock Junction Ry. v. Burke* [U. S. C. C. of App.], 66 Fed. Rep. 83.)

**FRAUDULENT CONVEYANCE—EVIDENCE.**—On an issue as to whether a conveyance of personal property was fraudulent as against creditors, evidence that after the alleged sale the purchaser went to another State, and that the seller remained in possession and apparent control of the property, is admissible to show fraudulent intent on the part of the seller. (*Ashcroft v. Simmons* [Mass.], 40 N. E. Rep. 171.)

**LANDLORD'S LIEN—RATIFICATION.**—Where persons converted property on which a landlord had a lien for rent, the latter's failure to repudiate their action, or to reply to their letter proposing to pay for what they had appropriated, was not a ratification of their act. (*McCarthy v. Roswald* [Ala.], 17 South. Rep. 120.)

### MUNICIPAL CORPORATIONS—CONTROL OF STREETS.

—Where part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it, by grading or otherwise, at the expense of the corporation. (*Wabash R. Co. v. City of Defiance* [Ohio], 40 N. E. Rep. 89.)

# The Albany Law Journal.

ALBANY, JUNE 29, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

MANY requests have been received asking that the opinion in the matter of *The Argus Company v. John Palmer*, as Secretary of State, et al., in relation to the legislative printing, be published in this journal, deciding, as it does, the question as to whether a concurrent resolution is a statute, and being a matter which is of great importance in many States as well as New York. The history of the manner in which legislative enactments have been made would be, perhaps, superfluous, though it may be remarked in passing that even in the very early history of this country the executive power was necessary to enact a law binding on the people within the territory over which the legislative body had jurisdiction. The Constitution of the United States provides principally for two methods of enacting statutes, and though they differ in name, yet they are practically the same. Article 1, section 7, subdivision 2, provides that "every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States, etc.;" and subdivision 3 of the same section, of the same article, provides that "every order, resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary, shall be presented to the President of the United States, etc." In either case, the approval of the President is necessary, or else a bill or concurrent resolution must be passed over his veto by a two-thirds vote of both houses. It is generally recognized that concurrent resolutions are more easily passed in Congress, and such a resort is taken on this account in many cases. There is nothing, however, in the United States Constitution which would give color to the proposition that a concurrent resolution, without the approval of the executive, would be equivalent to a stat-

ute, and it is undoubtedly true that no such force could be given to the action of the two houses without the aiding action of the President. The New York Constitution, however, is much more explicit on this subject, as it does not mention concurrent resolution in any of its various sections. In article 3, section 14, it expressly provides that "no law shall be enacted except by bill;" while section 9 of article 4 provides that "every bill which shall have passed the Senate and the Assembly shall, before it becomes a law, be presented to the Governor, etc."—a provision which is similar to the one contained in the United States Constitution. The first decision as to what a concurrent resolution is was handed down by Judge Landon in his opinion in the *Argus* case, above referred to, in which it is held that "a concurrent resolution of the two houses is not a statute." It would appear that a concurrent resolution is binding only on the members of the Legislature which passes such resolution, and is operative only on the members or those persons directly within their jurisdiction, or else in a case where it is expressly provided by statute that a concurrent resolution may operate in a certain way. The order of Judge Landon was affirmed by the General Term of the Supreme Court of the Third Department, and was subsequently affirmed by the Court of Appeals on the opinion of Judge Landon; so that his opinion has practically the same force and effect as one from the court of last resort. The opinion in full is as follows:

"The question presented is, whether under the statutes authorizing the defendants as the board to award the contract for certain public and legislative printing to the lowest bidder, they can adopt as a basis for computation, in order to determine who is the lowest bidder, extra copies of legislative bills, assumed by the board to be called for and ordered by the concurrent resolution of the Senate and Assembly in 1892; such extra copies being in excess of the number authorized to be printed by section 72 of the legislative act, chapter 86, Laws of 1892.

"The board advertised for proposals, received several bids, and on the 10th of May, 1895, proceeded to consider said bids with the view of awarding the contract, and thereupon, as appears from the affidavit submitted by



them, adopted a resolution 'to the effect that said board of State officers should include in the basis of computation of said bids for such legislative printing, the extra copies of bills called for by the concurrent resolution at page 234 of the Senate Journal of 1892,' and thereupon adjourned. I assume (as was assumed by the board for the sake of the argument), without deciding and without prejudice to the decision of the matter by said board, that upon the basis of said resolution, the relator is not the lowest bidder, but is the lowest bidder if the said resolution is unauthorized by law.

"Sections 72 and 77 of the 'legislative law,' chapter 682, Laws 1892, prescribe the duties of the board in respect to the award of the contract for legislative printing. Unless the concurrent resolution mentioned in the resolution adopted as aforesaid by the defendants has of itself, or by the aid of other statutes, the force of law, said sections of chapter 682 confer the sole power possessed by the defendants respecting the printing mentioned in this resolution of May 10th.

"Section 72 provides for including in the contract the printing of 640 copies of each Senate and Assembly bill, and 'also for each additional 100 copies thereof when ordered by statute.' Section 77 provides that 'such contractor shall print any extra number of copies of bills \* \* \* whenever ordered by law,' and that for this printing the contract shall provide the price.

"The contract now to be awarded is to be in force for two years from October, 1895.

"I have no doubt that 'provided by statute' and 'provided by law' as here used mean the same thing. When there is a statute prescribing and covering the powers and duties of the board in respect to the contract it is difficult to conceive how there can be any other law enlarging their powers and duties. Indeed, this statute is called the 'legislative law,' and the 'law' mentioned in section 77 is no other than this statute. A concurrent resolution of the two house is not a statute. 'No law can be enacted except by bill,' Const., article 3, section 14, and this, when passed by the Senate and Assembly, must be approved by the governor.

"The learned counsel for the relator has col-

lected an interesting review of the legislation respecting legislative printing. The statutes in force in 1892 were revised and superseded by the 'legislative law' of 1892.

"It appears from this review that the words 'ordered by statute' were inserted in chapter 588 of the Laws of 1886, entitled 'An act to provide for and define the public or legislative printing,' in place of the proposed words, 'ordered by concurrent resolution,' as the result of a very persistent effort on the part of Governor Hill and others to reduce and confine public printing within statutory bounds.

"The concurrent resolution of 1892, at page 234 of the Senate Journal of that year, reads as follows:

"*Resolved*, That the contractor to do the public and legislative printing be and he hereby is ordered and directed to print for the use of the Legislature, in addition to the number of bills required to be printed by the seventeenth joint rule, 500 extra copies of all general bills introduced in either house.'

"As this resolution is not a statute or law, it can be nothing more than an order of the Legislature of 1892 to the printing contractor to do the extra printing specified, and trust to the supply bill for his pay. The fact that the public printer has never been disappointed in the supply bill in this respect may forecast future happenings, but nevertheless a spent resolution and an expected clause in a future supply bill must not be mistaken for an existing statute or law.

"The defendants were, therefore, in error in including in the basis of computation of the bids for legislative printing the extra copies of bills called for by the said concurrent resolution.

"So long as the defendants keep within the terms of the statute, which confers, defines and permits their duties, the court cannot interpose. But when they go outside those limits to the prejudice of the public or of an individual whose rights are thereby injuriously affected, they must be called back within them. What they may rightfully do within their prescribed powers affords no test of their action outside of them. They can do nothing rightfully outside of them, and it is improbable that they will do anything improperly or wrongfully within them.

"My attention is called to the 21st section of the legislative act. It is not probable that this section authorizes printing extra copies of the papers or documents of which the number to be printed is fixed by the statute itself.

"The writ of *mandamus* must issue commanding the defendants to exclude from their basis of computation the extra number of copies of bills mentioned in said concurrent resolution."

F. T. Hamlin, Esq., of Canandaigua, N. Y., has written quite a lengthy article reviewing the work on the recent Constitutional Convention which was printed in the *Yale Law Journal*. In speaking of the judiciary article, he says:

"The real occasion for a Constitutional Convention, and the one justifying its assembling, was the unfortunate condition of the judicial system of the State. It had broken down under the stress of business it had been called upon to do. Our court of last resort had proved entirely inadequate to cope with its cases, and temporary relief had been supplied; at one time by a commission of appeals and at another by a second division, made up of Supreme Court justices selected by the governor. But this duplicate system had proved unsatisfactory. So, too, the calendars of the trial courts in the cities had become congested and some relief was demanded, as justice by being long delayed was practically denied. In addition to this the multiplicity of courts in the larger cities had been found confusing and undesirable. In order to remedy these and other existing evils the whole judiciary article was revised and materially changed. Briefly stated, the plan adopted to relieve the Court of Appeals was to strengthen the intermediate court by establishing an appellate division of the Supreme Court, to consist of five judges, and generally speaking to limit appeals to judgments and orders of the appellate division finally determining the action or proceeding, and to orders granting new trials on exceptions where the appellant stipulates that upon affirmance judgment absolute may be rendered against him. To relieve the trial courts and to supply judges for the appellate division, twelve new judges were provided. The Superior Courts of the cities were consolidated with the Su-

preme Court. In addition to these changes the existing limitation of \$500 on appeals to the Court of Appeals was abrogated, and the system of pensions for retiring judges was abandoned. It is, perhaps, worthy of mention, that the return to an appointive judiciary found little support in the Convention; while on the other hand an attempt to shorten the term of the judges from fourteen years to eight years was defeated by a large majority. That the new judiciary article has simplified and in the main greatly improved our judicial system is beyond question, but the general opinion of the bar of the State is that the provisions for the relief of the Court of Appeals will prove entirely inadequate. By withdrawing all money limitation, an invitation is extended to appeal minor cases, which will, it is said, more than make good the appeals from orders that have been prohibited. So, too, it is asserted that the assumption that strengthening the intermediate appellate court will have a tendency to lessen appeals to the court of last resort, takes too little account of the staying qualities of the average litigant."

One of the most important decisions made recently is that of Judge Parker in the case of *Bender v. Hemstreet*. This case involves a principle in the law of partnership, which, so far as we know, has never been decided before and is a most novel question. The opinion is as follows:

"The plaintiff, William H. Bender, and the defendant, George Hemstreet, formed a partnership under the firm name of *George Hemstreet & Company*. Hemstreet, becoming dissatisfied with the conduct of his partner, which he alleges was of such a nature as to prove detrimental to the business in which they were engaged, sold all of the partnership property and effects, of every name and nature, to the defendant Johnson, and this he did without consulting with Bender. The effect of this transaction, if legal, was to terminate the partnership, and render Hemstreet liable to account to his partner for the proceeds of the sale remaining, after the payment of the debts of the firm.

"Whether it was legal, presents the only question to be considered on this application to vacate an injunction restraining defendants

*pendente lite* from making any disposition of the property and credits of the partnership?

"As the facts appear, from the papers used on this application, the transfer made was illegal.

"The learned counsel for the defendant insists otherwise, and calls attention to the numerous authorities in this State, from *Mabbett v. White*, 12 N. Y. 442, to *Bulger v. Rosa*, 119 N. Y. 459, holding, that one partner has authority to sell and transfer all the copartnership effects directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his copartner. But none of them hold that a partner may sell all of the partnership effects to a third party not interested as a creditor, thus practically terminating the partnership. On the contrary, the court, in *Welles v. March*, 30 N. Y. 344, while asserting the propositions that each partner possesses equal power and authority to dispose of the partnership property and effects for all purposes within the scope of the partnership, and in the regular course of its trade and business; to assign firm property as security for antecedent debts; and to transfer all of the partnership effects to a creditor in payment of debts, nevertheless said, in effect, that aside from these exceptions the authority of each partner as the agent of the firm is limited to transactions within the scope and object of the partnership and in the course of its trade or affairs.

"Bates, in his work on Partnerships, states the general rule to be that 'The power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of property held for the purposes of the business, and to make a profit out of it.'

"An examination of the authorities leads to the conclusion that this is a correct statement of the general rule, although not established by the decisions in this State. And we find nothing in the authorities to which attention has been called which persuades us that the courts of this State will adopt a different rule when the question shall be fairly presented, as it seems likely to be in this case."

Judge R. M. Benjamin of Bloomington, Illinois, recently wrote a very interesting article on the income tax decision, part of which is as follows:

"How did the majority of the court arrive at the conclusion that a tax on incomes derived from land is a direct tax?

"The basis of their conclusion seems to be the claim that there is no real distinction between the rent or income from land and the land itself, and on this assumption they conclude that inasmuch as a tax on the land itself is a direct tax it follows that a tax on the rent or income from land is also a direct tax. They say: 'The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction.' They cite, in support of their position, the language of Coke, as follows: 'If a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs \* \* \* the whole land itself doth pass.' This is the familiar law. In other words a grant or devise of the profits or use of land to a man and his heirs passes to them the fee simple — the absolute ownership of the land called real estate. Upon the death of the grantee or devisee the fee simple or absolute ownership passed to his heirs or assigns, and so on forever. But a grant or devise of the profits or use of land to a man for one year or five years does not pass to him the fee simple, real estate, but passes only a chattel interest. Upon his death within the term his interest would pass as personal property to his administrator or executor and not to his heirs. Here is a distinction between these two classes of property. Land belongs to one class of property and income from land belongs to another class. Again, the term 'profits' as used by Coke has a more comprehensive meaning than the term 'income.' The latter is confined to profits or uses of a pecuniary nature. Applied to the affairs of an individual, 'income' conveys the same idea that 'revenue' expresses when applied to the affairs of a state or nation. The term 'profits' includes advantages and benefits in various respects other than pecuniary gains. There are other 'profits' besides pecuniary profits. The owner of a residence, whether it is worth \$5,000 or \$50,000 has the profits, ad-

vantages, benefits accruing therefrom by way of personal and social convenience, comfort and enjoyment, and yet such real estate may not and generally does not yield any pecuniary gain or income, but on the contrary cannot escape an annual direct tax. Here is a distinction between the 'profits' referred to by Coke—the advantages and benefits arising from the various uses to which the owner in fee simple may put his real estate—and the pecuniary gain or income from real estate. The owner of a residence worth \$50,000 and yielding no income would find out the difference between land and the income from land, between a land tax and an income tax. There is still another difference between land and the income of land. Land is a certain, definite, corporeal, permanent object. A land tax law goes straight, directly to this object without regard to rents or income therefrom, and irrespective of the ownership thereof. This object, the land itself, cannot escape the tax, although the owner may be a Lord Scully, or may before the time for the collection of the tax, sell the land and squander all the purchase money. A land tax when assessed becomes a lien upon the land. It is a direct tax. On the other hand, what is the nature of a tax on last year's income from land when the time arrives for its assessment this year? What is that income this year? The assessor may know how much the income was and may assess the tax accordingly, but where is the income itself—the subject matter of the tax? It may have been carried away by an absconding debtor; it may be in the pockets of a foreigner; it may have been squandered in this country; it may be non-existent. Last year's income from land is no longer any part or parcel of the land. It is like a young bird that has left the parent-bird and the nest. The young bird has flown away, and who can tell whither. It may be in nubibus; it may have migrated to another clime; it may have been devoured by birds of prey; it may be dead.

"We need not suggest other distinctions between land and income from land—between a land tax and an income tax. Now if there is a real distinction between these two kinds of property and between these two kinds of taxes, the basis upon which a majority of the court rest the contention that the tax upon income from land is direct and unconstitutional, sinks and disappears and the superstructure built thereon must fall. To be logical and consistent must we not treat income from the use of land and income from the use of invested personal property the same as income from the

use of brain and muscle. Must we not conclude with the minority of the Supreme Court (Justices Harlan, Brown, Jackson and White), that for purposes of taxation there is no real and constitutional distinction between incomes derived from industry and incomes derived from wealth, whether invested in land or in personal property.

"But notwithstanding all this the people of this country are patriotic. They believe that this is a nation; they know that in the time of a great war (a war with a great naval power, as England for instance, when our ports might be blockaded), a mere tariff or duties imposed on imported goods would afford but little or no revenue; they know that the taxing power is the strong right arm of the nation; and when they begin to reflect and realize that the doctrines laid down by the majority of the Supreme Court would maim and cripple this strong right arm of the nation they will hope and pray that in some future crisis of the nation (if such crisis must needs be), the Congress will reassert and the Supreme Court reaffirm the full constitutional power of the government, whereby it can call to its aid promptly and effectually, without regard to State machinery or State lines, the resources of invested wealth as well as all the resources of brain and muscle, for the preservation of the nation."

The English Court of Queen's Bench decided an extremely interesting matter in the case of *Gwilliam v. Twist*. It seems that the driver of a 'bus, being drunk, was apprehended by a police officer and was further ordered by the officer to get down from his box-seat on the cab. He acquiesced and went inside and induced a former conductor to drive the 'bus back to the stable. By the negligence of this driver the plaintiff was injured, and it was held by the Court of Queen's Bench that the proprietor of the 'bus was liable for damages for such injury although it did not appear that the conductor had express authority to provide, in his discretion, for an emergency such as has been described. In one of the opinions of the court the law is very tersely summed up as follows: "The law is this: that in cases of sudden emergency, the servant may have authority, within the scope of the employment, to act in good faith, and, according to the best of his judgment, for his employer's interest, provided that he violates no express limitation of his authority, and no order of the master applicable to the case, and provided that the act be not plainly unreasonable."

## UNION COLLEGE UPON THE BENCH AND AT THE BAR.

An address delivered at the Centennial Celebration of Union College.

**“WHY** may we not proceed further and affirm confidently that the profession of the law is to be preferred before all other human professions and sciences, as being most noble for the matter and subject thereof, most necessary for the common and continued use thereof, and most meritorious for the good effects it doth produce in the commonwealth?”

How far Union College has during the first half of the century of her existence given a practical answer to this question, propounded nearly 400 years ago by Sir John Davy in the preface to his reports, is to be determined by the story of her sons who have devoted their lives to the practice of the law or been called to administer it from the bench. That record we shall give in brief and incomplete manner unworthy of the theme.

A consideration presents itself at the outset which requires a moment's attention. It will be a ground for just criticism as regards the contents of this paper that undue space is devoted to those graduates who have attained distinction by virtue of holding official position and that very many illustrious men have been passed by who were ornaments to the bar, in some instances their very names being ignored, in others receiving but scanty mention.

This may arise because the individual opinion of the writer as to the place any alumnus has taken in the minds of the public, may not be that which by common consent is accorded him. But the real and only justifiable excuse for thus passing hastily over the names of many who are entitled to be recalled upon an occasion like this lies in the fact that as to lawyers who have never occupied official position the records and even traditions are so scanty as to render it impossible to do justice to their merits or fairly to recall the story of their lives and influence. When to this is added the brief space of time allotted for the preparation of this paper and necessity for inquiry and research in many directions, it will be fully appreciated that it is not only difficult but almost impossible to render the proper meed of praise to all the illustrious names to be found upon the roll of graduates of Union at the bar and on the bench.

Still another embarrassment exists in the fact that very many of her illustrious sons are so well known in our own day and in the present generation, that to recall their names would seem to be a work of supererogation, aside from the difficulty of doing justice to those who are still engaged in the active duties of their profession. It has therefore seemed

better, with the single exception of one who has passed away, to confine this paper to a record of a few of the leading lawyers and judges who graduated during the first half of that century, the completion of which we to-day commemorate.

In the first class graduated from Union we find the names of three clergymen, but not a single lawyer. A marked improvement is found in 1798, which graduated two lawyers, and in 1799 we not only find the bar fully represented but the bench recognized by the conferring of an honorary degree upon Egbert Benson, then justice of the Supreme Court and later judge of the United States Circuit Court.

In that year graduated John Savage, who survived until 1863, receiving from the college the degree of LL. D. in 1829. He was appointed chief justice of the Supreme Court of the State, January 29, 1823, and until 1836 presided over that court, having as associates such eminent jurists as Samuel Nelson, Green C. Bronson and William L. Marcy. His opinions are to be found in the volumes of Cowen and Wendell and do credit to his early training.

Samuel A. Foot was a member of the class of 1811, and admitted to the bar in 1813. After a long and distinguished service at the bar he became a member of the Court of Appeals in 1851. It was said by Judge Folger, on behalf of the Court of Appeals at the time of his death in 1878, at the age of eighty-eight, "He was the living link which held in one three successive judicial organizations. He began the practice of the law before any one now sitting on this bench was born, and he continued it in full vigor of mind and body until the day of his death."

In 1818, with Bishops Alonzo Potter and George W. Doane, was graduated Sidney Breese. Taking up his residence in Illinois immediately after graduating, he was almost constantly in official position in that State, discharging public trusts up to the time of his death in 1878, successively district attorney, reporter of the Supreme Court, senator of the United States, and chief judge of the Supreme Court of Illinois. He is regarded as one of the ablest jurists who has occupied a place upon the bench of that State, possessing a character of great intellectual vigor and absolute independence.

The name of William H. Seward, of 1820, is so thoroughly associated in the mind of every graduate of Union, with his record as a statesman, that it seems like trenching upon the ground of others to mention his name in connection with his career at the bar, yet it would be a manifest injustice to pass by the record of Mr. Seward as a lawyer. That he was eminently successful at the bar as a very young man is a matter which has a basis much more substantial than mere tradition, and none can listen but with pleasure to the well authenticated anecdote

illustrating his confidence and courage upon his first argument before Chancellor Walworth in the Court of Chancery. The story is told by one of his friends and admirers as follows:

Seward's manner when he began his argument was that of exceeding diffidence. To add to his embarrassment, the chancellor began to ply him with questions and suggestions. At length, when the questions became too frequent, the young lawyer paused in his argument and took his seat.

"Why do you not proceed with your argument?" was asked in some surprise.

"I beg leave to say," said Seward, "if your honor will permit, that until now I never understood the arguments in the Court of Chancery were conducted in the form of dialogue with the court, and not understanding that practice, I am unwilling to proceed."

"Proceed, sir, proceed with your argument," said the chancellor, "you shall continue it uninterrupted." And no further interruption occurred.

After retiring from the State Senate, Seward's legal career covered a period of little over four years, but during that time the celebrated cases of *The People v. Freeman* and *The People v. Wyatt*, in both of which he appeared for the prisoner, gave him a widespread and solid reputation as a lawyer, he having in the latter case interposed for perhaps the first time the defense of moral insanity, which has since become so popular, insisting that "persons who were the subjects of natural or congenital derangement are not morally accountable, because, though they may know an act to be wrong, they cannot refrain from doing it, being irresistibly compelled to its commission."

Mr. Seward's argument to the jury in that case, although unsuccessful, is said by one who was present to have rivalled Erskine's famous defense of Hadfield under a like plea.

Hiram Gray was a member of the class of 1821, and survived until a very recent date, having been a member of the Commission of Appeals appointed under the provision of the Constitution of 1869, which constituted as such commission four judges of the Court of Appeals then in office, for the purpose of completing the calendar of that court, and authorized the governor to appoint a fifth commissioner.

In the same year was graduated Philo T. Rugles, who at his death had the distinction of being the oldest living alumnus of the college. Although not distinguished as an advocate, and holding no judicial position, he exercised judicial functions during a period extending over very many years, and relating to matters of the utmost importance, since by virtue of his judicial temperament, thorough knowledge of the law and inflexible integrity,

he was selected alike by courts and litigants as referee to determine controversies involving most important questions of law and fact, as well as very large, varied and important financial interests.

John A. Lott was of 1823. After holding the office of justice of the Supreme Court, he became a judge of the Court of Appeals in 1869, and upon the organization of the Commission of Appeals was selected as chief commissioner, and continued to act in that capacity during the continuance of the commission and until the completion of the work assigned it under the Constitution.

In 1824 graduated Ira Harris, who not only represented the State with honor in the United States Senate, but discharged the duties of justice of the Supreme Court under the new Constitution in a singularly felicitous manner, rounding out a successful and honorable career as one of the founders of and lecturers in the Albany Law School, and acting for a brief period as the president of Union College; a man of thoroughly solid attainments who left the impress of his personality upon those with whom he associated at the bar, on the bench and in the lecture room, and whose name is one of those the sons of Union delight to honor. His long and honorable career closed in 1875.

Amasa J. Parker, of 1825, who passed away May, 1890, ripe in years and honors, in the eighty-third year of his age, filled a large place in the history of the bar and of the bench of the State. Although for a considerable period from 1844 to 1855 he was a justice of the Supreme Court, he is best known and will be remembered most distinctively as a lawyer. The manner of his graduation was novel and unique.

He was only sixteen years of age when he took charge, as principal, of a classical school at Hudson, which he conducted with success. Nearly two years after he had assumed charge of this academy, he learned that the trustees of a rival educational institution at Kinderhook, boasted of an advantage enjoyed over the Hudson Academy, in that their principal was a college graduate. Mr. Parker waited until the close of the school year at Hudson, then went to Schenectady. There he was presented to Dr. Mott and Vice-President Potter, afterward the Bishop of Pennsylvania. He explained his visit and said he was there to pass his four years' examination. The faculty approved of the novel application, and the full examination for the four years' course was successfully passed during the week, and he took his diploma with the class of 1825 and returning to Hudson sent word to his friends at Kinderhook that their boasted advantage was no longer good. Subsequently a trustee of Union, he was always loyal to its interests.

In 1851, with Judge Ira Harris, of Union, 1824,

and Amos Dean, Union, 1826, he engaged in founding the Albany Law School, and continued as one of its lecturers for a period of nearly twenty years, preparing in the meantime six volumes of reports of criminal cases and assisting in the editing of the fifth edition of the Revised Statutes of the State. He was one of the earliest advocates of law reform. While visiting Europe in 1853 when such reforms were under consideration in England, he addressed the Law Reform Club at its annual meeting on the invitation of Lord Brougham, explaining the results of his experience on the bench, as to the changes that had been made in this State, more particularly as to the administration of law and equity in the same court.

From 1855 up to the time of his death, Judge Parker was actively engaged in the practice of his profession and recognized as one of the leaders of the bar of the State, being engaged in many of the most important cases in the State and federal courts.

Of Amos Dean, 1826, we have spoken in connection with the founding of the Albany Law School in collaboration with two other eminent graduates of Union. This school in 1873 became a part of Union University, and it is very largely to the impetus given under the management of Amos Dean that it early attained a high reputation as a school of law.

William F. Allen, of 1826, was for sixteen years a justice of the Supreme Court, for two terms comptroller of the State and for eight years a judge of the Court of Appeals. It was well said of him "he filled a large space in the annals of the State." The qualities which characterized him were said by those who knew him most intimately to have been "a firm, intelligent and comprehensive grasp of the most difficult questions in the law, and the wisdom which he brought to bear upon the solution of legal controversies," as well as the "facility with which he could comprehend and formulate the principles applicable to the most difficult and complicated cases, and above all, his independence of judicial judgment and fearlessness with which he adhered to and enforced his conviction of the right," and it was not an undeserved tribute that "through an extended life he was an honor to his race, to his profession of the law and to his judicial office."

Rufus W. Peckham, for many years justice of the Supreme Court in the Third Judicial Department and at the time of his decease in 1873 a member of the Court of Appeals, was of 1827. No more fitting tribute can be paid his memory than that of the memorial handed down at the opening of the court at its first meeting after the disaster by which he came to his death. Chief Judge Church, on behalf of himself and his associates, said, "Judge

Peckham has for many years been identified with the judiciary of the State. His judicial career began as a judge of the Supreme Court, to which he was elected in the district where he had spent the whole of his professional life, and the qualities which distinguished him as a judge in that position led to his nomination and election as an associate judge of this court on its organization. His firmness, his learning and his fearlessness and independence in maintaining his convictions, guided always by a strong sense of justice, which was a distinguishing feature of his character, won the confidence and respect of the bar and bench, and of all with whom he was associated."

Ward Hunt, of 1828, attained to the high dignity and responsibility of associate justice of the United States Supreme Court after having served as associate and chief judge of the Court of Appeals and commissioner of appeals.

George F. Comstock, of 1834, came to the bar in 1837 and entered upon the practice of his profession at Syracuse. In 1847 he became reporter of the Court of Appeals for a term of three years, and in 1856 a judge of the Court of Appeals to fill vacancy; was chief judge of the court 1860 to 1862. "His opinions are all marked with the stamp of eminent ability, but his reputation as a judge rests chiefly upon his opinions in a few cases which involve the determination of great questions and the evolution and application of principles of permanent value. These opinions he elaborated with the greatest care and exhibited great logical power, the most discriminating analysis and profound learning." He practised his profession with marked success after his retirement from the bench, and up to his death in 1892.

John K. Porter, distinguished as an advocate, and bearing a high reputation as a judge of the court of last resort, was of 1837. For many years a member of the leading law firm in the city of Albany, he conducted a very large business as counsel in the higher courts and achieved a reputation in the argument of causes second to that of no lawyer in the State. For a term of years, beginning with 1865, he was a member of the Court of Appeals, and upon his retirement became the head of one of the leading firms in the city of New York. He was best known to the public by reason of his participation in the action of Tilton against Beecher, in which he won many professional laurels, and to the country at large from having been counsel upon the trial of the assassin Guiteau for the murder of President Garfield. A hard student, the unremitting labors of this trial, extending over weeks and months, undermined his constitution, and ruined health necessitated his retirement from the bar. He was brilliant, persuasive and logical as a lawyer,

and his opinions are clear, pointed and concise, indicating a vigorous intellect trained to the duties of the bar and the bench.

His standing with his brethren at the bar is, perhaps, best illustrated by the fact that he was chosen as the first president of the New York State Bar Association upon its organization in 1876, and elected for a second term the following year.

Those in attendance upon these Centennial exercises have listened to a commemorative address from George F. Danforth, of 1840. To those who have had that pleasure it is unnecessary to recall either his vigorous personality or ability as an orator. To the wider circle of graduates of the college he is known as a loyal son of Union, for whom a successful career at the bar was followed by a term of fourteen years of service in the Court of Appeals, from which he retired alike to the regret of the bar and bench only by reason of the constitutional limitation upon the term of his office. He was selected by a unanimous vote of his associates to preside over the deliberations of the commission appointed in 1890 to revise the judiciary article of the Constitution and did much toward shaping the report which was ultimately substantially adopted by the recent Constitutional Convention.

Hamilton Harris, of 1841, is, perhaps, among all the names mentioned, more especially a representative of the bar as apart from the bench. Nearly all the sons of Union who have been distinguished as lawyers have likewise achieved success as judges. But aside from the office of State Senator, Mr. Harris has aspired to no official position. For very many years he has been closely identified with the history of the bar of the State, and his industry, ability and learning have been availed of by hundreds of suitors in trial courts and courts of last resort, and no lawyer in the State has a more substantial clientage nor is better worthy of its confidence. The easy and deliberate manner of Mr. Harris in the trial courts recalls the anecdotes related of Sir James Scarlett, who was said, during the progress of a trial, to regard the proceedings with apparent indifference, but, as in fact, giving the closest attention to the salient features, with regard to which his adversary found him a most thoroughly equipped and dangerous adversary. Nothing of fact or law escapes his notice, and in concise and convincing terms, with no attempt at oratory, every point is presented in the clearest and most convincing terms to court and jury. No one has greater pride in his profession nor takes greater interest in affairs appertaining to the advancement of the educational interests of the State. Mr. Harris is not a stranger to the delights of literature, and finds relief from most painstaking and successful labor at the bar among the shelves of a carefully selected library.

Orsamus Cole, of the class of 1843, was for many years chief justice of the Supreme Court of Wisconsin, and as such attained a high reputation as a jurist.

Robert Earl, of 1845, retired from a seat upon the bench of the Court of Appeals at the close of 1894. after a continuous judicial service in that court of nearly twenty-five years, having served a longer period in that tribunal than any other judge sitting upon that bench since the organization of the court. Judge Earl was admitted to practice in 1848, and remained at the bar until 1869, serving during that period as county judge of his county. He first took his seat upon the bench of the Court of Appeals in 1870. He later became a member of the Commission of Appeals, and, upon the dissolution of that body, was again elected a member of the court. He acted as chief judge in 1870 and 1892. His opinions appear in the New York reports, beginning with volume 41 and ending with volume 144, and number over 1400. If published by themselves, it is said they would make about eighteen volumes of the Court of Appeals reports. He has thus impressed himself in a most striking manner upon the development of the law in this State for the past quarter of a century, since their quality fully equals the quantity.

The unusual courtesy was extended him upon his retirement from the court of the expression of the views of the judges in an official minute, and their appreciation and that of the bar cannot better be expressed than by an extract from that proceeding. They say: "Especially we shall miss him at the consultation table, where the capacity to see swiftly, grasp accurately and hold firmly the rapid succession of facts and doctrines involved in the cases as they pass in review, finds its most useful field of effort. He held his place there, a sentinel never asleep, a patrol always on the alert, a guard not to be eluded; and yet none of us, even when stopped or challenged, ever had reason to regret the manner of the vigilance. For, however earnest the warning, or relentless the criticism, there was always kindness and courtesy behind it, and a zeal which fully subordinated pride of opinion to the sound and stable reputation of the court."

John T. Hoffman, of 1846, is best known in other fields than the law. He was, nevertheless, a man of standing at the bar, and, as recorder of the city of New York, obtained a high reputation for a fearless and independent discharge of his judicial duties.

Eighteen hundred and forty-six graduated Silas W. Sanderson, for some time chief justice of the Supreme Court of California, and who for many years occupied a commanding position at the bar of that State, and William H. King, a lawyer of high standing and reputation in his adopted city of Chicago, where, for a considerable period of time,



he was president of the association of the bar of that city.

And here we have arrived at the close of the first half century, and, with a single exception, leave the record from 1847 to be made up at a later day; not but that a number of the sons of Union have distinguished themselves at the bar and served faithfully and well upon the bench, but for the reason that we now come to deal more fully with our contemporaries, many of whom have established their reputation, some of whom have it yet to make, and further suggestion might seem invidious.

The exception noted is that of Samuel Hand, of 1851, who passed away nearly a decade since at the comparatively early age of fifty-three. From 1859, when Mr. Hand located at Albany, his reputation as a lawyer was at once established throughout the State. As a member of the famous firm of Caggar, Porter & Hand, he developed his capacity for work, his methods of thorough preparation, and his ability to grasp and expound intricate questions of law.

Up to the time of his death, except the short interval during which he was a judge of the Court of Appeals in 1878, he was the leading counsel at the bar of that court, a position for which he was admirably fitted not only by his knowledge of the law but by reason of his ability to grasp complicated facts and to apply legal principles thereto. During these years he served a short period as State reporter, publishing six volumes of the New York reports. Chief Judge Ruger said of him with the approval of the members of the Court of Appeals: "His most enduring claim to distinction must, we think, rest mainly upon the reputation made by him as an advocate at the bar of this court, where, for nearly a quarter of a century, he occupied a commanding position and was more extensively employed in the argument of cases than any other individual practitioner. The confidence reposed by his clients in his ability was fully justified by the great power and varied resources which he brought to bear in the discharge of his professional engagements and the success which usually attended his labors. His forensic efforts were always distinguished by thoroughness of preparation, perfect and expert knowledge of the case in hand, a clear and comprehensive appreciation of the legal questions involved, and of the reason and philosophy of the rules bearing upon them, a logical and felicitous method of arrangement and presentation which enabled him to exhibit in the strongest light the favorable features of his theme, and to anticipate and counteract those of his adversary."

He was the second president of the New York State Bar Association, serving two terms in that capacity.

The roll of lawyers and jurists who graduated from Union during the first half century of her existence numbers also Alfred Conkling, of 1810, United States minister to Mexico and district judge Northern District of New York; John W. Edmonds, of 1816, circuit judge of the First Circuit in 1845 and justice of the Supreme Court in 1847; Josiah Sutherland, of 1824, justice of the Supreme Court in 1857; Enoch H. Rosekrans, of 1826, justice of the Supreme Court in 1855, and William W. Campbell, of 1827, judge of the Superior Court and justice of the Supreme Court.

Eighteen hundred and twenty-six graduated Alexander W. Bradford, commissioner to revise the laws, and surrogate of the county of New York; Hamilton W. Robinson, judge of the New York Common Pleas, and Gilbert M. Speir, judge of the Superior Court.

Eighteen hundred and thirty-three gave to the Supreme Court bench Joseph Mullin and Daniel Pratt; 1835, James C. Smith, for a long time presiding justice in the General Term of the Supreme Court; 1836, Peter S. Danforth and William Fullerton of the Supreme Court bench; 1839, John N. Pettit, circuit judge in Indiana, and Hooper C. Van Vorst of the Common Pleas and Superior Court; 1841, Joseph Potter of the Supreme Court, and 1842, Joseph W. Jackson, justice of the same court.

Union has, therefore, in addition to a brilliant array of lawyers whose name is legion, and whose services at the bar have been rendered with ability, fidelity and integrity second to none, seen of her graduates up to 1846 upon the bench, a chief justice of the Supreme Court under the Constitution previous to 1846, three chief judges of the Court of Appeals, eight associate judges of that court, four of the five commissioners of appeals, and the list is not complete without the enumeration of numerous judges and justices of Superior Courts, and three chief justices of the highest courts of other States.

Thus has the college discharged its functions as an educator of the men who are described by the prince of Roman orators as "learned in the laws and that general usage which private persons observe in their intercourse in the community, who can give an answer on any point, can plead and take precautions for their client," and from among whom are selected the magistrates of the commonwealth, whose duties are set forth in the quaint language of Bishop Horne to be, "when he goeth up to the Judgment Seat to put on righteousness as a beautiful robe and to render his tribunal a fit emblem of that eternal throne of which justice and judgment are the habitation."

No one can be better aware than the writer of this paper that justice has not been done to the

alumni of Union who have pleaded at the bar or have administered justice from the bench. Lack of time, opportunity and sources of information can alone excuse the shortcomings of which he pleads guilty. He throws himself upon the mercy of the court, craving so light a sentence by way of just criticism as may be compatible with the character of the offense. To have selected from the large number of names of those who have graced the bench, those who might have been deemed most worthy of further mention, would have been a work of difficulty which could have been performed, with justice to those interested, by no expenditure of time or labor. To have selected a few for fuller mention would have appeared invidious. To have given the record of all might have been tedious. It has therefore been deemed best to leave those names as well as those of the distinguished members of the bar who have made a reputation for themselves and been an honor to the college to other annals, in which may be more fully recorded their ability, industry and integrity.

J. NEWTON FIERO.

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#### COMMENTS OF ENGLISH LEGAL PERIODICALS ON THE WILDE CASE.

IN America, in addition to the feelings of disgust which have arisen from the short printed reviews of the evidence in the Wilde trial, there has been great interest in the judge and lawyers who participated in this *cause célèbre*. On this account a short review of the opinions of the English legal periodicals will prove attractive to the members of the American bar.

The *Law Times*, in its editorial columns, says:

"It is a long time since we had a trial so full of lessons as that of Taylor and Wilde for sodomy. Its judicial aspect is interesting. Mr. Justice Charles appeared to attach some weight, however small, in favor of the prisoner, to the intellectual and literary character of Wilde. Mr. Justice Wills was overpowered by the offensive nature of the case—the intellectual and literary character of Wilde rather added to the beastly odor which arose to nostrils unused to such moral stinks. Here we find different idiosyncracies influencing slightly but perceptibly the judicial mind in dealing with the same subject-matter. It is unavoidable.

"The forensic aspects of the case are, perhaps, more interesting. The devotion of Sir Edward Clarke to the cause of a client who, at his best, was a moral monstrosity, is startling. It has been called heroic. Possibly it was—had it been successful, the achievement would have been phenomenal. But it failed, and the worthlessness of the cause which received self-sacrifice of every kind becomes pain-

fully prominent. The bar is supposed by the public to be a blood-sucking profession. How often its members work for nothing the public know not. Few barristers are grasping builders of fortunes. Very many vehemently support causes in which they have once embarked with absolute self-abandonment. Conspicuous instances may bring this home to the popular mind.

"The forensic conflicts became personal. The ex-solicitor-general was fighting an up-hill fight—leading a hope, if not forlorn, yet desperate. The solicitor-general had to ensure that the previous partial miscarriage of justice in the absence of the law officers should not become perfect when he was leading. He had to face a fierce and watchful defence—to get rid of that dangerous glamor of "art" which Wilde himself impudently attempted to throw over the filthiness of his crimes, and which his advocate courageously supported by eloquence of which the theme was wholly unworthy; 'trimmings' it was of the most deceptive but tawdry description, and we certainly do not complain that Sir Frank Lockwood was one whit too vehement, nor do we regret that he exercised the dubious right of reply, which defenders of prisoners grudge to the law officers of the crown.

"The little lofty lectures of Sir Edward Clarke all round would be pardonable vanities, even if they had no forensic design. What he did in the longest period during 100 years in which one solicitor-general has held office is of no more importance than the fact that Sir Alfred Wills likes a room to himself. That he never exercised the right of reply affords no reason why no other law officer should. Of course it is satisfactory that he approved of the fairness and ability of Mr. Gill and of the cross-examination of Sir Frank Lockwood, whilst disapproving of his rhetorical descriptions of some of the evidence. Sir Edward, not without foundation, believed that this projection of his personality well forward would be effective, and the foreman of the jury, who is reported to have jerked out 'guilty' amidst snivelling gulps of emotion, no doubt felt a pang of regret for the ex-solicitor-general. The bar has to face this sort of influence as a real danger. The personal character, personal experiences and opinions of advocates are beside every issue to be tried, and it will be a sad day for the bar of England when the prestige of privy councilors, noble lords, and ex-law officers in practice fail to find opponents capable of rising above it, and so far as possible counteracting its influence upon the 'superstitious reverence' which is believed, in some instances, to possess the minds of jurymen."

Then follows an article on "The Legal Points in Wilde's Case," thus:

"There are several legal points of very wide and

general interest connected with this case which it would be unsatisfactory to pass by unnoticed. We alluded in a previous number to the rule laid down by *Reg. v. Carden* (1879, 5 Q. B. Div.), which prevents a magistrate in a prosecution for criminal libel from receiving evidence in support of a plea of justification, and on which the magistrate acted in the preliminary proceedings in the *Queensberry* case, and pointed out both its unfairness and its anomalous character now that the legislature has repealed it in favor of newspaper proprietors. We revert to the subject now merely to express the hope that advantage will be taken of Sir John Leng's bill to amend and consolidate the law of libel—which is at present before Parliament—to repeal it altogether. Another point of importance raised by the *Wilde* case is as to the position of prisoners indicted at once for a statutory offence in regard to which they are, and a common-law offence in regard to which they are not, competent to testify. This question was first raised in *Reg. v. Owen* (1888, 58 L. T. Rep. 780). There the prisoner was tried on an indictment containing two counts, one for an indecent, and the other for a common assault. He gave evidence at the trial under section 20 of the Criminal Law Amendment Act 1885, which makes a person charged with an indecent assault a competent witness, but does not apply to a charge of common assault, denying that he had indecently assaulted the prosecutrix, but admitting that he had put his arm around her. He was acquitted on the statutory, but convicted on the common-law charge. There was evidence to support the conviction independent of the prisoner's statement. But the Court for Crown Cases Reserved held that his statement was an admission which could be used against him. This decision was impliedly followed by Mr. Justice Charles in the case of *Wilde* and Taylor. It clearly shows the necessity for the enactment of the Evidence in Criminal Cases Bill in order that these arbitrary distinctions between charges with reference to which prisoners are, and those with reference to which they are not, competent witnesses may be abolished. The present law is doubly unfair. If the prisoner's incidental evidence in regard to charges as to which he is not competent to testify is adverse to himself, it is available against him as an admission; if it is favorable, it merely ranks as an unsworn statement, to which little credit is attached.

"Lastly, the question of the admissibility of the evidence of an accomplice, and the effect of the absence of corroboration has arisen, and the action of the judge in withdrawing the charge supported by such evidence only invited criticism. Mr. Darling, Q. C., in the *Times*, arraigns the judge as if he had acted beyond his power and contrary to practice in

withdrawing the charge connected with *Shelley*. Roscoe, however, says in his *Criminal Evidence* (p. 123) that 'it has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal,' \* \* \* 'but, while the law is thus fully established, the practice of judges is almost invariably to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner.' 'The law,' he adds, 'remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated.'

"We think Mr. Justice Wills acted wisely in this instance, but it is desirable that the law and practice should be made uniform and consistent."

The *Law Times* prints several letters sent to the editor, the first is on "The Function of Prosecuting counsel," as follows:

"*Linguam causis acuis* (Horace Epist. i, 3, 1.23).

—SIR.—While admiring the generosity of the sentiment expressed by Sir E. Clarke, in his splendid oration in defense of *Wilde* at the Old Bailey, that the solicitor-general should act rather as a judge than as an advocate working for conviction, permit me to cite one or two historic instances which would decidedly induce the view that the reputation of the solicitor-general is, speaking historically, that of a lawyer with a decided talent for what Aristotle calls eristic speech. Thus, Solicitor-General Finch, on the trial of Sir Harry Vane, in June, 1661, indulged in such forensic amenities as openly declaring that 'the prisoner must be made a public sacrifice of.' In his peroration he exclaimed: 'What counsel does he think would dare speak for him (Sir H. Vane) in such a manifest case of treason, unless he could call down the heads of his fellow-traitors, Bradshaw or Coke, from the top of Westminster Hall.' In the last century it fell to the lot of a solicitor-general to deliver an invective, which for its scathing satire, as well as for its pregnant consequences, has acquired a permanent place in the pages of history. I refer, of course, to Wedderburn's invective against Franklin before the Privy Council, February, 1774. It is well known that the solicitor-general's sarcastic wit on this occasion produced such a profound resentment in its object that Franklin declared his resolution never again to wear the clothes he donned before the Privy Council till he signed the public Declaration of the Independence of America. It is unnecessary to add he kept his resolution, being one of the four American signatories to the Treaty of Paris, in January, 1783, by which his Britannic majesty declared the United States to be free, sovereign and independent. The incident

is well detailed in the Chatham letters, by an eye-witness, the Whig Earl of Shelburne: 'Mr. Wedderburn (appointed solicitor-general 1771) under the pretext of reply and the encouragement of the judges—the indecency of whose behavior exceeded, it is agreed on all hands, that of any committee of election—entered largely into the constitution and temper of the province, and concluded by a most scurrilous invective against Dr. Franklin, occasioned, as Dr. Franklin says, by some matter of private animosity; as Mr. Wedderburn says, by his attachment to his deceased friend, Mr. Whately, the publication of whose correspondence contributed to influence the assembly to their late resolution.' The piece of eristic in question was: 'Amidst tranquil events, here is a man who, with the utmost insensibility to remorse, stands up and avows himself the author of all. I can compare him only to Zanga, in Dr. Young's 'Revenge'—

Know, then, 'twas I.  
I forged the letter — I disposed the picture;  
I hated—I despised—and I destroy.

"I ask, my lords, whether the revengeful temper attributed to the bloody African is not surpassed by the coolness and apathy of the wily American?' Dr. Priestly, another eye-witness of this historic scene, said that 'at the sallies of Mr. Wedderburn's sarcastic wit all the members of the council, the president himself not excepted, frequently laughed outright, no one behaving with decency except Lord North.'

"This incident may fairly be claimed as a *locus classicus* for the solicitor-general not 'behaving as a judge,' and its lamentable consequences furnish no mean support to Sir E. Clarke's contention that he should do so. But, as one who has frequently enjoyed Sir F. Lockwood's 'sallies,' I must of course protest that I am unwilling and incapable of passing any opinion as to whether he may not, like Demosthenes in *Ad Leptinem*, indulge in rhetorical bitterness."

Two short letters follow. The first is:

"In case your columns are open to remarks on the recent trial, I beg to submit that there are cogent reasons why the result must be regarded as unsatisfactory. To begin with, the case had been prejudged in an unusual manner, so much so, that it is surprising that it was not removed by a writ of *certiorari* to the Court of Queen's Bench. The stress laid by the prosecution on the grave nature of the charges surely demanded that the tainted witnesses should be corroborated by evidence of a conclusive kind; and at the outset a man is placed under peculiar disadvantages when the offenses are alleged to have been committed months, and even years ago. In considering the sentence, it is astonishing that the judge should have inflicted the ex-

treme penalty of the law when there were no aggrieved parties in the case. For it cannot be pretended that the accomplices, who were the only witnesses of importance, were such. Permit me to add that there seems some misapprehension respecting section 11 of the Criminal Law Amendment Act. It was introduced in order, its promoter said, to bring the English law on the subject into harmony with the French law; but, in point of fact, it does nothing of the kind. The maximum penalty, as first proposed, was one year's imprisonment, but when another year was suggested it was allowed to pass without discussion. The clause, in fact, was 'rushed' through the House at the time of the 'panic' caused by Mr. Stead's sensational articles. But surely common sense and common fairness demand that a distinction should be made between cases where the chief witnesses have a grievance, and where they are only self-declared accomplices, who make a trade of vice."

The second is:

"All things are possible with God — and a common jury, and everyone must have been prepared for the possibility of the Wilde trial ending as it did, although the result owed little to the assistance of counsel for the defense. In fact the proceedings reflect little credit on any of the persons concerned except the judge. The prosecution was singularly weak, and against all precedent in a case of such importance, had no assistance from either of the law officers. Besides the inconvenience and unfairness to the prisoners of including charges of conspiracy (which, as his lordship intimated, should not have been brought at all) with those under section 11 of the Criminal Law Amendment Act; everyone with any experience in criminal matters knows the fatal effect likely to follow the abandonment of serious charges at the last moment. If, the ordinary jurymen argues, these are abandoned, can we be quite sure that the others should have been preferred? He might also regard it in the nature of a jetsam—as evidence that the prosecution felt themselves in a bad way. Another fatal blunder was the failure to seize the obvious reply to Sir Edward Clarke's natural and obvious criticisms upon three of the witnesses. With corroboration, and the absence of any inducement to lie, their very infamy becomes a claim to confidence. Would any but the basest of mankind be guilty of such crimes? It would also have been well to point out in reply to Mr. Oscar Wilde's rhetorical deliverance from the witness-box that Plato's philosophy, although peculiar (witness the conversation in the garden where the cicadas chirped), never recommended anything like the gift of silver cigarette-cases to the vendors of newspapers."

The *Law Journal* says, editorially:

"The ludicrous suggestion which has been made in certain quarters that Sir Edward Clarke will suffer politically by his brilliant and strenuous advocacy in the Wilde case might well be passed over in silence were it not that the duty of counsel in defending prisoners is a subject on which very many people entertain hazy ideas. It is not necessary to dwell on the supreme ability and courage with which Sir Edward fought this difficult and losing battle; everyone admits that fact, and indeed it forms the ground for the absurd rumor to which we have referred. We shall merely remark in passing, that the English bar has every right to be, and is to a man, proud of the brilliant intellectual power displayed in this case by one who is amongst the most distinguished of Nisi Prius advocates. If Lord Brougham had not made his unfortunately exaggerated statement in Queen Caroline's case as to the revolution and anarchy which counsel were entitled to bring about in the interests of their clients, no section of the public probably would have taken alarm at any strenuousness on the part of counsel. It may be desirable to recall the fact that Lord Brougham went far beyond the limits of accuracy in this passage, and that the true theory was defined by Sir Alexander Cockburn in his famous speech at the reception of M. Berryer. The advocate may use the weapons of the soldier, but not the dagger of the assassin. But the most strenuous defense is the right, even of the worst criminals, and is in accordance with the best interests of society as a whole."

#### SLIPSHOD LEGISLATION.

THE question you put to me is, as I understand it, What legislation is it of primary importance for the Legislature of the State of New York to enact? My answer is: Some statute which will deal with the method of enacting laws, the notice to be given to parties and localities interested and the proper separation of public from private legislation.

A great opportunity was lost by the Constitutional Convention when it failed to see, notwithstanding the persistency with which the Board of Trade and myself pointed out to it the source of the evil, that some constitutional amendment should be adopted which would separate public from private bills, create a cabinet of State officers for the promotion of the one—public measures—and subject private and local bills to trial, scrutiny and examination, with the aid of experts, and compel such bills to bear the necessary expense of such scrutiny and observation, so that the Legislature may be informed, not by mere statements of orators or lobbyists, but as carefully and thoroughly as a jury is

informed as to the facts by the taking of testimony and the summing up of such testimony by skilled legislative counsel, so that the recommendations of committees may partake of the nature, as to each particular bill, of a special inquiry and a special committee of investigation.

This would reduce the number of bills which are brought before the consideration of the House, and would end almost altogether the legislation, both corrupt and slipshod, which is the result of ignorance, by reason of which venality can protect itself on the pretense of being ignorant of the consequences of its own acts.

The one single element which was accepted by the Constitutional Convention out of the whole scheme of constitutional reform put before it by me to bring method and order into our legislation and give notice to the locality of its proposed enactment, was that of submitting to the mayors of the cities local laws which affected the cities, and it is admitted that much good has already been accomplished and will hereafter result from the adoption by the people of this State of this tentative and limited reform in the enactment of local measures.

However, a much larger scheme of notice to localities which are to be affected by legislation, and information of the members of the Legislature, is possible by enacting into law in the State of New York a modified form of the Standing Orders which since 1844 have regulated the law-making of the parliament of England, and which were adapted by me to the needs of the State of New York in a series of sections of a proposed article in the State Constitution, but which may be formulated into a statute instead.

It is, therefore, my opinion that no one law which can be enacted by the Legislature of the State of New York is as important as that which will bring method, order and light in place of chaos, venality and ignorance in the enactment of the laws themselves.

SIMON STERNE.

—*The World*.

A controversy arising from overlapping locations, after being carried on both before the land office and the courts, was compromised by allowing one of the locations to patent most of the disputed land. A company was then organized, representing both parties to the dispute, and the land was conveyed to it. *Held*, that this company could not refer its title to either or both of the contending locations, at its election, so as to give it the right to follow the dip within the end lines of their location at will, but on the contrary, it must derive its rights in this respect solely from the location under which the patent was obtained. (*Del Monte Mining & Milling Co. v. New York and L. C. Mining Co.* [U. S. C. C. (Colo.), 66 Fed. Rep. 212.]

## Abstracts of Recent Decisions.

**APPEAL—RES JUDICATA.**—When a cause has been reversed and remanded, with directions to enter a certain decree, and thereupon such a decree is entered by the trial court, such decree cannot be questioned on a further appeal, provided it conforms to the direction. (*Roby v. Calumet & C. Canal & Dock Co.* [Ill.], 40 N. E. Rep. 293.)

**BILL OF LADING—PLEDGE.**—E. & Co. were grain brokers in the city of A. Persons from whom they bought grain drew at sight on E. & Co. for the price, and forwarded the drafts for collection, with the bills of lading of the grain attached. E. & Co. arranged with the C. bank to take up these drafts, and hold them as demand notes against E. & Co., with the bills of lading as security. E. & Co. claimed no control or right to the bills of lading until they should take them up from the C. bank. *Held*, that though the payment of the drafts by the C. bank extinguished them as commercial paper, the bills of lading did not thereby become the property of E. & Co., but the bank became the lawful holder thereof, and entitled to receive from the carrier of the goods represented by such bills of lading—at least to the extent of the amounts paid on the drafts, with interest. (*Walters v. Western & A. R. Co.* [U. S. C. C. of App.], 66 Fed. Rep. 862.)

**CORPORATION—LIABILITY OF STOCKHOLDER.**—One who subscribes for stock in a corporation, but only delivers the subscription to the soliciting agent to hold until he has investigated the matter, and who immediately investigates and promptly forbids the delivery of the subscription, is not liable thereon. (*Great Western Tel. Co. v. Lowenthal* [Ill.], 40 N. E. Rep. 318.)

**CONSTITUTIONAL LAW—OLEOMARGARINE—PROHIBITION OF SALE.**—Act Va. March 1, 1892, entitled "An act to prevent the adulteration of butter and cheese, and the sale of the same, and preserve the public health," but in fact and substance prohibiting the sale of oleomargarine, is not a health law, but an interference with interstate commerce, and for that reason unconstitutional. (*Ex parte Scott* [U. S. C. C. Va.] 66 Fed. Rep. 45.)

**LEGISLATIVE APPORTIONMENT.**—Whether a legislative apportionment is constitutional is a question within the jurisdiction of the courts, though it involves only political rights. (*People v. Thompson* [Ill.], 40 N. E. Rep. 307.)

**CRIMINAL LAW—WAIVING PRELIMINARY EXAMINATION.**—A defendant, unless a fugitive from justice, is entitled to a preliminary examination before he can be placed upon trial in a prosecution by information, unless he waives such examination, which

he may do either when brought before the examining magistrate, or when called upon to plead to the information in the District Court. (*Coffield v. State* [Neb.], 62 N. W. Rep. 875.)

**EMINENT DOMAIN—RAILROAD COMPANIES.**—It is well settled that after a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and the right to payment from the railroad company, if it entered under an agreement to pay, or to damages if it entered without authority, belongs to the owner at the time possession was taken. (*Roberts v. Northern Pac. R. Co.* [U. S. S. C.], 15 S. C. Rep. 756.)

**FEDERAL OFFENSE—POST-OFFICE—EMBEZZLING LETTERS.**—The statute making it a crime to take a letter from the post-office, or which has been in any post-office, "or in the custody of any letter or mail carrier before it has been delivered to the person to whom it is directed (Rev. St., § 3892), does not extend to the case of a letter stolen from the desk of the addressee, upon which it has been placed by the mail carrier, in the absence of any one to receive it. (*United States v. Safford* [U. S. D. C., Mo.], 66 Fed. Rep. 942.)

**INSURANCE—WAIVING CONDITION.**—Notice and proof of loss are waived when an insurance company denies liability on the ground that its policy was not in force when the loss occurred. (*German Ins. & Sav. Inst. v. Kline* [Neb.], 62 N. W. Rep. 857.)

**LIFE INSURANCE POLICY—CONSTRUCTION.**—A life insurance policy insuring the life of a father was issued upon an application signed by both the father and the son, in which the latter was named as beneficiary. The policy was made payable to the "assured" after due notice of the death of the "person whose life is hereby insured." *Held*, to be a contract made with the son in his own name and for his own benefit. (*Cyrenius v. Mutual Life Ins. Co. of New York* [N. Y.], 40 N. E. Rep. 225.)

**MASTER AND SERVANT—ASSUMPTION OF RISK.**—Plaintiff, while stationed as a Lookout near the front end of cars which were being pushed along a spur track, was thrown forward by a collision with a car standing on the track, and injured. Brush overhung the track and obscured the view. *Held*, that it was a question for the jury whether or not plaintiff assumed the risk attendant on such condition of the track. (*Oregon Short Line & U. N. Ry. Co. v. Tracy* [U. S. C. C. of App.], 66 Fed. Rep. 931.)

**MASTER AND SERVANT — ASSUMPTION OF RISKS.**—Where plaintiff went into defendant's employ as car inspector, after stating that he would not unless furnished with a proper signal to protect him while under the cars, on the promise that the signal should be furnished, but before it arrived he was injured by the backing of a train against a car which he was working, defendant is not liable, plaintiff having assumed the risk. (*Marean v. New York, S. & W. R. Co.* [Penn.], 31 Atl. Rep. 562.)

**MECHANIC'S LIEN — FORECLOSURES.**—In an action by a sub-contractor to foreclose a mechanic's lien based on the claim that the contractor has been fully paid in advance of the terms of his contract, the owner, though admitting that he has overpaid the contractor, and accepted the work unfinished, may make the contractor a party to the suit, and have his claims against such owner determined therein. (*Hinton Bridge Const. Co. v. New York Cent. & H. R. R. Co.* [N. Y.], 40 N. E. Rep. 86.)

**NEGOTIABLE INSTRUMENTS—CONSTRUCTIVE KNOWLEDGE.**—Knowledge of such facts as would put a prudent man on inquiry in reference to negotiable paper is, in the absence of bad faith, not sufficient knowledge to affect the rights of a purchaser for value and before maturity. (*Clark v. Evans* [U. S. C. C. of App.], 66 Fed. Rep. 263.)

**INDORSEMENTS.**—Where a negotiable promissory note has been before maturity indorsed to a third person, the maker of the note must, in order to avail himself of the defense of payment before the indorsement, plead and prove that the plaintiff had notice of such payment before the indorsement. (*Yenney v. Central City Bank* [Neb.], 62 N. W. Rep. 872.)

**PROMISSORY NOTE.**—An agreement by the payee of a note, with the maker's widow, that certain sums paid by the maker, and by her after his death, for the payee's benefit, together with the sum paid by her to the payee, should be accepted in full settlement of the note, constitutes a valid satisfaction thereof. (*Beck v. Snyder* [Penn.], 31 Alt. Rep. 555.)

**PARTNERSHIP — MORTGAGE.**—It is within the power of one member of a partnership, acting in good faith, to make a valid chattel mortgage of all the partnership property to insure partnership indebtedness. (*Settle v. Hargadine-McKittrick Dry Goods Co.* [U. S. C. C. of App.], 66 Fed. Rep. 850.)

**RAILROAD COMPANIES—FOREIGN CORPORATIONS.**—A State statute, declaring it unlawful for any foreign corporation to own or acquire property in the State, or do any business there, without first filing a copy of its charter in the office of the secretary of State, and an abstract thereof in each county in

which it desires to do business, does not take it out of the power of a railroad company previously owning property, and authorized to do business in the State, to make a valid sale of all such property, without first complying with the provisions of the statute. (*Chattanooga, R. & C. R. Co. v. Evans* [U. S. C. C. of App.], 66 Fed. Rep. 809.)

**REMOVAL OF CAUSES—TIME OF FILING TRANSCRIPT.**—While, upon removal of a cause from a State to a Federal Court, security is required that the transcript shall be filed on the first day of the next succeeding term, the Federal Court is not to be deprived of jurisdiction if the transcript is filed at a later day in the term, but, for good cause, may permit it to be filed at such later day. (*Lucker v. Phoenix Assur. Co. of London* [U. S. C. C., S. Car.], 66 Fed. Rep. 161.)

**TAXATION—EXEMPTIONS—CORPORATION.**—A foreign manufacturing corporation authorized by its charter to manufacture, buy and sell, or otherwise procure, electric apparatus of all kinds, and engaged in the manufacture of such apparatus, and also in buying and selling the same, in New York State, is not wholly engaged in carrying on manufacture, and hence it is taxable on the amount of its capital employed in the State. (*People v. Campbell* [N. Y.], 40 N. E. Rep. 239.)

**TRUSTS — CONTRACT — ENFORCEMENT.**—A stakeholder or custodian of a fund, who makes a contract with a claimant to the fund for a payment to him of a portion thereof, in consideration of retaining the balance for himself, cannot in a suit on the contract, and in the absence of express provisions therein, require the complainant to bring in other claimants to fund, or require an adjudication upon the rights of these claimants or other possible claimants to the fund, as precedent to a right of recovery under the contract. (*Ludlow v. Strong* [N. J.], 31 Atl. Rep. 409.)

**FOLLOWING TRUST FUNDS.**—Where goods sold on credit to an insolvent firm, through its fraud, were subsequently resold to its customers, and the firm's vendor afterward discovered the fraud and rescinded the sale, equity has jurisdiction to follow the proceeds of the resales into the hands of the firm's assignee for the benefit of creditors, and subject them to a lien in favor of the defrauded vendor. (*American Sugar Refining Co. v. Fancher* [N. Y.], 40 N. E. Rep. 206.)

**WILLS—JURISDICTION OF FEDERAL COURTS.**—A will having been established by competent authority, the Federal courts have jurisdiction to determine its interpretation in an action between citizens of different States. (*Wood v. Paine* [U. S. C. C., R. I.], 66 Fed. Rep. 807.)

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# THE ALBANY LAW JOURNAL:

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## The Albany Law Journal.

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ALBANY, JULY 6, 1895.

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### Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

AS has been remarked before in these columns, the number of actions for libel, both in this country and in England, seems to be increasing; while it is also a matter of note that the number of verdicts recovered in these proceedings are proportionately decreasing yearly. The proposition, therefore, seems to be that the feelings of men are becoming more and more sensitive to statements made in the newspapers, while the average jurymen, and more particularly the judge, does not place much value on the so-called "slights" which are alleged. An action which has been somewhat noised about in the English papers is that of *Andrews et al. v. Nott-Bower*. The facts of the case seem to be that the head constable of a city, acting under the directions of its watch committee and magistrates, drew up a report containing a list of all the public houses in the city in respect to which a renewal of license was to be asked for at the approaching general annual licensing meeting. Besides the names of the public houses, the report contained columns with dates and other details of information which would be useful to the magistrates at the licensing meeting. It contained, among other things, opposite the name of the public house, of which the plaintiff was licensee, the objections to the renewal of its license, notice of which had been served by the police. Acting in accordance with the directions given him, the head constable sold copies of this report to persons who

had business at the licensing meeting. In an action of libel brought by the plaintiff against the head constable in respect of his publication of the above-mentioned objections, it was held that the occasion of the publication was privileged. Lord Esher, in delivering the opinion of the Court of Appeal, says: "The resolution was passed, not merely that this book should be compiled, but that it should be compiled because it would be a useful assistance to the members of the court in the exercise of their judicial functions. But then the magistrates passed another resolution to the effect that it would be of assistance to them, in exercising their judicial functions, that everybody who should come before them, for the purpose of assisting in that judicial operation, should have a copy of this book. They therefore directed the head constable to sell this book to all persons who might apply for and require it in order to facilitate their business at the general annual licensing meeting. When, therefore, the head constable issued the book to persons, whether counsel or solicitors, or parties who came before the magistrates for the purpose of assisting them in the exercise of their judicial functions, he was, in my opinion, only doing that which the magistrates had the right of commanding him to do, and which he was bound to do. The order given to the constable was an order of the court, as to the mode in which its business should be carried on, and was an order given to one of its own officers. What that officer did was, therefore, a thing done on a privileged occasion. There is no evidence that he delivered this book to anybody but those to whom he was directed to deliver it, and, therefore, I think the occasion is privileged, and under these circumstances this appeal must be dismissed."

Lopes, L. J., in his opinion, says: "There is no evidence, as far as I can see, that the report

was delivered to anybody who had not business at the Brewster Sessions; but it is said that the delivery of the report to persons other than the justices, although they had business at the Brewster Sessions, was in excess of privilege. I have said it is a somewhat new point, and one naturally feels some hesitation about it. But I have come to the conclusion that the occasion was privileged. The report most clearly was made and published by direction of a competent authority, namely, the justices. It cannot be said but that it was a report that, at any rate, was convenient and desirable for a proper and effective discharge of the business of the Brewster Sessions. And, as far as I can see, the defendant did not do anything more than that which he was ordered to do by the court. Now, that being so, I arrive at the conclusion that the occasion was a privileged one, and that nothing has been done which can be said to be a violation or an abuse of the privilege. There are certain words in the case of *Stuart v. Bell*, 64 L. T. Rep. 633; (1891) 2 Q. B. 341, which, I think, are very applicable to this case. They are these: 'The reason for holding any occasion privileged is common convenience and the welfare of society, and it is obvious that no definite line can be so drawn as to mark with precision those occasions which are privileged, and separate them from those which are not.' I think those words are applicable to the present case, because it seems to me that this report was convenient, and indeed almost necessary, for the purpose of carrying out the business of these sessions, and it was ordered, as I have already said, by a competent authority. Then there was the point with regard to actual malice. That point has not been relied upon. Clearly there was no evidence of actual malice that ought to have been left to a jury. The occasion, therefore, was privileged, and the appeal must be dismissed."

The Debs case has attracted from its inception the liveliest interest, not only because it embraces what is perhaps one of the most vital questions of the day, the relations between capital and labor, but because it was also necessary to have finally adjudicated what is the full power of the courts to regulate questions involving not only interstate commerce, but the peace and order of the country. It would be

difficult to find stronger and more impressive words than those written in this, now celebrated cause, by Justice Brewer, of the United States Supreme Court, and which are: "A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defense of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob, with its accompanying acts of violence."

Continuing, Judge Brewer, in closing the opinion, says: "We have given this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that, while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the juris-

diction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail,—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that, it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been obeyed, and, when it found that they had been, then to proceed under section 725, Rev. St., which grants power “to punish, by fine or imprisonment, \* \* \* disobedience, \* \* \* by any party \* \* \* or other person, to any lawful writ, process, order, rule, decree, or command, and enter the order of punishment complained of; and, finally, that the Circuit Court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152; *Ex parte Terry*, 128 U. S. 280–305, 9 Sup. Ct. 77; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225; *U. S. v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746.”

Perhaps, as has already been suggested, the most important question from a legal standpoint of view is the power of the United States courts to preserve the peace and safety of the citizens of every State alike. The opinion is one which deserves the most careful study, and we regret that we cannot in these columns print more of it; but concerning the point which we have just mentioned we print the following from Judge Brewer’s opinion: “We do not care to place our decision upon this

ground alone. Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying: ‘If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own,—it can no more sustain such an action than any private person could under similar circumstances.’

“This language was relied upon in the subsequent case of *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, which was a suit brought by the United States to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake, and it was claimed that the United States, having no pecuniary interest in the subject-matter of the suit, could not be heard to question the validity

of the patent. But this contention was overruled, the court saying, in response to this argument, after quoting the foregoing language from the *San Jacinto* case: 'This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his due, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States.'

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free

from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

"As said in *Gillman v. Philadelphia*, 3 Wall. 713, 724: 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation imposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the parliament in England.'

The closing exercises of the Harvard Law School were marked by the presence of Sir Frederick Pollock, professor of jurisprudence at Oxford, who came to America to be present at the twenty-fifth anniversary of the deanship of Professor Langdell. It may be recalled that the distinguished dean of the Harvard Law School was the founder of the Langdell or case method of studying law. Among other things Sir Frederick Pollock said:

"We have long given up the attempt to maintain that the common law is the perfection of reason. Existing human institutions can only do their best with the conditions they work in.

"If they can do that within a reasonable margin to be allowed from mistakes and accidents, they are justified in their generation.

"Even their ideal is relative. What is best for one race or one society, at a given stage of civilization, is not necessarily best for other races and societies at other stages. We cannot say that one set of institutions is in itself better or more reasonable than another, except with reference expressed or implied to conditions that are assumed either to be universal in

human societies, or to be not materially different in the particular cases compared. It may perhaps be safe to assume in a general way that what is reasonable for Massachusetts is reasonable for Vermont. It would not be at all safe to assume that everything reasonable for Massachusetts is reasonable for British India, nor, indeed, that within British India what will serve for Lower Bengal will equally well serve for the Northwest frontier.

"The first right of every system, therefore, is to be judged in its own field, by its own methods and on its own work.

"It cannot be seen at its best, or even fairly, if its leading conceptions are forced into conformity with an alien mould. A sure mark of the mere handicraftsman is to wonder how foreigners can get on with tools in any way different from his own. Thus in England one shall meet people who cannot understand that the Scots do without any formal difference between law and equity; as, on the other hand, I have known learned Scots fail to perceive that the common law doctrine of consideration, being unknown to the law of Scotland, is yet founded on a hard bottom of economic fact which every legal system has to strike somewhere. We now realize that the laws of every nation are determined by their own historical conditions not only as to details but as to structure; and if we fail to attend to this we cannot duly appreciate the system as we find it at a given time.

"Many points of early Roman law remain obscure to us, notwithstanding more than half a century of the brilliant and devoted work of model scholars, just because the historical conditions are matter of conjecture. In our own system the most elementary phrases of equity jurisprudence carry with them a vast burden of judicial and political conflict; and the range of activity left opened to the court of chancery in Blackstone's time can be understood only when we have mastered both the strength and the weakness of the action on the case two centuries earlier. But history does not exclude reason and continuity, no more than a man's parentage and companions prevent him from having a character of his own. Development is a process and not a succession of incidents. Environment limits and guides the direction of effort; it cannot create the living growth.

"Hence it seems to follow that a system which is vital and really individual either must be resigned to remain in some measure inarticulate, or must have some account to give of itself that is not merely dogmatic and not merely external history, but combines the rational and the historical element. In other words, its aims are not completely achieved unless it has a philosophy, and that philosophy must be its own. This we recognize freely enough as regards other systems. It appears to us quite natural that Roman law should have its proper conceptions and terminology. We think no worse of the Roman law of property for starting from the conception of absolute ownership rather than the conception of estates, no worse of the Roman law of injuries by negligence for being developed by way of commentary on a specific statute and not, as with us, through judicial analogies of the simpler notion of trespass, aided by statute only so far as the statute of Westminster was necessary for the existence of actions on the case. What I desire to suggest is, that, as we allow this liberty to others as matter of right, we should not be afraid of claiming it for ourselves; that, if English speaking lawyers are really to believe in their own science, they must seek a genuine philosophy of the common law and not be put off with a surface dressing of Romanized generalities.

"Take for example the Germanic idea which lies at the root of our whole law of property, the idea of seizin. So much has this idea been overlaid with artificial distinctions and refinements in the course of seven centuries, that it is possible even for learned persons to treat it as obsolete. Nevertheless, it is there still. Actual enjoyment and control of land or goods, the recognition of peaceable enjoyment and control as deserving the protection of the law, the defence of them against usurpation, and, at need, restitution by the power of the State for the person who has been deprived of them by unauthorized force, these are the points that stand in the forefront of the common law when we take it as presented by its own history and in its native authorities. Or, more briefly, possession guaranteed by law is with us a primary, not a secondary, notion. Possession and rights to possess are the subject-matter of our remedies and forms of action. The notion of ownership, as the maximum of claim or right in a



specific thing allowed by law, is not primary, but developed out of conflicting claims to possession and disposal. He is the true owner who has the best right to possess, and to set or leave others in his place, fortified with like rights and exercising like powers over the thing in question. This is the line of development indicated by our own authorities. It leads us gradually from the crude facts to the artificial ideas of law, from the visible will and competence of the Germanic warrior to use his arms against any intruder on his homestead to the title, rights and priorities of the modern holder of stock or debentures.

"It is impossible here to follow the steps; they form a long, and sometimes intricate history. But is the process on the face of it absurd? Is there anything unreasonable about it? Can any one assign any obvious objection against using the genius of our own laws as the most promising guide to their fundamental ideas? As it is, our students, not to say the books they put their trust in, are in little better plight than our learned ancestors of the 18th century. They too commonly start with a smattering of Roman doctrine taken directly or indirectly from Justinian, then find (as they needs must) a great gulf between Roman and English methods, and lastly make desperate endeavors to span it with a sort of magic bridge, by invoking supposed mysteries of feudalism, which in truth are in no way to the purpose, and they are still on the wrong side when all is done. Is there any real need for this trouble?

"I venture to think not. Let us dare to be true to ourselves, and, even if the first steps seem less easy (for everybody thinks he knows, by the light of nature, what ownership is, and resents being undeceived), we shall find increasing light, instead of gathering darkness, as we go farther on our way. We may smile at our medieval ancestors' anxiety to keep something tangible to hold on to; their shrinking from incorporeal things as something uncanny; their attempts, as late as the 14th century, to give delivery of and avow some by the handle of the church door; their Germanic simplicity may be called rude and materialistic, but, at all events, they did their best to keep us in sight of living facts. In one respect they failed. We cannot deny it. It is no fault of theirs that

the arbitrary legislation of the Tudor period plunged us into a turbid ocean, vexed by battles of worse than fabulous monsters, in whose depths the gleams of a scintilla juris may throw a darkling light on the gambols of executory limitations; a brood of the common law, or on the death struggle of a legal estate, sucked dry in the octopus-like arm of a resulting use, while on the surface, peradventure, a shoal of equitable remainders may be seen skimming the waves in flight from that insatiable enemy of their kind, an outstanding term. There are some ravages of history that philosophy cannot repair, and the repentance of later generations can at best only patch.

"Observe that when I defend our fathers, I make no pretense of right to attack the Roman institutional system on its own ground. The history of Roman forms of action and Roman legal categories is quite different from ours. The common law has never had a procedure answering to the Roman Vindication. At first sight it may seem a small matter whether a man who finds his cattle in strange hands shall say: 'Those are my beasts; it is no business of mine where you got them; I claim them because they are mine' (which is the Roman way), or shall reverse the order of thought and say: 'Where did you get those beasts? for they were mine, and you have no business to hold them against me' (which is the Germanic way). Practically, no doubt, the result may come to much the same thing, but the divergence of method goes pretty deep.

"The formulas of the Roman republican period are already more modern and abstract than ours, and Roman lawyers of the empire, when they began to systematize, had to construct their system accordingly. The fact that their work, in its main lines, has lasted to this day, and has stamped itself on the modern codes of not only Latin, but Teutonic nations, is enough to show that it was not ill done. Only when modern admirers claim universal speculative supremacy for the Roman ideas and methods need we feel called upon to protest. In that case we must remind the too zealous Romanizer that the masters of modern Roman law, notwithstanding their advantages in systematic training and in having a comparatively manageable bulk of material, are still not much nearer than ourselves to the attainment

of an unanimous or decisive last word on possession or ownership or divers other fundamental topics.

"One might produce further examples to show the danger of being in haste to abandon our own methods, and the still greater dangers, that arise from well meant attempts to improve them by mixing them with others. Thus our native common law procedure is in essence contentious; it is a combat between parties in which the court is only umpire. Our equity procedure, a sufficiently acclimatized exotic, but still an exotic, is in essence officious; it represents (though one cannot say that in modern times it has actually been) an active inquiry by the court, aimed at extracting the truth of the matter in the court's own way. No one has put this contrast on record more clearly or forcibly than Mr. Langdell.

"Twenty years ago the authors of our judicature acts in England, men of the highest eminence, but trained exclusively in the chancery system, whet about to engraft considerable parts of that system on the practice of the courts of common law. What came of their good intentions? Instead of the simplicity and substantial equity which they looked for, the new birth of justice was found to be perplexed practice, vexatious interlocutory proceedings and multiplication of appeals and costs, so that for several years the latter state of the suitor was worse than the former.

"Repeated revision of the rules of court and some fresh legislation was needed before the reconstructed machine would work smoothly. But I may not pursue these matters here, and can only guess that perhaps that American parallels might be found.

"I think that I have shown that the common law has a right to its individuality, and if we now turn to facts observable on this continent and elsewhere in order to see how that right maintains itself in practice, I do not think that we can fairly be accused of taking refuge in empiricism.

"The vitality of any coherent scheme of rules or doctrine may be tested in various ways. Among other tests, the power of holding or gaining ground in competition with rivals, and the faculty of assimilating new matter without being overwhelmed by it, are perhaps as good

as any. We shall find, I think, that in religious and philosophical debate, each advocate concerns himself to justify the system of his choice according to these tests quite as much as to establish its truth of superiority by demonstrative proof. If I may use the highest example without offense, modern theology, so far as it is apologetic and not purely critical, pays much more attention to the general standing of Christianity in relation to modern ethics and civilization than to discussing the testimony of the apostles and evangelists as if it was a series of findings by a special jury. The plain man asks not what you can prove about yourself, but what you have done and can do; and the philosopher may perhaps find more reason in this method than the plain man himself knows. Applying it to the case in hand, we see that the common law has had considerable opportunities and trials both in the east and in the west in presence of other systems.

"In British India the general principles of our law, by a process which we may summarily describe as judicial application confirmed and extended by legislation, have in the course of this century, but much more rapidly within the last generation, covered the whole field of criminal law, civil wrongs, contract, evidence, procedure in the higher, if not in the lower, courts, and a good deal of the law of property. Family relations and inheritance are the remaining stronghold of the native systems of personal law, which are fortified by their intimate connection with religious or semi-religious custom. It is not much to say that a modified English law is thus becoming the general law of British India, for if the French, instead of ourselves, had conquered India the same thing must have happened, only that the 'justice, equity and good conscience' by which European judges had to guide themselves in default of any other applicable rule would have been Gallican, and not Anglican.

"But it is something to say that the common law has proved equal to its task. The Indian Penal Code, which is English criminal law simplified and set in order, has worked for more than a generation among people of every degree of civilization, with but little occasion for amendment. In matters of business and commerce English law has not only established itself, but has been ratified by deliberate legis-

lation, subject to the reform of some few anomalies which we might well have reformed at home ere now, and to the abrogation of some few rules that had ceased to be of much importance at home, and were deemed unsuitable for Indian conditions.

"More than this, principles of equitable jurisprudence, which we seldom have occasion to remember in modern English practice have been successfully revived in Indian jurisdictions within our own time for the discomfiture of oppressive and fraudulent money-lenders. The details of procedure, both civil and criminal, have undergone much revision and transformation in British India, as in most other civilized countries and States; and there is doubtless much to be said of both success and failure in this department. But since neither the praise nor the blame that may be due to modern codes of procedure can be said to touch the common law, save in a very remote way, they do not concern us here.

"There is another example in which you may take a neighborly interest, that of the province of Quebec. You are aware that the inhabitants of lower Canada live in the guaranteed enjoyment of a law whose base is not English, but French, and that their Civil Code, enacted not quite a generation ago, is avowedly modelled on the code of Napoleon. Nevertheless the common law (which, of course, prevails in the other provinces of the Dominion), has set its mark to some extent on the substance of legal justice in French Canada, and to a considerable extent on procedure.

"We find in the Civil Procedure of lower Canada, as we should expect, the decisory oath of the defendant, and other features of pleading and process common to all modern systems derived from Roman law, but we also find that in a large proportion of causes, either party can demand a trial by jury. This may be said to show the common law competing against a powerful rival under the greatest possible disadvantage, or rather making itself felt in spite of being excluded from formal competition.

"Perhaps the assimilation of new matter is a yet stricter test of vital power than tenacity on old ground or prevalence over enfeebled rivals. In this case the great example is the incorporation of the law merchant with the common law, and the immense development of commercial

law that accompanied and followed this process. Anglicised law merchant has become to a certain extent insular, but if we must admit so much of its disadvantage, I believe it is on the other hand a wider, richer and more flexible system than is to be found on the commercial codes of France and her imitators, who have stereotyped mercantile usage and business habits as they existed in the 17th century. We have indeed preserved antiquated forms, but we preserve them because every clause and almost every word carries a meaning settled by modern decision.

"A policy of marine insurance is to our current maritime law somewhat as a text of the praetor's edict to a title of digest built upon it. And this does not prevent further development.

"The courts cannot contradict what has already been settled as law, but the power of taking up fresh material is still alive, as we have been assured by high authority in England within the present generation.

"Can we rest here in contemplating the past work and present activity of the common law?

"We cannot forbear, I think, to look to the future and consider what security we have for the maintenance of this vital unity.

"Ten years ago the Supreme Court of the United States declared, in a judgment of admirable clearness and good sense, which I trust will be followed in England when the occasion comes, that in matters of general commercial principle 'a diversity in the law as administered on the two sides of the Atlantic is greatly to be deprecated.' Shall this remain for all time a mere deprecation, appealing forcibly, no doubt, to the best sense of our highest tribunals, but still subject to human accidents? Is there not any way beside and beyond the discussion of lawyers in books and otherwise, of assisting our ultimate authorities to agree? Would not the best and surest way be, that in matters of great weight and general importance to the common law, they should assist one another? Certainly there are difficulties in the way of any such process, but is there, in truth, any insuperable difficulty?

"The House of Lords, as we know, is entitled to consult the judges of the land, though not bound either to consult them in any par-

ticular case, or, when they are consulted, to decide according to their opinion or that of the majority. There is nothing I know of in our Constitution to prevent the House of Lords, if it should think fit, from desiring the judges of the Supreme Court of the United States, by some indirect process, if not directly, and as a matter of personal favor, to communicate their collective or individual opinions on any question of general law. Nor, I should apprehend, can there be anything in the constitution of that most honorable court or the office of its judges to prevent them from acceding to such a request if it could be done without prejudice to their regular duties.

"It would be still easier for the privy council, a body whose ancient powers have never grown old, and whose functions have never ceased to be expansive and elastic, to seek the like assistance. And if the thing could be done at all, I suppose it could be done reciprocally from this side, with no greater trouble. Such a proceeding could not, in any event, be common. It might happen twice or thrice in a generation, in a great and dubious case touching fundamental principles, like that of *Dalton v. Angus* — a case in which some strong American opinions, if they could have been obtained, would have been specially valuable and instructive.

"Could the precedent be made once or twice in an informal and semi-official manner, it might safely be left to posterity to devise the means of turning a laudable occasional usage into custom clothed with adequate form. As for the difficulties, they are of the kind that can be made to look formidable by persons unwilling to move, and can be made to vanish by active good will. Objections on the score of distance and delay would be inconsiderable, not to say frivolous. From Westminster to Washington is for our mails and dispatches hardly so much of a journey as it was a century ago from Westminster to an English judge on the northern or western circuit.

"Opinions from every supreme appellate court in every English-speaking jurisdiction might now be collected within the time that Lord Eldon commonly devoted to the preliminary consideration of an appeal from the master of the rolls. At this day there is no mechanical obstacle in the way of judgments being rendered which should represent the best

legal mind, not of this or that portion of the domains that acknowledge the common law, but of the whole. There is no reason why we should not live in hope of our system of judicial law being confirmed and exalted in a judgment seat more than national, in a tribunal more comprehensive, more authoritative and more august than any the world has yet known.

"Some one may ask whether we look to see these things ourselves or hope for them in our children's time. I cannot tell. The movement of ideas will not be measured beforehand in days or years.

"Our children and grandchildren may have to abide its coming, or it may come suddenly when we are least hopeful. Dreams are not versed in issuable matter and have no dates. Only I feel that this one looks forward, and will be seen as waking light some day. If any one, being of little faith or over-curious, must needs ask in what day, I can answer only in the same fashion. We may know the signs, though we know not when they will come. These things will be when we look back on our dissensions in the past as brethren grown up to man's estate, and, dwelling in unity, look back upon the bickerings of the nursery and the jealousies of the classroom; when there is no use for the word "foreigner" between Cape Wrath and the Rio Grande, and the federated navies of the English-speaking nations keep the peace of the ocean under the Northern lights and under the Southern Cross from Vancouver to Sidney and from the channel to the Gulf of Mexico; when an indestructible union of even wider grasp and higher potency than the federal bond of these States has knit our descendants into an invincible and indestructible concord.

"For that day is coming, too, and every one of us can do something, more or less, to hasten it; of us, I say, not only as citizens, but as especially bound thereto by the history and traditions of our profession, which belong to America no less than to England. If we may deem that the fathers and founders of our polity can still take heed of our desires and endeavors, if we may think of them as still with us in spirit, watching over us, and peradventure helping us, then surely we may not doubt that in this work Alfred and Edward and

Chatham are well pleased to be at one with Washington and Hamilton and Lincoln. Under the auspices of such a fellowship, we, their distant followers are called; in their names we go forward; it is their destiny that we shall fulfil, their glory that we shall accomplish.

"This, and nothing less than this, I claim here, an Englishman among Americans, a grateful guest, but no stranger, for the full and perfect vocation of our common law."

We note with much interest the reorganization of the board of trustees and faculty of the Albany Law School, coupled with the announcement that it is proposed by the school to make a specialty of preparation of students for the bar during the course, extending over one year, keeping in view the requirements for admission by the examiners appointed under the statute of 1894. The reorganization places at the head of the board of trustees Hon. Amasa J. Parker, whose father was one of the founders of and for more than twenty years a lecturer in the school. The newly-elected dean, J. Newton Fiero, is known to the profession as a lawyer and legal author, and by reason of his interest in matters pertaining to law reform, rather than as a teacher or lecturer. He has, however, been a member of the faculty during the past four years, making a specialty of Procedure. He will under the new arrangement also take the subjects of Equity and Torts. James W. Eaton, recently district attorney of Albany county, and the editor of the last edition of Reeve on Domestic Relations, is expected to devote all the time and attention that can be spared from his practice to the work of the school. The announcement of the school states that Chief Judge Andrews, Justices Landon, Learned, Parker and Herrick, of the Supreme Court, and others, including Professor Collin, formerly of Cornell Law School, will give occasional lectures on special topics. There seems to be abundant opportunity for work of the character laid out for the school in the prospectus. Since a very large number of students are unable to spare the time or money necessary for a course of two or three years, such as is given at most of the law schools, this course is so arranged as to enable the student to spend one or two years, as the

case may be, in an office, devoting his last year before going up for examination to study at the school under a corps of instructors, and must prove a convenient arrangement for students so situated. It is stated that the year's work will be fully up to the standard of quantity and quality required at any school in the country.

The full bench of the Supreme Judicial Court of Massachusetts has handed down a decision of interest to savings banks in the case of *Maloney v. Casey and the Haverhill Savings Bank*, trustee. The case was an action of contract against Casey, in which judgment was rendered in favor of the plaintiff against him, and the bank was adjudged trustee. It appeared that the bank book given Casey had been lost, and an application was made on behalf of the bank to the Superior Court that an order of judgment should not be entered against the trustee without the production of the book, or until the plaintiff filed a bond conditioned to hold the bank harmless. The Superior Court refused to grant this request, and the Supreme Court affirms its decision. Among other things it says:

"The statutes on trustee process plainly intend that credits in savings banks shall be subject to attachments by that process. \* \* \* It is for the Legislature to say on what terms trustee process shall be maintained to reach the credits of the principal defendant, and the rules of the bank are not regarded as essential conditions, on a compliance with which the indebtedness of the bank to the depositor necessarily depends.

"We are of opinion that the statutes do not make the liability of the bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which were intended to regulate the conduct of the depositor in his relations with the bank."

The Pennsylvania State Bar Association, which was organized during the past winter, will hold its first meeting at Bedford Springs on the 9th and 10th of July. More than four hundred members of the Pennsylvania Bar have joined the association, and the meeting is expected to be an interesting one. Mr. J. Newton Fiero, of Albany, will deliver an address before the association upon "The Work of Bar Associations," and will respond to the toast of the "American Bar Association" at the annual banquet on the evening of the 10th.

## THE APPELLATE DIVISION. OR DIVISIONS. OF THE SUPREME COURT.

**I**S there more than one Appellate Division of the Supreme Court under the Constitution of 1895?

The question is one of at least theoretic interest; it may be that practical and important results depend on the answer.

The primary inquiry is, whether the new Constitution creates more than one Appellate Division, or if not, whether it gives authority for such creation. If neither, then legislation creating, or attempting to create, more than one Appellate Division, would be subject to an inherent weakness—tending in the direction of unconstitutionality.

First, then, as to the provisions of the Constitution (art. 6):

“The Supreme Court is *continued*.”

We have, then, under the new regime (*a*) *no new* court, and (*b*) *only one* court.

This is a merely preliminary reflection. The clauses of the sixth article of the Constitution on the precise question now mooted, may be arranged in three classes, viz., those (I) indicative of one Appellate Division; (II) indicative of more than one, *i. e.*, four, Appellate Divisions; and (III) ambiguous.

### I. AMBIGUOUS.

1. The very first reference to the new judicial phenomenon is ambiguous. It is said: “There shall be *an* Appellate Division of the Supreme Court.” So far is plain sailing; but when it is added “Consisting of seven justices in the first department and of five justices in each of the other departments,” the reader is left to choose between these competing constructions: (*a*) There shall be an Appellate Division of the Supreme Court in each of the four departments, consisting in the first of seven justices, and in each of the others of five; (*b*) There shall be an Appellate Division of the Supreme Court, consisting of twenty-two justices, seven to be assigned to the first department and five to each of the others.

2. It is next provided that “from all the justices elected to the Supreme Court the governor shall designate those who shall constitute the Appellate Division in each department, and he shall designate the presiding justice thereof.” This does not *necessarily* mean that there is to be an Appellate Division in *each* department. It might be construed to direct the governor to designate, from the entire Supreme bench, those who should constitute the Appellate Division of the court, and to name, in the case of *each* appointee, the department in which he was to sit; or “the Appellate Division in each department” might be taken to indicate four Appellate Divisions.

“The presiding justice *thereof*” seems to mean of the department, and not of the Division; for “the presiding justice *of the department*” occurs twice, later, in the same section.

3. “A majority of the justices designated to sit in the Appellate Division in each department shall be residents of the department.” Besides, a construction which would make this imply the existence of an Appellate Division in each department, is one which would make it require a majority of the justices (constituting the one Appellate Division) who shall be assigned to sit in any one department to be residents of the department.

4. “The justices of the Appellate Division in each department shall have power to fix the times and places for holding special and trial terms.” This might either (1) refer to an Appellate Division in each department, or (2) be a direction to the justices in (*i. e.*, assigned to) each department. The latter construction is favored by a portion of the same sentence, where the power is given “to assign the justices in the departments” to hold terms.

5. “The justices of the Appellate Division in each department shall have power to appoint and remove a clerk.” (§ 19.) Possible meanings: Either (1) an Appellate Division in each department, or (2) the Appellate Division justices (sitting) in each department shall have power, etc.

### II. INDICATIVE OF ONLY ONE APPELLATE DIVISION.

1. The governor may “make temporary designations in case of the absence or inability to act of any justice *in the Appellate Division*.” (§ 6.)

2. “No justice *of the Appellate Division* shall exercise any of the powers of a justice of the Supreme Court other than those \* \* \* pertaining to the *Appellate Division*,” etc.

3. “*The Appellate Division* shall have the jurisdiction now exercised by the Supreme Court at its General Terms.

4. “No judge or justice shall sit in the Appellate Division \* \* \* in review of a decision made by him,” etc.

5. “No unanimous decision *of the Appellate Division* of the Supreme Court that there is evidence \* \* \* shall be reviewed by the Court of Appeals.” \* \* \* Appeals may be taken as of right, only from judgments or orders entered upon decisions *of the Appellate Division* of the Supreme Court.”

6. The clerks of *the Appellate Division* shall receive compensation to be established by law, etc. (§ 19.)

### III. INDICATIVE OF FOUR APPELLATE DIVISIONS.

1. “Whenever *the Appellate Division* in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments” may transfer

appeals. It appears undeniable, that the "business," in any department, is exclusively that of the judicial body therein; hence, a division in each department.

2. Certain local appeals shall be heard in the Supreme Court in such manner as the *Appellate Divisions* in the respective departments \* \* \* shall direct.

3. "The Appellate Division in any department may, however, allow an appeal upon any question of law," etc.

It is believed that a careful study of the foregoing quotations from the New Organic Law will lead to the conclusion that such law presents a possible field for future judicial doubt and construction on the question whether it provides for one or for more than one Appellate Division of the Supreme Court, in case such a question shall arise in any case, and involve practical results.

We now turn to the acts of the Legislature, and shall hardly wonder if that body found itself unable to avoid all ambiguity in attempting to carry out the intent of a Constitution presenting the peculiarities of phraseology which have been noted.

Laws of 1895, chapter 946 is an act containing numerous amendments of the Code of Civil Procedure, many of them having for their objects to conform that code to the New Constitution. It affects more than 200 sections of that code; to some of these sections, as amended by the act of 1895, reference may be made. The amendments may be conveniently classified in like manner as the clauses of the New Constitution.

#### I. INDICATIVE OF FOUR APPELLATE DIVISIONS.

SEC. 2. "*Courts of record enumerated.* Each of the following courts of the State is a court of record.

\* \* \* 3. The Appellate Division of the Supreme Court in each department. 4. The Supreme Court." Here we have five courts of record declared to exist. The mathematical lawyer will be puzzled to determine the relation between the *whole* and *its parts*.

Sec. 21. "The Appellate Division of the Supreme Court, in any department," may order papers destroyed.

Sec. 56. Board of examiners to certify successful candidates "to the Appellate Division of the Supreme Court of the department in which" the candidate resides, etc.

Sec. 89. "The justices of the Appellate Division in each department" shall appoint a clerk.

Secs. 135, 144. "The presiding justice of the Appellate Division of the Supreme Court of the first department."

Sec. 190. The Court of Appeals has jurisdiction to review certain determinations of "the Appellate Division of the Supreme Court in any department" (subd. 2.)

Sec. 220. "There shall be *an* Appellate Division of the Supreme Court in each judicial department hereby created, consisting of seven justices in the first department and of five justices in each of the other departments." Compare this with the corresponding declaration of the Constitution.

Sec. 225. "The terms of the Appellate Divisions of the Supreme Court are to be appointed," etc.

Sec. 226. "An appointment of a term or terms of *an* Appellate Division must be made," etc.

Sec. 232. "The justices assigned to duty in the Appellate Division of each department."

Sec. 234. "Extraordinary terms of the Appellate Division of the Supreme Court in any department."

Sec. 245. The Supreme Court Reporter must be appointed and may be removed "by the justices of the Appellate Divisions of the Supreme Court, or a majority of such of them as attend," etc.

Sec. 246. "The justices of the Appellate Divisions of the Supreme Court must meet in Convention."

Sec. 1344. "The Appellate Division of the Supreme Court in the fourth judicial department," \* \* \* the justices of the Appellate Division of the fourth judicial department."

#### II. INDICATIVE OF ONLY ONE APPELLATE DIVISION.

Sec. 17. "The justices assigned to *the Appellate Division* of the Supreme Court" are to meet in convention at Albany and frame Rules of Practice. The convention "must \* \* \* adopt a seal for *each department of the Appellate Division* of the Supreme Court.

Sec. 190. The Court of Appeals has jurisdiction to review "the actual determinations made by the Appellate Division of the Supreme Court" (subd. 1.)

Sec. 191. "No unanimous decision of the Appellate Division of the Supreme Court \* \* \* shall be reviewed by the Court of Appeals."

Sec. 223. "A designation of a justice of the Appellate Division of the Supreme Court must be in writing," etc.

Sec. 242. "A term of the Appellate Division of the Supreme Court must be attended by the sheriff of the county," etc.

Sec. 792. "Where a writ of mandamus \* \* \* has been issued from the Appellate Division of the Supreme Court."

Sec. 1000. Exceptions ordered to be heard by the Appellate Division of the Supreme Court.

Sec. 1227. "A motion for a new trial made at the first instance at a term of the Appellate Division of the Supreme Court."

"Title IV. Appeal to the Appellate Division of the Supreme Court."

#### III. AMBIGUOUS.

Sec. 230. "In each department four of the jus-

tices of the Appellate Division of the Supreme Court shall constitute a quorum."

Sec. 231. "Where in any case four justices of the Appellate Division in any department are not qualified," etc.

Sec. 248. "In each course heard by the Appellate Division of the Supreme Court, the attorney \* \* \* must deliver to the clerk of said Appellate Division," etc.

Sec. 2070. "Where the application is to the Appellate Division, by the Appellate Division, or a justice of the Appellate Division of that judicial department."

It is unnecessary to quote further from the amendments of the Code of Civil Procedure, effected by chapter 946 of the Laws of 1895, to illustrate the great variety of diction, in the references to the re-organized Supreme Court. The climax of contracts seems to be reached in references to departments of the Appellate Divisions and Appellate Divisions of the departments.

It may be that no serious consequences will arise from what is undeniably a striking looseness of expression in so important a document as the Constitution, and which is emulated in the legislation of 1895.

The philosophic student will reflect that the confusion may have been occasioned by the metamorphosis in the use of the now time-honored expression—"the General Terms" of the Supreme Court. Properly mere *sittings*, they had come to be viewed as the *court* itself. In substituting "Appellate Division" for General Term or General Terms we have to deal with *the tribunal*, or a portion thereof, and not a Term.

THEODORE F. C. DEMAREST.

NEW YORK, June 18, 1895.

### HENRY ERSKINE.

NOT a few men have labored under the disadvantage of having very celebrated brothers. Such was Henry Erskine's lot. On the restricted stage of the Edinburgh forum his powers had not the same scope and opportunity for their effective display as had those of his younger brother in the more public and important arena of Westminster Hall; or, as he himself expressed it, when Lord Advocate, in his interview with the king, his brother was playing at the guinea table while he was engaged at the shilling one. Judging by material results, the career of the chancellor was undoubtedly the more successful of the two, but the touchstone of this kind of success is often in the last degree fallacious, and it may well be doubted whether there was much to choose in point of mental accomplishments between the two gifted brothers Henry and Thomas Erskine.

Henry Erskine, the second son of the tenth Earl of Buchan, was born in Edinburgh, in a house situated in one of the numerous "closes" which run off the High-street, a thoroughfare now fallen sadly from its former high estate, but still picturesque and laden with memories of the historic past. The year of his birth was 1746, the year of Culloden. Of his early youth we have few particulars beyond the fact that he was always—to use the words of his mother—"losing his pocket hankies." He was educated at St. Andrews, Glasgow, and Edinburgh, and at the university of the last-named city he had the advantage of studying under Dr. Hugh Blair and Adam Ferguson, two professors of considerable importance in their day. Besides attending the usual course of lectures he attended the debating societies connected with the college, and in these, like many another who afterwards attained forensic fame, he acquired a readiness in speaking and an admirable training in dialectic. Passing from the university he was admitted a member of the Faculty of Advocates in February, 1768, being then twenty-two. Like the generality of lawyers he did not at once flame into distinction; he was destined to pace the floor of the Parliament house to comparatively little purpose for a time, for, although sprung from an illustrious family, and highly gifted, he labored under the disadvantage, so far as early success was concerned, of being a Whig, at a time when to avow Liberal principles in Scotland was almost tantamount to committing professional suicide. He could afford to wait, however, and everything, we are told, comes to him who does so. Meantime he established his reputation as the wit of the faculty. One of the principal clerks of session at that period was Sir James Colquhoun of Luss, a gentleman noted for many eccentricities, whom Erskine took a malign delight in pursuing with his waggeries. One day in court, as a case was proceeding, Erskine, having nothing better to do, amused himself by making faces at Sir James as he sat at the clerk's table—a course of action which so irritated poor Sir James that, at last being unable to stand the persecution any longer, he started up and disturbed the gravity of the whole court by exclaiming, "My lords, my lords, I wish ye wad speak to Harry! he's aye makkin' faces at me." Erskine, in some alarm, pulled a long face, and decorum prevailed. The case went on again, and was proceeding satisfactorily till Sir James, happening to turn his eyes towards the bar, and being met with a fresh grimace from the irrepressible wag, again convulsed the court by jumping up and calling out in a passion, "See there, my lords, he's at it again!"

By degrees, the young advocate began to get a practice together, despite his Whiggish opinions in politics. Many of his early cases were before the



General Assembly of the Church of Scotland, the supreme court of the church, composed of representative clergymen and lay elders, a large popular assembly, which afforded an admirable field for the display of eloquence. Principal Hill, of St. Andrews, was then one of the leaders on the "Moderate" side of the Assembly, and, as Erskine's views inclined to the "Evangelical," the two had many a battle, which Erskine enjoyed exceeding; he used to say he liked pleading in the Assembly because "running down Hill was very pleasant work." His style of oratory was pleasing in the extreme, his speeches were seasoned with wit, but he never forgot the true function of humor in argument. Never playing the buffoon, he always regarded his gift of humor as of service only if it helped to make his argument more lucid and more acceptable to his audience. A remarkable tribute to the charms of his style was once given by one of the judges. Erskine was opening an appeal before the full court, and he remarked that he would be very brief, as the facts were very simple and his point plain, upon which one of the judges entered his protest by saying, "Hoots, Maister Harry, dinna be brief, dinna be brief." Such a request can be made to very few advocates; the desire, as we all know, is usually and properly that they should be as brief as possible.

As the years went by the capacity of Erskine came to be more and more appreciated. His name appears with greater frequency in the "Faculty Decisions," and by 1783 his position at the bar was so important that, on the accession to power of the coalition ministry, he was appointed lord advocate. At that period, and, indeed, till comparatively recent years, the law officers of Scotland, on going out of office with the government by which they were appointed, laid aside their silk robes, and resumed the ordinary stuff gowns of the outer bar. Henry Dundas, Erskine's predecessor in the office of lord advocate, therefore, having put off his silk gown, met Erskine immediately afterwards, and said to him in a bantering tone, "It is hardly worth your while getting a silk gown for all the time you will want it, you had better borrow mine." Erskine, never at a loss, at once retorted, "From the readiness with which you make the offer, Mr. Dundas, I have no doubt that the gown is one made to fit any party; but, however short my time in office may be, it shall never be said of Henry Erskine that he took to the abandoned habits of his predecessor." It would be difficult to match this felicitous retort. The shrewd eye of Dundas was not mistaken in the forecast that Erskine would not long be burdened with the cares of office, for the coalition collapsing in the course of a few months, Erskine had perforce to go with it. In 1785 he was elected to the honorable position of dean of faculty, an office to which he was unani-

mously re-elected each year for the next ten years. In Scotland it has long been the boast that no prisoner, however poor, need want counsel to defend him; so far back as 1424 a statute was passed, which enacted that, "gif there be onie puir creature, for faulte or cunning, or dispenses, that cannot, nor may not follow his cause, the king, for the love of God, sall ordaine the judge, before quhom the cause suld be determined, to purvey and get a leill and wise advocate, to follow sik puir creature's causes." For a great many years counsel for the poor have been chosen in rotation from the junior bar, but the dean of faculty, by the traditions of his office, has usually been expected, if called upon, to give his services to poor prisoners charged with capital offences. In the remarkable series of prosecutions for sedition which took place in 1703, and which were conducted in a manner that made Samuel Romilly, a spectator of some of them, shudder, and caused Fox to exclaim in the house of commons, in reference to the remarks of Braxfield, the lord justice clerk, "God pity the people who have such judges." Erskine was only asked to appear in one, that of Sinclair, and he did appear, making a long and interesting speech on the relevancy of the indictment, according to the custom of the period. The court decided against Erskine's contention, but the crown quietly dropped the prosecution altogether. On the trial of Gerrald, in the same series of prosecutions, the prisoner applied to the court to appoint him counsel, on the ground that several advocates to whom he had made application had refused their services. The lord justice clerk said that, "even without the interference of the court, I think no gentleman ought to refuse to defend a panel whatever the nature of the crime may be;" and Lord Henderland said that the prisoner should have his choice, "at the same time recommending to him not to wantonly interfere with the superior avocations of a gentleman at the bar whom the court are not induced to trouble with impositions on this head from a panel." In preparing the report of this case for his collection of State Trials, Mr. Howell wrote to Erskine concerning this statement, and received the following reply: "You are right in supposing that I was the person alluded to by Lord Henderland in Gerrald's trial; but I was not one of the counsel to whom Gerrald applied, and who, he says, unanimously refused to undertake his defense. Had he wished my assistance, I should certainly have appeared for him, however inconvenient it might have been to me from the multiplicity of business in which I was in those days involved, for I ever felt (as the lord justice clerk well expresses it) that no gentleman ought to refuse to defend a panel whatever be the nature of his crime. I should at the same time have qualified my compliance with

this condition—that the conduct of the defense should be left entirely to me, knowing, as I did, that if he spoke for himself he would avow principles and views which would supply the counsel for the crown with the only thing they wanted to make out their case—the criminal intention.” He then added that Sinclair had agreed to this condition, but that Muir, another of the accused persons had declined his assistance on these terms and had pleaded his own cause, getting in the result a sentence of transportation for fourteen years. These remarks of Erskine have been quoted and commented on by Mr. Forsyth, Q. C., in his interesting, but now somewhat neglected work, “*Hortensius, the Advocate*,” in the chapter devoted to forensic casuistry, a subject which has a curious fascination for certain minds. It revives the old question, Is an advocate justified in defending a person whom he knows to be guilty? The abstract question is one to which the lawyer seldom gives any thought; he asks the question, is there any legal evidence against the accused? His duty it is to see that a prisoner, if convicted at all, is convicted on legal evidence alone. That is the only position he can take up, and that is what Erskine practiced.

The next great event in his career was his dismissal from the deanship, on which, during his tenure of office, he had conferred such lustre. Political feeling was running higher than ever in the Parliament House, and in Scotland generally; everyone who expected to rise must first bend the knee to the Dundases, who held the country in the hollow of their hand. When, therefore, Erskine took the leading part at a great meeting, held in Edinburgh to protest against the policy of the government of the day, great was the horror aroused in the steady going adherents of the Tory party, and swift was the Nemesis which overtook Erskine, so far as his post was concerned. In January, 1796, shortly after the date of the political meeting, the faculty of Advocates, by 161 votes to 38, turned Erskine out of office solely on the ground that he had taken part in that meeting! We often speak of the “good old times,” but those good old times were very remarkable for an excess of party rancour, which invaded other spheres besides the political, and this incident is a striking instance of that condition of things.

“In 1804,” says Cockburn, “the gods, envying mortals the longer possession of Eskgrove, took him to themselves.” Eskgrove had been lord justice clerk, and that high office was consequently rendered vacant. With Hope, then lord advocate, the appointment practically lay, and, with a magnanimity exceedingly rare for the times, and by no means common yet, he offered to waive his own claims in favor of his political opponent Erskine;

an offer the more remarkable, inasmuch as Hope was one of the leading spirits in the movement which resulted in Erskine's deposition from the deanship. Erskine, however, after consultation with some of his friends, declined the offer, and Hope took the position himself. This proved to be Erskine's last chance of promotion to the bench, although not of office, for on the accession to power of the ministry of all the talent, in 1806, he had another brief taste of official life as lord advocate. In the same year he entered Parliament for the first time; but, although taking part in several discussions, he had no opportunity of adequately displaying his gifts, so that we cannot say whether he would have been a successful Parliamentary orator, or only another instance of the able lawyer failing to catch the tone of the House. His appearance before the House of Lords, however, excited a good deal of interest in Westminster Hall “I remember,” writes Lord Campbell, “hearing him plead a cause at the bar of the House of Lords, all the courts in Westminster Hall being deserted from a curiosity to compare the two brothers, and full justice was done to the older.” In one of these appeals he had an amusing passage of arms with one of the lords. Having in the course of his speech to use the word “curator,” he pronounced it with the accent on the first syllable, after the fashion affected in the Parliament House. One of the lords, unable to stand this pronunciation any longer, said: “Mr. Erskine, we are in the habit in this country of saying ‘curator,’ following the analogy of the Latin language, in which, you are aware, the penultimate syllable is long.” “I thank your lordship,” was Erskine's reply, “we are weak enough in Scotland to think that in pronouncing the word ‘cūrātor’ we follow the analogy of the English language; but I need scarcely say that I bow with pleasure to the opinion of so learned a *senātor* and so good an *orātor* as your lordship.” Erskine had rather the best of it again.

By the fall of the Ministry in 1807, Erskine was again obliged to retire to the outer bar, and the dissolution which occurred almost immediately thereafter brought his Parliamentary career to an end. In 1811, on the death of Blair, the president of the Court of Session, Erskine appears to have thought that he should have been offered the post, for, on its being filled up by the promotion of Hope, he resolved to retire from the profession altogether, and accordingly he did so, passing the remaining six years of his life at his country estate of Ammondell, Linlithgowshire. There he solaced the evening of his days with the pleasures of gardening, and with his violin. He died on the 8th of October, 1817, in the seventy-first year of his age.

He had literary tastes; he wrote several metrical pieces, and he befriended Burns during the poet's sojourn in Edinburgh. His placid temper, the genial flow of his wit, the irresistible pun, the sweet smile, his fidelity to his principles, endeared him to all who came in contact with him. One or two examples of his humorous sayings have already been given, but his well-known witticism in connection with the visit of Dr. Johnson to the Parliament House under the guidance of Boswell must not be omitted. After being presented to the doctor, and having made his bow, Erskine slipped a shilling into Bozzy's hand, whispering that it was for a sight of his bear. His steadfast adherence to his Whig principles was long celebrated among his brother Liberals by the toast "The Independence of the Bar and Henry Erskine." Testimony to the geniality of his nature, and his powers of advocacy, has been given by Brougham, Cockburn, Jeffrey and Sir Walter Scott—a phalanx of no mean judges of what they were writing about; but perhaps the most effective testimony of all was that given by a poor peasant, who said, when advised not to go to law against a wealthy neighbor, "Ye dinna ken what ye say; there's nae a puir man in Scotland need want a friend, or fear a foe, while Harry Erskine lives."—*Law Times*.

### Abstracts of Recent Decisions.

**CONFLICT OF LAWS—CONTRACT OF SALE.**—A corporation domiciled in Louisiana placed an order for a machine with a manufacturing company located in Ohio; the correspondence showing the complete terms of the contract, both as to amount and time of payment. The builder sent an agent to superintend the erection of the machine, and wrote to the purchaser that it might hand the cash and notes to him. The machine being ready for operation, the purchaser telegraphed that it could not make the cash payment. The seller then wired their agent to accept the purchaser's draft at 60 days, with interest, in lieu of the cash payment. *Held*, that the original contract was made under the law of Ohio, and that there was nothing in the circumstances to show a subsequent rescission of that contract and the making of a new one in Louisiana. (*G. A. Gray Co. v. Taylor Bros. Iron Works Co.* [U. S. C. C. of App.], 66 Fed. Rep. 686.)

**CREDITORS' BILL—LIS PENDENS.**—Plaintiffs, by a creditors' bill, acquired a lien on whatever equity of redemption their debtor, D, had in a railroad, sold to E under foreclosure. Thereafter, in a suit to which plaintiffs were not parties, a decree was entered waiving all rights of D to claim an equity of redemption, in consideration of the issue of

certain bonds by E to officers of D. *Held*, that the issue of the bonds to such officers did not make D chargeable to plaintiffs for the value thereof, on the theory that the bonds were thus substituted for the equity of redemption. (*Merriman v. Chicago & E. I. R. Co.* [U. S. C. C. of App.], 66 Fed. Rep. 663.)

**RAILROADS—RECEIVERS—APPOINTMENT.**—Where a Circuit Court of the United States has appointed receivers for a railroad which lies only partly within its district, another court, within whose district a portion of the road lies, will, on application, appoint the same receivers,—the portions of the road not being capable of separate management without injury to the road; the appointment of other receivers by the second court not being necessary to the preservation of the rights of lienholders, who object to the receivers appointed; and the grounds of objection not having been presented to the first court as reasons for its removal of the receivers appointed by it and the appointment of others in their stead. (*Dillon v. Oregon S. L. and U. N. Ry. Co.* [U. S. C. C., Oreg.], 66 Fed. Rep. 622.)

### New Books and New Editions.

#### INDEX-DIGEST OF THE UNITED STATES SUPREME COURT REPORTS, VOLUMES 119-154.

This is an excellent digest of the United States Reports, and is the third volume of the series, the first two volumes of this series containing a digest of the first 118 volumes of the opinions of the national court of last resort. The arrangement of the work is excellent, and the many subdivisions under each heading make it a work which is of practical value to the lawyer. The work not only contains a digest, but also a table of cases, which is of much benefit, in that under the title of each case it is easily ascertained where the case has been cited and the various points which have been decided in the case in which the case in question is cited. Published by the Lawyers' Co-Operative Publishing Company, Rochester, N. Y.

#### AMERICAN STATE REPORTS, VOLUME 42.

This is the last volume of this set which has been published, and is printed in the usual good form and with the excellent index that has marked this series from its beginning. This volume contains the following Reports: Alabama, 99; California, 103; Connecticut, 64; Illinois, 151; Kansas, 53; Kentucky, 94; Massachusetts, 161; Mississippi, 71; Missouri, 121; Nebraska, 39-40; New York, 143; Oregon, 25; Pennsylvania State, 162; South Carolina, 40, and Tennessee, 93. Published by Bancroft-Whitney Co., San Francisco, Cal.

# The Albany Law Journal.

ALBANY, JULY 13, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

**H**IRAM E. SICKELS, both as a man and a lawyer, is worthy of more than the passing notice which is necessarily devoted to the vast majority of our number by way of comment or eulogy.

His manhood stood the stern test of the struggle for the life of the nation and he was mustered out after three years of service, the type of the citizen soldier who had become a veteran and performed his duty and who gladly returned to his responsibilities as a citizen.

Warm hearted, kindly yet withal courteous and conservative, he was indisposed to mingle in affairs beyond what seemed necessary by reason of his position in the community, yet was never averse to discharging his full duty in that relation.

As a lawyer, he was known to be painstaking, careful and industrious. The judicial cast of mind with which he was gifted was adapted to the determination of the large number of causes disposed of by him as referee, selected both by consent of parties and appointment by the court. This itself was a recognition of the legal ability and sterling qualities always sought for in one selected to act in such a judicial capacity.

An incident illustrates not only his disinterestedness where personal considerations were concerned, but also his pride in his profession, and the discharge of his official duties. At the time the question was agitated as to the provisions of law necessary to bring about the publication of the present combined series, Mr. Sickles was consulted by Messrs. Fiero and Whitaker, the committee of the State Bar Association who had the matter in charge, with regard to his views of the matter. He very promptly, after stating that the proposed plan would involve a pecuniary sacrifice on his part and would also entail upon him additional labor

without extra compensation, expressed his hearty sympathy with the movement and his desire to forward whatever might be in the interest of prompt and accurate reporting of the decisions of all the courts of the State, and from that time forward gave every assistance in his power to an arrangement which not only necessarily deprived him of a considerable income but cast upon him a very considerable additional burden.

It is of course as the reporter of the decisions of the Court of Appeals, during a period of twenty-three years, that his name is so familiar to the bar, and it is also in that capacity that it will be specially perpetuated in connection with the law as administered during the past quarter of a century by our court of last resort. One hundred completed volumes of reports, the equivalent of nearly seventy thousand pages, have been issued and bear his name, a larger number than have been edited by any court reporter. It is true that one hundred and two volumes should bear the name of Freeman's Reports had all the work been completed by him, but the fact is not to be overlooked of the existence of the gap in those reports to be filled by another.

It is not only by the quantity, but also by the quality of the work by which Mr. Sickels is to be judged, and as to this it can in all fairness be said the quality fully equals the quantity, and the New York Reports from volume 46 to volume 146 are models of terse, clear and intelligent reporting. Not bound down to any theory as to how a syllabus should be drafted, his view was to make it a concise and yet reasonably full statement of the rules of law laid down in the opinion, and in this, the unquestioned object of the head note, he succeeded admirably. The syllabus of the case as drafted and carefully revised by him contains the spirit and meaning of the opinion, and never misleads the student, the lawyer or the judge.

The bar have thus lost one whose methods of work in his official capacity were familiar and well understood, upon whose care, intelligence and industry they could always rely, and one who withal was a sound lawyer, a faithful reporter and a high-minded, honorable man.

Major Hiram E. Sickels was known by name

at least throughout the length and breadth of the country wherever the New York Reports were quoted as authority in litigated suits at law, in questions arising in contested will cases, and in the decision of constitutional questions or the construction of statutes passed from time to time by the Legislature of the State of New York. He was a man possessed of legal acumen in an extraordinary degree and combined with it a judicial discrimination and ability that would fit him for a seat on the bench of the court whose decisions for the past fourteen years he has abridged and compiled into what are known as the New York Reports. Mr. Sickels was reporter for the Court of Appeals, the highest judicial tribunal in the State, and it is generally conceded that he displayed rare faculty in the collaboration of the decisions made in the numerous cases heard before that august tribunal. He was born June 24, 1827, in the village of Albion, Orleans county, his father being of old Holland Dutch extraction, and his mother of German. Young Sickels received a general education at the Albion academy and his diligence in study enabled him on leaving the academy to commence the study of the law in the office of Curtis & Stone at Albion, and in 1848 he was admitted to the bar and commenced the practice of his profession in his native village. He continued it until the breaking out of the war aroused the patriotic and martial spirit in him as it did in thousands of other men in all the varied walks of life, professional and otherwise. In 1862 he assisted in raising the Seventeenth Volunteer Battery of light artillery, and on August 26th of that year was commissioned its first lieutenant. He entered the profession of arms with the same zeal and spirit which had characterized his entrance into the legal profession. He took part with the battery in the capture of the seemingly impregnable Fort Fisher, participated in nearly all the battles around Richmond, especially in Grant's masterly movements in front of the rebel capital, was then transferred with his command to the front of Petersburg and was in a series of sharp battles, including Five Forks, which resulted in the evacuation of that stronghold and the fall of Richmond, and then joined in the pursuit of Lee, ending in the rebel chieftain's surrender at Appomattox. He was mustered out of service

June 12, 1865, with the brevet rank of captain for the gallant and efficient service he had rendered. Returning to Albion, he resumed the practice of the law. Desiring a wider field, however, in which to practice his chosen profession, in 1871 he removed to this city, and since made it his home. In February, 1872, his eminent ability had already become known, and a recognition of it was contained in his appointment during that month to the position of State Reporter, his function being to compile the reports of cases decided in the Court of Appeals. That position he held without intermission until the time of his death.

His thorough knowledge of the law in all its branches was so well known and established that his findings or decisions in a case partake of a semi-judicial character, and were generally relied upon as final.

Maj. Sickels was the chairman of the State board of civil service examiners from 1883 to 1888. He was also a member of the special water commission and one of the organizers of the Fort Orange club.

The commencement exercises at the law schools, and especially Yale and Harvard, have been remarkable for the distinguished gathering of judges and jurists who have been present to fitly celebrate the closing scenes of the collegiate year. At New Haven Judge Brown, of the United States Supreme Court, made the principal address before the Yale Law School. His subject was "The Twentieth Century." The subjects of the oration could not have been more properly and appropriately chosen, and coming as they do from a judge of the highest court in the nation, they echo the sentiments of the judiciary on issues which involve the stability of the government. The first subject which Justice Brown spoke on was Municipal Corporations, and the principles which he laid down will be found in the short summary which we print herewith, together with a thoughtful discussion of corporations as monopolies and the so-called tyranny of labor. Judge Brown, on these several subjects, spoke as follows:

"The point I desire to urge upon your attention is that you are entering the arena of professional life at a more than usually critical

period. Old things are rapidly passing away, and the question presses itself upon us, What will the Twentieth century furnish to take their place?

"In the domain proper of the law the reforms have already been so sweeping that the future seems to promise more of conservation than of change. I look, however, to a greatly increased efficiency in the administration of the law, which, in many of the States, is most unsatisfactory. I look for the time when the technicalities which hedge about the administration of criminal law will be swept away and every case be squarely settled upon its merits.

"If we had more independent judges who could conduct trials, instead of listening to them, and more intelligent juries, there would be less complaint of the mal-administration of justice.

"The important changes of the twentieth century, however, promise to be social rather than legal or political. While the signs of the material development and prosperity of the country were never more auspicious than at present, it is not to be denied that the tendencies of the past thirty years, to which I have already called attention, have produced a state of social unrest which augurs ill for its future tranquility.

"The processes of combination have enabled manufacturing and other corporations to put an end to competition among themselves by the creation of trusts. Upon the other hand, labor, taking its cue from capital, though more slowly, because less intelligent and alert to its own interests, is gradually consolidating its various trade unions with the avowed object of dictating the terms upon which the productive and transportation industry of the country shall be carried on.

"The reconciliation of this strife between capital and labor, if reconciliation be possible, is the great social problem which will confront you as you enter upon the stage of professional life.

"Distinctions in wealth within reasonable limits, so far from being objectionable, are a positive blessing even to the poor, in the opportunity they afford for a diversity of labor and of talents.

"With no reward for industry and no punishment for idleness, what would be the pro-

portion of the industrious to the idle? Where would be the incentive to labor? What would become of the hundreds of thousands who are engaged in providing luxuries for the rich, and in ministering to their pleasures? The whole fabric of civilization is built upon the sanctity of private property. Were this foundation to be taken away, the structure would crumble into ruins.

"While it is entirely true that the business methods of the past thirty years have tended to increase enormously the fortunes of a few, it is wholly untrue that the poor as a class are either absolutely or relatively poorer than before. The sins of wealth, though many and grievous, have not generally been aimed directly at the oppression of the poor.

"While I have no doubt of the ultimate settlement of our social problem upon a reasonable and judicious basis, there are undoubtedly certain perils which menace the immediate future of the country, and even threaten the stability of its institutions. The most prominent of these are municipal corruption, corporate greed and tyranny of labor.

"Municipal misgovernment has come upon us with universal suffrage, and the growth of large cities—and in general seems to flourish in a ratio exactly proportioned to the size of the city.

"The activities of urban life are so intense, the pursuit of wealth or of pleasure so absorbing, as upon the one hand to breed an indifference to public affairs, while, upon the other, the expenditures are so large, the value of the franchises at the disposal of the cities so great, and the opportunities for illicit gain so manifold, that the municipal legislators whose standard of honesty is rarely higher than the average of those who elect them, fall an easy prey to the designing and unscrupulous.

"Though I am unwilling to believe that corporations are solely responsible for our municipal misgovernment, the fact remains that bribery and corruption are so universal as to threaten the very structure of society.

"Universal suffrage, which it was confidently supposed would inure to the benefit of the poor man, is so skillfully manipulated as to rivet his chains, and to secure to the rich man a pre-dominance in politics he has never enjoyed under a restricted system.

"Probably in no country in the world is the influence of wealth more potent than in this, and in no period of our history has it been more powerful than now.

"Mobs are never logical, and are prone to seize upon pretexts rather than upon reasons, to wreak their vengeance upon whole classes of society. There was probably never a flimsier excuse for a great riot than the sympathetic strike of last summer, but back of it were substantial grievances to which the conscience of the city seems to have been finally awakened. If wealth will not respect the rules of common honesty in the use of its power, it will have no reason to expect moderation or discretion on the part of those who resist its encroachments.

"The misgovernment of which I have spoken is so notorious and so nearly universal, that it is useless to attempt to ignore it, or to expect that it will cure itself. Whether the remedy for all this lies in raising the character of the electorate by limiting municipal suffrage to property holders, or in government or commissions, is a question which will not fail to demand your attentive consideration. The great, the unanswerable argument in favor of universal suffrage is, not that it ensures a better or purer government, but that all must be contented with a government in which all have an equal voice.

"Corporations are a necessity in every civilized State. They have a practical monopoly of land transportation, of mining, manufacturing, banking and insurance; and within their proper sphere they are a blessing to the community.

"On the other hand, the ease with which charters are procured has produced great abuses. Corporations are formed under the laws of one State for the sole purpose of doing business in another; and railways are built in California under charters granted by States east of the Mississippi, for the purpose of removing their litigation to federal courts.

"The greatest frauds are perpetrated in the construction of such roads by the directors themselves, under guise of construction company, another corporation, to which is turned over all the bonds, mortgages and other securities, regardless of the actual cost of the road.

"The road is equipped in the same way—by

another corporation, formed of the directors, which buys the rolling stock and leases it to the road—so that when the inevitable foreclosure comes, the stockholders are found to have been defrauded for the benefit of the mortgagees, and the mortgagees defrauded for the benefit of the directors.

"Worse than this, however, is the combination of corporations in so-called trusts, to limit production, stifle competition and monopolize the necessities of life. The extent to which this has already been carried is alarming, the extent to which it may hereafter be carried is revolutionary. Indeed, the evils of aggregated wealth are nowhere seen in more odious form.

"The truth is that the entire corporate legislation of the country is sadly in need of overhauling, but the difficulty of procuring concurrent action on the part of 44 States is apparently insuperable.

"From a wholly different quarter proceeds the third and most immediate peril to which I have called your attention—the tyranny of labor. It arises from the apparent inability of the laboring man to perceive that the rights he exacts he must also concede.

"Laboring men may defy the laws of the land and pull down their own houses and those of their employers about their heads, but they are powerless to control the laws of nature—that great law of supply and demand, in obedience to which industries rise, flourish for a season and decay, and both capital and labor receive their appropriate reward.

"The outlook for permanent peace between capital and labor is certainly not an encouraging one. The conflict between them has been going on and increasing in bitterness for thousands of years, and a settlement seems farther off than ever.

"Arbitration is thought by some to promise a solution of all these problems, and where a dispute turns simply upon a rate of wages it may often be a convenient method of adjustment. Yet its function is after all merely advisory. Compulsory arbitration is a misnomer—a contradiction in terms. One might as well speak of an amicable murder or a friendly war.

"It is possible that a compromise may finally be effected upon the basis of co-operation or profit-sharing, under which every laborer shall become to a certain extent a capitalist. Per-

haps with superior education, wider experience and larger intelligence, the laboring man of the 20th century may attain the summit of his ambition in his ability to command the entire profits of his toil.

"In dealing with the evils which threaten our future tranquility you ought to find and doubtless will find, an efficient coadjutor in a free press. Indeed, the bar and the press are the great safeguards of liberty—its influence upon public opinion—we are led to regret that such influence is not oftener exerted in the right direction. But with all their faults, newspapers are indispensable, and life would lose half its charm without them. Let it be said to their credit that in times of great popular outcry against abuses their voice is generally upon the side of reform.

"It has been given to the 19th century to teach the world how a great republic can be founded upon principles of justice and equality; it will be the duty of the 20th to show how it can be preserved against the insidious encroachments of wealth, as well as the assaults of the mob.

"Freedom and injustice are ill-mated companions; and at the basis of every free government is the ability of the citizen to apply to the courts for a redress of his grievances and the assurance that he will there receive what justice demands. So long as we can preserve the purity of our courts we need never despair of the republic."

A very interesting letter was recently published in the *Mail and Express*, under date of London, which discusses the English judicial system. The comparison of the English system with our own presents some considerations which will be of benefit, if they should result in the improvement of each, and for that reason we publish the letter, which runs as follows:

"A criminal trial is just over in London which has brought into strong relief that which is, perhaps, the greatest defect in the English judicial system, viz., the forbidding an accused person to give evidence on his own behalf. The point has, of course, often been noticed before, and invidious comparisons drawn between the English system on the one hand and the systems which obtain in most of the United

States on the other; but this particular trial has focused attention because in it the prisoner was allowed to give evidence, owing to the charge on which he was arraigned. For it so happens that a few years ago an addition was made to the statutes, which, while creating a new class of offenses, provided that persons accused of them should be allowed at option to make themselves witnesses. And the people are now asking, 'Why should this man be allowed the privilege of giving evidence, and a man accused of murder not be allowed?' And there is no answer. There can be no answer, no real answer.

"No doubt lawyers, read and brought up in the atmosphere of the courts, will contest this. They urge that an accused person more often does himself harm than good by speaking, and that, therefore, he should be forced to remain silent. It is probably true that the majority of persons brought to trial are guilty. No one ever heard of an innocent man injuring his cause by telling the truth. And, therefore, when the prisoner helps to convict himself he is furthering the cause of justice involuntarily. Is this to be regretted? Professional lawyers in England argue that it is. Why do they so argue? Because with them the professional instinct and tradition is far stronger than the love of justice. This may seem a hard saying, but it is absolutely true. It is the feeling of the fox-hunter who considers it a crime for the farmer to shoot a fox, however much harm it may have done to the poultry yard, since, in his eyes, all foxes should be preserved in order to afford sport to the hunt. Your English lawyer looks upon a trial as a duel between counsel. If the prisoner has the better tongue on his side, so much the better for him. But he must not himself have a voice in the matter, not though his life, his reputation and everything dear to him, is at stake. Can anything be more barbarous?

"Till quite lately the accused was not even allowed to make an unsworn statement, but that has been altered, and a prisoner is now at liberty to tell his own story, to give his own version of the transaction, but not on oath, and not subject to cross-examination. Obviously what he says in his own favor under such conditions cannot often count for much. Still there



are cases in which a simple explanation may clear away the clouds. Till a dozen years ago even this privilege was withheld, but in June, 1881, the wickedness and injustice of the restriction were brought prominently into notice, and such a wave of indignation swept over the country that the most hidebound of judges could not but be sensible of it, and after a few months of delay the needed reform was introduced. (It was a question of unwritten procedure, not of law.) For in June of that year a murder was committed in a railway carriage, and the murderer, when put on his trial, was not allowed to say what had happened. Now, in that case the guilt of the accused was beyond doubt; it was a murder deliberately planned for money. But none the less, every thinking man felt that it was clearly unjust to shut his mouth. It was felt that a perfectly innocent man might be found at the end of a journey with a dead body as his traveling companion, for he might have been compelled to kill in self-defense. Take the very case of Lefroy and Gould. Suppose when Lefroy fired he had missed Gould, and that Gould had closed with him, had wrested the revolver from him, and had shot him? Gould might have been tried for murder, and would not have been allowed to explain matters; nay, more, his counsel would not have been allowed to tell his story for him, since he was forbidden. All the counsel could do was this: He could say to the jury, 'On the facts proved in evidence, the prosecution suggests a certain theory and asks you to infer the guilt of the prisoner; I, on the other hand, suggest a different theory, and ask you to infer the innocence of the prisoner.' That was the ruling of the chief justice of England on the Lefroy trial. It is worth noting, by the way, that in India (where the criminal law consists of a Code which has been arrived at by boiling down the English law and making certain alterations), prisoners are allowed to give evidence under fixed rules, and the system answers well. No doubt the change will come sooner or later in England also, but the prejudice against reform is very strong.

"Another curious system which has attracted attention in this trial is 'the last word.' (This sounds like one of Adelaide Proctor's poems.) The procedure in English criminal cases is this: If witnesses are called on the defense,

the prisoner's counsel addresses the court after they have given their evidence, and then the prosecuting counsel has the right to make a speech in reply. But if no witnesses are called on the defense (the prisoner's own evidence in the few particular cases in which it is permitted does not count), then the prosecuting counsel has no right to follow up the speech of the counsel for the defense. That is to say, where witnesses are called on the defense, then the prosecution has 'the last word,' but where no witnesses are called on the defense, then the defense has 'the last word.' But there is an exception to the rule, for when the solicitor-general appears in person on behalf of the Crown, he is entitled to 'the last word,' whether the defense calls witnesses or not. Now, either this final speech is of importance, or it is not. Lawyers believe it to be of great importance, and frequently refrain from calling witnesses on the defense in order to secure it; but, as above pointed out, they cannot prevent the solicitor-general from claiming it in such cases as he conducts himself. Naturally enough it has been pointed out again and again that he ought not to have this exceptional privilege; that all prisoners ought to be treated alike. For the result of the present system is to convey the idea that the Crown is 'pressing for a conviction' whenever this unusual machinery is put in operation, and it is difficult to combat this idea. It certainly seems to the ordinary lay mind that there ought to be but one procedure, no matter who the counsel may be. However, in the particular case, there is no doubt the appearance of the solicitor-general helped largely to prevent a miscarriage of justice, so the defenders of the system can urge for it the doctrine of expediency. But what a satire on the administration of justice it is when the fate of an accused man is seen to depend upon the accident of the lawyer present, and not on the evidence produced for and against him."

The opinion of Judge Ross, in the case of the Government against the Stanford estate, which action was brought to recover the share due from Stanford as a shareholder of the Southern Pacific Company, is one which will be eagerly read, as it discusses many valuable points in the national legislation by which the

construction of the Northern Pacific and Central Pacific was authorized, and the provisions made for the issuance of bonds and for their redemption.

On April 4, 1864, the California Legislature passed an act of aid to the Central Pacific, which vested in it all the rights given it by the legislation of Congress. The Western Pacific was incorporated under these acts to connect with the Central Pacific at Sacramento. This corporation in 1870 merged with the Central Pacific, and the combined property came under the legislation affecting the Central Pacific and the Union Pacific. All other consolidations were similarly affected between the Missouri river and the Pacific coast.

The Central Pacific accepted the terms offered. In all the corporations affected in this State Stanford was a stockholder, holding 130,880 shares in a total of 520,000 shares paid in. He owned 13,500 shares of the Western Pacific railroad when it received aid. It was charged that no part of the money due the government had been paid, and that it now amounted to more than \$78,000,000, which the property of the company, if seized, would be inadequate to cover.

The court said it could not be influenced by any event which occurred subsequent to the contract with the government. The only question was what Stanford's liability was as to the payment of the debt to the government. The money made by Stanford and what has been done with the money earned by the Central Pacific were not matters of which the court could take cognizance. Sections of the State legislation were read to show the liability of stockholders. The court said the only legislation bearing on this case was section 12 of the act of 1861, which provided that when any stockholder should cease to be such, his responsibility for a proportion of his debts should cease, except as to debts incurred prior to his having become a stockholder. There was no doubt that, though Stanford and his three partners only held a portion of the stock, they were the moving spirits.

The court referred to decisions which showed that the government grants were made under peculiar circumstances which made them in a sense national enterprises. The grants, how-

ever, constituted contracts from which the companies could not arbitrarily recede.

The principle involved in this, the court said, was elementary, but he fortified his conclusion by reading authorities. The contract contemplated a repayment of the bonds. The only question was, how? This was a question not heretofore decided, but it had a bearing on the case. It would have to be decided whether there was any direct promise from these stockholders to repay the bonds. He found that no such promise existed by implication, and it has been settled that an implied promise in such cases was not entered. The acceptance of the bonds was an applied promise to stockholders to repay them — in fact, their acceptance under the language of the statutes was an absolute and unqualified agreement to pay to the government. The stockholders accepted the assistance, with an agreement as to how it should be repaid — if the acceptance was unqualified, which it was, it could but be accepted as a total acceptance. While there was no statement as to this in the clause providing for the forfeiture, if considered in connection with the context of the law, no other construction was possible. There was no doubt that the company had accepted all the responsibilities of the loan.

The question remained as to whether the responsibility rested with the stockholders. Beyond any doubt there was no common law liability. It reverted to the application of the State Constitution and subsequent State statutes as to such liabilities. It has been held that the States statutes did not fix any definite liability. The court referred to the original State Constitution and to the later Constitution of 1879, and to intervening legislation. While in later legislation the responsibility of stockholders for liability is in the proportion of their stock to capitalization of their corporation, the legislation of the era in which the railroad debt accrued did not so provide, and subsequent legislation had no bearing on the debt.

But the court said he did not believe the State legislation material, as the contract between the company and the government would have to be relied upon — he was satisfied that the government did not intend that the stockholders should be individually responsible for the debt. It had extended its aid in a way

which showed that it was an extraordinary occasion, and that it made the stockholders of the railroad company its instruments in delegating to them great powers. It evidently did not intend that any individual responsibility should be with them. Subsequent legislation could not alter the case in favor of the complainants.

The decision was in favor of Mrs. Stanford, and the federal officials said, after it had been rendered, that the case would not be further prosecuted. They regarded Judge Ross' decision as final, as all the points at issue had been covered.

The Honorable Joseph Hodges Choate, president of the recent Constitutional Convention, jurist, humorist, and, it is claimed, the persecutor of Sage, the multi-millionaire, is always a subject of pleasure and delight. There is certainly a keenness to his wit and a grace to his words which add to the charm of his presence, and we always seek his remarks on lawyers and his arguments on the Income Tax, or other subjects, as one would search for sweet clover among bristling thorns. At the commencement exercises of the Harvard Law School, James C. Carter, Esq., the toastmaster, introduced Mr. Choate, and said that he was the person who, at the recent trial, was constrained to read a chapter of the bible to the millionaire defendant in the case of Sage v. Laidlaw, and might have something equally as good and apropos for his legal brethern. In speaking of Sir Frederick Pollock, Mr. Choate said:

"I can remind him," said the speaker, "that there was a Harvard school before he was. I claim myself to have enjoyed the tuition of Harvard College and of the Dane law school in the golden age of each of these institutions. Profound as is my admiration for our distinguished president, I wish to say I graduated under the genial reign of David Sparks, the happy period of college life at Harvard. He had but one motto, which he universally applied in his treatment of the undergraduates: 'Be to their faults a little blind, and to their virtues very kind, and clap the padlock on the mind.'

"When from there I proceeded to the law school a similar state of things prevailed. Happily, there was no such thing as dean of the law school. I do wish to pay a single tribute

to the memory of Prof. Parsons. He was then the most eminent of the professors of the law school, and the only one from whom I ever learned anything. I do not claim that he was a profound lawyer, at least before he made the acquaintance of Prof. Langdell, but he was one of the most charming of men. It was his maxim of life, which I have endeavored to follow, that it was the duty of every lawyer to get all the entertainment possible out of his work as he went along. I do not think Prof. Langdell was the first inventor of the system of studying law by original research in actual cases. Mr. Justice Gray began it fifty years ago, and has kept it successfully to this moment. There are results in the modern system which I do heartily approve. It sends out to the great cities of this Union young men far better equipped with legal knowledge and with the fundamental principles that are to prepare them for the practice of law than any of their predecessors have enjoyed, and I think I may fairly say that we practitioners of the New York bar welcome all we can get of them. There is only one trouble, Prof. Langdell, and that is they know altogether too much. They know it all. And there are none of us old men in the law who cannot learn a great deal from them. But it is their misfortune that at the outset they are topheavy. And it is only after six months or a year of running about our streets, when they have learned that the legs are as important to the young lawyer as the brain, that they make themselves as useful as you intended them to be.

"I consider that America is the paradise of judges and lawyers, especially of lawyers, and when any pessimistic views are expressed of what all these coming lawyers are to do, I say, come to New York. Mr. Carter will soon be retiring, and will leave room for a thousand men.

"One question I should submit for the consideration of our distinguished guest from over the water. Why is it that such an enormous number of lawyers and judges are required to meet the modest wants of the American people? Take our State of New York, with 7,000,000 of people. It has 70 judges of the Supreme Court, besides seven judges of the Court of Appeals, three federal judges and one judge in each of the counties, 60 in number, for probate and legal business, making 140 judges to meet the wants of 7,000,000 people. Well, as I understand it, though I may be mistaken, England, with her 30,000,000 people, finds 32 judges of the first-class ample for all her wants."

## THE WORK OF THE BAR ASSOCIATION.

Address before the Pennsylvania State Bar Association, at Bedford Springs, July 10, 1895, by J. NEWTON FIERO.

IT is a time-honored introduction to the charge by the court to the grand jury, that "the oath which you have taken is a brief and beautiful epitome of your duties," and it is usual to add that it is unnecessary to enlarge upon the powers and responsibilities which are therein so clearly and succinctly stated. It is equally the custom of the judge thereupon to proceed to an elaborate explanation of the rights, privileges and functions of the grand inquest.

In the by-laws of the Pennsylvania State Bar Association, as in the constitutions of its sister associations, there is embodied a concise and distinct statement of the purposes of the organization. This declaration seems an adequate and complete presentation of the objects sought to be accomplished; but following the example of the court in like case, I shall somewhat amplify this provision and enlarge upon the practical work of associations of members of the bar.

The formation of associations of this character is a recognition of the futility of individual effort and of the power and influence of organization; an admission that the lawyer, unaided by co-operation on the part of his brethren, can, except in rare cases, accomplish but little that is of value to the profession or the public, beyond the performance of his duties as counsel and advocate.

It is the outgrowth of and possibly an improvement upon the compact and influential organizations of lawyers in the mother country, concentrated in and gathered about the inns of court, which have done so much toward preserving the standard of ability and integrity of the bar of England, and its efficiency has been most thoroughly recognized by a recent movement among English barristers looking toward the formation of a like association.

## THE PURPOSE OF BAR ASSOCIATIONS.

The association of members of the bar has a higher purpose, however, than is possible for any organization which, as in most cases, has for its sole object the protection of the interests of a trade, class, or profession, in that it cultivates a broader and more liberal spirit in its effort to improve the science of jurisprudence in the interest and for the benefit of the people of the State.

While the line of differentiation is not sharply drawn, yet the aims of such an association divide themselves into two classes: first, the oversight and care of the education of the prospective lawyer previous to his admission to practice, and the creation and maintenance of such a sentiment in the bar as shall tend to uphold the honor and dignity

of the legal profession; having, as a subordinate and secondary aim, the cultivation of social intercourse among its members, and the perpetuation of the memory of those who have passed over to the majority. This may be termed the relation which the association holds toward the profession; second, the more important duty which lawyers, as members of an association, owe to and undertake to perform toward the public, is, by way of revision and repeal of unwise, improvident and obsolete laws, through appropriate legislation; the prevention of ill-considered, hasty, careless and vicious legislation, so far as practicable under existing conditions, and the exercise of care and watchfulness over the administration of the law by duly constituted tribunals.

In the discharge of the obligation which lawyers owe to themselves, the first to be considered, and perhaps the more important, as influencing all the others and relating most intimately to the welfare and standing of the profession, and at the same time affecting the public interest, is admission to its membership. Questions relative to legal education and qualification have, during the past few years, received most careful consideration, and the standard of legal learning has thereby been, and is being, raised to and maintained at a much higher point than was heretofore deemed practicable.

Scarcely less important is the preservation of the high standing of the members of the bar, and the maintenance of the reputation for honor and integrity which is demanded from the profession, by means of discriminating, yet firm and uncompromising action in the discipline and exclusion of unworthy members.

Nor is the association of the members of the bar for mutual improvement by closer acquaintance and the enjoyment of the social courtesies of life to be passed lightly over, and as we recall how little is preserved of the record of the life of the active lawyer, who has attained even a very high degree of prominence in his profession, we more fully appreciate the desirability and necessity of that branch of the work which is devoted to keeping green the memory of those who have passed away, rendering the department of legal biography one of the greatest interest and highest importance.

Thus far, as to the duties lawyers owe to and undertake to discharge toward each other by mutual association, embodying, however, very much due to the public as well as to the profession. I in no wise underrate their importance, but the reference made to them must suffice at this time, since our object in this paper is to consider more particularly the work of the association in its relation to the citizen and the State, and the manner in which that work can be most readily and effectually ac-

complished, and as to this branch of the subject only that portion can be touched upon relative to the general features of reform in the substantive law and methods for its administration.

#### A PLEA AGAINST CONSERVATISM.

The lawyers of America are not to overlook the fact that we are nearing the close of the nineteenth century, with a strong predilection in many quarters for the adoption of twentieth-century methods of thought and action. It must be appreciated that rules of law and methods of procedure which were established at the period of the Norman Conquest, devised by the early chancellors of England, and modified by the decisions of Eldon and Mansfield, are not now accepted without question or controversy. As affairs have been influenced by steam and electricity, so laws which were adapted to the time of William the Conqueror served the purposes of a rude kind of justice in the days of Thomas à Becket, and were administered with many misgivings by the doubting chancellor and the great common-law judge, will not be tolerated by the business public of to-day. The conservatism of the bar must necessarily give way to the spirit of progress, and we must adopt such rules of action and such methods of business as are reasonably consonant with the disposition and responsive to the demands of the client. This boasted conservatism is not only beyond criticism, but deserves all praise, in so far as it does not stand for opposition to modern thought and action; but when that conservatism is arrayed against the spirit of the time, it requires no prophet to foretell the result, and it is the part of wisdom for the profession, acting through association of its members, to recognize the existing condition of affairs, and adapt laws and procedure to such conditions. The demand of the age is for greater simplicity, both in the law and in the practice, and this demand must be heeded, and if not acceded to by the profession, they will no longer be the leaders, but will be obliged to follow the steps of those who are unfit for and incapable of framing laws or constitutions.

There is a decided indisposition on the part of the individual lawyer to devote either time or attention to the amendment of the law in any respect, and he therefore resigns himself to a condition of inertia which from absolute indifference soon becomes active opposition to any effort on the part of his brethren to reform either the substance or the administration of the law, contenting himself with the view that present conditions have existed for nearly a thousand years and that any change or amendment is not only disadvantageous but will be dangerous.

As a profession, we are not up to the times; our

leaders are too much engrossed in their practice to give this subject their personal attention, those who manifest an interest in the subject find the majority of their brethren wedded to existing conditions, and the organization of the courts, the regulation of the practice and the enactment of the statutes are left very largely to men who are but indifferent lawyers although exceedingly able politicians not to say eminent statesman.

The truth is, and it should be enforced on every proper occasion, that the lawyers of these United States as a body do not exhibit a proper public spirit in performing the duty which they owe to the community by way of enforcing a careful, thorough and complete revision of the laws, State and Federal, and insisting upon the simplifying and rendering less expensive the existing methods of procedure.

The indisposition of the bar to give sufficient time and attention to the science of jurisprudence, the enactment of statutes and the proper constitution of the courts, is a conceded lamentable fact, and so far as it has become a spirit of opposition to necessary reforms it is to be criticised and deprecated. I can only presume that your bar is so liberal in its views, modern in its spirit and progressive in its methods, that I may thereby be relieved from even the suspicion of comment or criticism.

That our statute books are full of crude, illy-considered, unintelligible, inconsistent and obsolete laws is conceded. That this is a disgrace to our civilization does not seem to be appreciated. That it is the duty of the bar to remedy it, does not appear to be seriously considered. Yet here is a field which can be most profitably occupied without creating objection or arousing antagonism from any quarter.

It is the province of bar associations to correct this evil, to educate the sentiment and enforce the views of its members who are in sympathy with modern ideas, to formulate the plan and regulate the manner and method in which the law shall be condensed, revised and simplified, and in so doing it will conserve the highest and most important interests of the bar, the bench and the State.

This demands careful, painstaking and unremitting labor, carried on with a due spirit of reverence for the past, with a large measure of wisdom and prudence as to the present, and a wise forecast for the future.

#### OBSTACLES TO WORK OF ASSOCIATIONS.

The practical question is, "In what manner can a bar association best accomplish the ends of its existence?" and in answer to this question we must not overlook the obstacles to be met and overcome.

There is a most formidable obstacle in the way of effective action, even when the members of the profession are agreed upon a course of action which

involves any change in existing methods, however slight, or however beneficial. This is the difficulty in obtaining necessary legislation for the purpose of carrying out any needed reform. Without reflection upon or experience with regard to this matter, it would be assumed that opposition to action recommended by an association of members of the bar would most likely arise from other than members of the profession, and that where reforms had been agreed upon, after careful consideration by an organized body of lawyers, there would be little or no opposition from the bar. The contrary, however, is the fact, demonstrated by experience, and it is found that lawyers who are members of legislative bodies are most sensitive to any change recommended by an association of members of the bar, and most difficult to win over from active opposition to any plan which has been adopted by bar associations. This seems to result from two conditions:

First, many of the lawyers who are influential in legislative bodies are political leaders, and, as such, have to a very great extent put aside their professional pride and their personality as members of the bar and devote themselves exclusively to the profession of statesmanship. A proposition which is not partisan in its character, or which fails to confer a personal benefit upon some constituents, or which is not likely to secure votes at the caucus or the polls, is not deemed worthy of consideration. Hence they are unwilling to give either time or attention sufficient for the examination of the wisdom or propriety of any reform, and are likely to become active opponents of proposed measures because they have not and will not carefully examine the merits of the matter presented.

Moreover, lawyers as a body are much inclined to criticize the labor of others, particularly members of the profession, and when an act, drawn by a committee of a bar association and approved by that body, is presented for action, lawyers in the Legislature are very much inclined to carp at and cavil about both the form and substance of the provision, although approving hundreds of bills during each session which are not at all creditable to either their literary taste or legal judgment.

On the other hand, there are to be found in legislative bodies many broad, progressive, liberal-minded men who take up matters of this character with a will and who are disposed, through pride in their profession and belief in the necessity for reform in the law, to press matters to a successful issue. It is to such that we owe the fact that bar associations have a standing in legislative bodies; that lawyers, as such, have their legitimate influence, and that any progress whatever is made in the direction of law reform.

#### NATIONAL, STATE AND LOCAL ASSOCIATIONS.

The work of the national, of State and of local bar associations necessarily differs somewhat in character. An association of lawyers from every State in the Union must necessarily have somewhat different aims from one in which the membership is confined to a single State or locality. So a local association organized from the bar of a county or city has to a considerable extent other and different purposes from those which mainly occupy the attention of a State association, which, with its field not so broad as that of a national body but more enlarged than that of a locality, has within its purview many matters which are not relevant or proper to be considered by either of the others.

To illustrate: The American Bar Association, drawing upon every State and Territory for its membership, and having chief among its objects the promotion of uniformity of legislation throughout the Union, has a broader field than any State organization, and its methods by reason of this fact and the wide distribution of its membership, must to a considerable extent differ from those of any other like body. That association acts chiefly through the papers submitted to and discussions had at its annual meetings and the inquiry, investigation and reports of its standing and special committees. It undertakes to influence legislative action to only a limited extent through direct action, and in doing so is confined mainly to such legislation as can be enacted at Washington and which will affect the powers or jurisdiction of the Federal tribunals, hence this association may be said to work mainly through its moral influence upon the bar and the public by creating a sentiment upon a given topic and thus bringing about changes and reforms in matters of interest and importance to the lawyer and the client throughout the country.

Again, the association of the bar of the city of New York has no literary side to its work but is solely a social and business organization, existing for ethical purposes as well, and devoted very largely to maintaining a high standard of integrity at the bar and opposing the elevation of incompetent or corrupt men to the bench. While not in full sympathy with the views entertained by this association in every case, it deserves to be said that it is a terror to evil-doers at the bar or upon the bench. It must be added that this association also devotes itself to a careful and rigid examination of the bills presented to the New York Legislature affecting the interests of the bar and the public, and fearlessly and effectually interposes its objections to whatever is regarded as improper or vicious legislation. It is enabled to perform this work in a most thorough and satisfactory manner by reason of the facility for obtaining meetings of the committee having this

matter in charge which is not possible in case of a State association, and by its numbers and standing is able to undertake and accomplish much that is ordinarily outside the scope and beyond the power of a purely local association.

The ownership of a valuable library in an accessible locality in most desirable quarters, makes the rooms of this association valuable for professional work, in which respect it is somewhat unique among bar associations.

As to the responsibilities of a State association, I can best carry out the purposes of this paper by briefly referring to the work carried on and the methods adopted by the New York State Bar Association. I feel at liberty to do so only by reason of the kind suggestion which accompanied the invitation to address you, that as a member of that body I am somewhat acquainted with the character of its work and the manner in which it has been sought to be accomplished. I may be excused therefore in stating some of its recent efforts in the way of reform in the law and its administration and their results, rather than confining myself to a purely theoretical view of the subject.

#### THE WORK OF THE STATE ASSOCIATION ILLUSTRATED.

The New York association entered more actively upon the work of reform in the law and procedure in 1890. At the annual meeting in that year a paper was read entitled, "What shall be done to relieve our courts?" in which it was urged that a Constitutional Commission should be appointed to report a new judiciary article for adoption by the people. This was followed by the appointment of a committee for the purpose of drafting an act and obtaining such legislation. This became a law and such a commission was appointed, upon which the association was very largely represented. A new judiciary article was framed by this body which, although not acted upon at that time, became the basis for the article adopted by the Convention of 1894. The association continued the agitation of the question of reform in the judiciary by making that subject a topic for discussion at two of its annual meetings, at which leading members of the bar throughout the State presented arguments and papers. A Constitutional Convention having at length been provided for, a committee of the association was charged with the duty of presenting the views of the association with regard to the judiciary. This committee urged substantially the plan which had been proposed by the Constitutional Commission of 1890, and its recommendations, with a single exception, were embodied in the provisions relative to the reorganization of the judiciary which became part of the Constitution as adopted by the people.

In 1891, the attention of the association was called to the reports of the decisions of the courts of the State, nine sets of reports then being issued, many of them duplicates.

As in the case of the Constitutional amendment, a committee was appointed to take the matter in charge, and this resulted in such legislation and bringing about of such concert of action among the reporters and publishers that the official reports now in existence are known as the Combined Series, consisting of the reports of the Court of Appeals, of the Supreme Court and of the Inferior Courts of Record, each constituting a series complete in itself, but issued in weekly numbers at a very moderate price, these pamphlets being subsequently replaced by bound volumes, giving a system equal if not superior to that existing in any State or country.

A little later began an agitation in favor of a more thorough system of examination for admission to the bar. At the annual meeting of the association, the deans of the several law schools of the State read papers advocating the movement, and it has resulted in the enactment of a statute providing for the appointment of a permanent commission to examine such applicants, the members of which receive a stated compensation, and whose duty it is to formulate proper rules and regulations for that purpose. Their recommendation is a condition precedent to admission to practice, furnishing a uniform system of examination which has been found to work in the interest of both the student and the lawyer, and must ultimately be highly beneficial to the client.

The Code of Procedure of New York, by reason of changes made from the original draft by David Dudley Field, and in opposition to his views, has become complex, complicated and cumbersome. In 1894, the president of the association, in his annual address, recommended that action be taken for the purpose of bringing about a revision and simplification of the practice. The subject was taken up by the committee on law reform, which reported favorably upon the subject, and it was made a matter for discussion at the last annual meeting, when a bill which was submitted by the committee, providing for the appointment of three commissioners to revise the Code, was recommended for passage and the Committee charged with procuring its enactment. This bill became a law, and the governor of the State has just appointed the three commissioners provided by its terms, thus putting the State in the way of obtaining a revision and simplification of its procedure.

The methods pursued in bringing about these results have been already indicated. They are, in brief, in the first instance, to present the matter to the association in a paper prepared usually by some

member of the committee on law reform, reflecting the views of its members, but not authoritative as such. This is followed by a reference to that committee for consideration and action, and a report follows, by which the subject is usually placed upon the programme for consideration at the annual meeting, and when favorably passed upon, the committee originally reporting is put in charge of the necessary legislation to carry out the views of the association. The committee has usually appointed a sub-committee to take charge of the specific matter and carry on correspondence with the other members of the committee and of the association and members of the Legislature with reference to the proposed enactment. It has in some instances been found desirable, in addition to the personal efforts of the members of the committee, to call the attention of the members of the association and of the bar generally, by a circular letter, to the proposed enactment, asking their opinion and endorsement. In such cases a postal directed to the chairman of the committee, printed so as to leave a proper blank for the member to insert his views, has accompanied the circular, and upon receipt of the answers the chairman and other members of the committee have appeared before the committee of the Legislature having the matter in charge. It has also been necessary at times to present the subject to the governor, and procure his approval.

#### IMPORTANCE OF COMMITTEE WORK.

The methods of work must, of course, vary with the specific matter in hand, but by far the most serious difficulty to be met in connection with active practical work of an association in procuring proper legislation such as it may recommend, is to be found in the indifference of members to the calls upon them by the respective committees, and unless extraordinary care is taken in the formation of the committees, much embarrassment arises in obtaining a sufficient number of men willing to take active and energetic interest in the affairs committed to their charge. But as the members acquire confidence in the methods adopted, and become encouraged by the results obtained, and the committees come to understand that their labors are appreciated and acted upon, there comes a decidedly increased interest, and very much stronger disposition toward effective action, which later ripens into something like enthusiasm for the work, coupled with a justifiable and honest pride in its results. The committee work necessarily falls upon a very limited number, but the support of the entire committee is necessary to enable its active members to give character and strength to its suggestions and recom-

mendations. Names selected solely by reason of locality, influential connections or marked ability, are not in many instances those likely to be most useful in the work of committees of this character. In no part of the work of the association, however, is greater care necessary than in the selection of the committees who have in charge the securing of proper legislative action, and no committee can be charged with more important duties than that which "shall consider and report to the association such amendments to the law as they shall deem beneficial, oppose such as they shall deem injurious, observe the practical working of the judicial system of the State, and recommend from time to time such action as they shall deem best."

#### ESSENTIALS TO SUCCESS.

But beyond these considerations among the essentials to success in practical work of the association are:

First, unanimity and harmony of action. It will be impossible to accomplish results where action is recommended by a bare majority against the wishes of a powerful and energetic minority who will frequently be much more interested in defeating a measure than its friends in securing its passage; and on the other hand, a minority does well to bear in mind that it should bow gracefully and unqualifiedly to the will of the majority, and that nothing can be accomplished in an association of this character except by the hearty cooperation of all its members. The moral to be drawn from this suggestion perhaps is that it is unpolitic and unwise to attempt to bring about radical changes or decided reforms except in those instances where there is a substantial consensus of opinion among the members of the association.

The second suggestion is that the efforts of the association as a whole and of its members and committees must be directed to and concentrated upon a single important matter and that the energies of the body cannot be wasted upon a number of minor and unimportant details in which very few persons will be interested and which are in themselves of no great importance. It is necessary to arouse the sentiment of the bar in favor of some needed reform which is apparent to all and which is calculated to awaken the interest of the entire profession. Great danger exists that the efforts of the entire body will be frittered away in procuring the enactment of legislation of trifling importance, perhaps only affecting individual interests. This can only be avoided by the adoption of an inflexible rule that the association will not act upon matters except those of public interest and importance affecting the rights, obligations and remedies of the whole body of citizens and having some relation to the people of the entire commonwealth.



Again, I need only advert to the necessity, on the part of the officers and committees charged with the performance of any duty, of persevering labor and untiring vigilance. Nothing is more discouraging than the efforts to bring about a reform which is universally conceded to be desirable and necessary, but yet arouses no special degree of interest or enthusiasm in any except its active promoters; the temptation is great on the part of those charged with a duty of this character to feel that their obligation does not extend beyond its presentation to the proper authorities, and that in case the bar as individuals or the association as a whole does not exhibit that degree of interest which the occasion demands, the committee is absolved from further labors and responsibilities. If such a spirit is indulged in it will be fatal to success. The time and labor necessary to accomplish results are known only to those who have experienced the difficulties and discouragements of the work.

Still further, and of the last importance, is the necessity for full confidence in and hearty support of the officers and committees charged with any given duty, by the members of the association individually and by the association as an organization. In such case only can an association obtain that degree of authority to which it is entitled, and the influence of such co-operation upon the officers and committees in enabling them to carry out the wishes of the organization is not only desirable but absolutely necessary. It is only by a long pull, a strong pull and a pull all together that a bar association is able to accomplish any results in any field, and a failure to accord to those undertaking to carry out the measures resolved upon the warmest sympathy, heartiest support and highest degree of confidence, effectually dampens enthusiasm, discourages effort and invites defeat.

#### THE FUTURE OF THE PENNSYLVANIA ASSOCIATION.

Presenting my excuses for the apparently didactic manner of this paper and for its reference to the experience of other associations, as only justified by the practical purpose for which it is intended, I congratulate you upon the formation of this association, upon the interest manifested in it by your presence and enthusiasm and upon the genuine success of your first annual meeting. I can only express the wish, coupled with the confident expectation, that the bar of Pennsylvania, which has always maintained so high a standard of education, ability and professional honor, will make this association most creditable to lawyers, helpful to courts and beneficial to clients, thus fully realizing the highest and best results possible to be attained by the association of members of the bar.

#### Abstracts of Recent Decisions.

**ADVERSE POSSESSION.**—Where one who has color of title to a tract of swamp and timber land goes upon the land, cuts and deadens timber thereon, clears part of it, and makes rails and railroad ties out of the timber, he has such possession of the entire tract as will set the statute of limitations running. (*Johns v. McKibben* [Ill.], 40 N. E. Rep. 448.)

**CORPORATION—POWER TO INCREASE STOCK—ESTOPPEL.**—Where a corporation is absolutely without power to issue stock, or to increase its stock above a certain limit, no act or consent of a stockholder who receives stock issued without authority can estop him to deny its validity, or his liability to pay for it. (*Larda Imp. Co. v. Stevenson* [U. S. C. C. of App.], 66 Fed. Rep. 632.)

**FEDERAL COURTS—JURISDICTION OVER PARTIES—NON-RESIDENTS OF DISTRICT.**—In section 1 of the judiciary act of 1887-88, the clause defining the districts in which suits may be brought is not limited in operation to the classes of cases enumerated in the preceding part of the section as being within the jurisdiction of the Circuit Courts, but applies to all suits, including patent cases; hence a New Jersey corporation cannot be sued in the district of Massachusetts for infringement, although it has a place of business there. (*Donnelly v. United States Cordage Co.* [U. S. C. C., Mass.], 66 Fed. Rep. 613.)

**LIMITATIONS—PRESUMPTION OF PAYMENT.**—On presentation of a claim against a decedent's estate barred by the statute, indefinite evidence of declarations by the decedent that he intended to set up his nephew, the claimant, in business, because he owed him certain money, is insufficient to overcome the presumption raised by the bar of the statute. (*Appeal of Ferguson* [Penn.], 31 Atl. Rep. 733.)

**NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—Plaintiff, while turning an iron ladle fastened to car trucks and moving on a railroad track, put his foot on the rail, close to the wheel, and was injured by the sudden moving of the wheel. He could have done his work while standing out of danger, and he knew that the wheel was liable to move. *Hell*, that he was guilty of such contributory negligence that the question need not be submitted to the jury. (*Werk v. Illinois Steel Co.* [Ill.], 40 N. E. Rep. 442.)

**RAILROAD COMPANY—STREET RAILWAYS.**—The use of a street for an electric railway does not impose an additional burden or servitude to that implied by the dedication. (*Limburger v. San Antonio Rapid Transit St. Ry. Co.* [Tex.], 30 S. W. Rep. 533.)

## Correspondence.

THOMPSON ON PRIVATE CORPORATIONS.

NEW YORK, July 2, 1895.

*Editor of the Albany Law Journal:*

The work of Judge Seymour D. Thompson on Private Corporations,\* is an event of so much importance in our legal literature and history that I will ask you to give place to this short notice of it. A careful examination of the three volumes which have already appeared (the rest will soon follow), has impressed me with the conviction that this work is far beyond the ordinary range of legal authorship. It will take as of right possession of the field that it is designed to cover, and I predict, for reasons which I shall briefly give, that it will permanently hold it.

It is national in its scope. It aims at nothing less than to state fully the law concerning private corporations as they exist to-day throughout the United States.

When we consider that the scope of such an undertaking requires an examination into the legislation and adjudications of about fifty separate States, as well as of Congress and the federal courts, we at once realize how laborious, how extensive, almost immeasurable, such an undertaking is. Diversity in details are infinite but it is surprising after all to see in matters fundamental and basic what a substantial uniformity is found to exist. It is the latter fact that has made the author's attempt to state the whole law relating to private corporations in this country practicable.

The execution of the scheme requires six volumes of about 1,100 pages each, in which the vast and various details are, for the purposes of methodical treatment and reference, arranged into sections, numbering in all, about 8,000.

And this statement of its bulk raises a most important question, namely, whether the treatise is constructed on the best plan, and if so, whether in the execution of that plan the author has been unnecessarily diffuse. The plan on which what goes under the name of an elementary legal work ought to be constructed depends upon the subject which is to be dealt with. Undoubtedly there are certain subjects which may largely be treated in what may be called an institutional manner, where the author's chief labor is to state ultimate principles, with their ground and reasons, without much detailed or specific reference to cases. But there are other subjects as to which such a mode of treatment is not the best; and to this class belongs the subject of private corporations. In this country it is funda-

mental that all such corporations have a legislative origin; that all their powers are statutory; and, moreover, in the constitution of every State there are provisions limiting legislative power in respect of the creation of corporations and the powers that may be conferred upon them. These constitutional and legislative provisions are largely the basis of the judicial judgments relating to corporations and their powers, and make it necessary in many cases to give the text of the positive provisions in order accurately to understand and apply the doctrines of the courts as exemplified in the adjudged cases. The author has wisely recognized this necessity and has, in our opinion, constructed his work on the right, and, indeed, on the only true plan. It is not too large for the highest usefulness. It is a cyclopedia of corporate law. Inasmuch as the body of the profession throughout the country has not access to all of the statutes and decisions of the various localities, and if they had, would find it very inconvenient to refer to them in the daily work of the profession, the author's plan is one of the highest utility and practical value.

With this book before him the case will be exceptional where the inquirer will find it necessary to go beyond it in order to solve, or get the data to solve, any legal problem on the subject that may arise. I find that it is a work specially designed for the practitioner and the judge. My own experience illustrates this. On the day these volumes came into my hands I was engaged in tracing the law concerning the transfer of shares and the right as against the corporation of an assignee of shares whose assignment had not been registered on the books of the corporation. I found the subject so exhaustively considered that it saved me several days' labor and made it needless to look further.

The author has the essential requisites for doing his work well. He is a man of unwearied diligence, and an active life has been exclusively devoted to the literature and the actual work of the law. He has codified statutes. He has edited for years leading law journals and reviews. He is not a mere doctrinaire. He was for a long period a master in chancery, daily dealing with the actual adjudication of disputes of wide and varied range. He served for twelve years on an appellate bench. He has written various works, civil and criminal, on legal topics, all of which display his learning and his capacity for original thought, and the formation of independent and fearless judgments. All this learning and extensive and ripe experience he has brought to the production of this masterpiece of legal work. Not the least of its merits is that it is not "manufactured" as so many modern law books are, by the aid of students and hired assist-

\* Commentaries on the Law of Private Corporations, by Seymour D. Thompson. In six volumes. Bancroft-Whitney Co., San Francisco. 1895.

ants, but has been wrought out by the personal labor of the author.

Because of these varied merits I have ventured to predict that it will take the field, and will hold it, for it will be long before another will undertake such a stupendous work. It is twelve years since it was announced, and during all this time it has engaged the author's attention and labors. It is a monumental work. It is evident, from the author's loving and tender inscription to his wife, that he so regards it. We can well imagine his feelings in being permitted to behold its completion. In reading his dedication and preface one is reminded of what Gibbon says of the great work on which his fame so securely rests. Let it be stated in his own inimitable language. He thus marks the conception of the Decline and Fall: "It was at Rome, on the 15th of October, 1764, as I sat musing amidst the ruins of the capitol, while the bare-footed friars were singing vespers in the Temple of Jupiter, that the idea of writing the decline and fall of this city first started to my mind."

More than twenty years afterward he thus describes and commemorates its completion: "On the night of the 27th of June, 1787, between the hours of eleven and twelve, I wrote the last lines of the last page, in a summer house in my garden. After laying down my pen I took several turns in a *berceau* or covered walk of acacias, which commands a prospect of the country, the lake and the mountains. The air was temperate, the sky was serene, and the silver orb of the moon was reflected from the waters, and all nature was silent. I will not dissemble the first emotions of joy on recovery of my freedom, and, perhaps, the establishment of my fame. But my pride was soon humbled, and a sober melancholy was spread over my mind by the idea that I had taken an everlasting leave of an old and agreeable companion, and that whatsoever might be the future date of my history, the life of the historian must be short and precarious."

Such feelings are not difficult to understand. And so the author of the work of which I am writing, esteeming it as the most important and permanent of his published labors, expresses, upon its completion, his sense of grateful satisfaction in these solemn and impressive words:

*"And to that good being who has given me the strength to persevere to the end through so many years of toil and discouragement, I tender my most grateful acknowledgments."*

JOHN F. DILLON.

#### HUSBAND AND WIFE—PARTNERSHIP PROPERTY.—

When funds invested in a partnership business by the wife were community property, the husband becomes a partner in the business. (*Houghton v. Puryear* [Tex.], 30 S. W. Rep. 538.)

## New Books and New Editions.

### TIFFANY ON SALES.

The eighth and latest volume of the Hornbook Series, published by the West Publishing Company, has just appeared in the hand-book on the Law of Sales, by Francis B. Tiffany, the author of the well-known work on Death by Wrongful Act.

So much has been written upon the merits of the "Hornbook Series" that anything additional may seem superfluous, yet we cannot refrain from commenting in passing upon the general utility, merit and scope of the series.

The student has long looked in vain for textbooks which should present to the mind and to the eye a clear, concise and yet comprehensive statement of the various branches of the law which should instruct him without wearying and overtaxing his mind with useless minute distinctions and subtle differences too multitudinous for the human mind to grasp in any logical sequence.

Such a book has at last been supplied by the Hornbook Series, the several volumes of which, compiled by well-known authorities upon the different legal subjects, set forth in black-letter text the fundamental principles of the law in a style free from useless verbiage, so that both the eye and the mind readily comprehend and digest the matter presented. The principles set forth in the black-letter text are elucidated by more or less extended commentaries thereon, prepared in a masterly manner, which are further explained by copious references to decisions rendered in the courts of the United States and of the several States of the Union.

The series is of untold value to the practicing lawyer, enabling him to find and refresh his mind in an instant upon any fundamental principle or variation therefrom of which he may be in doubt, and furnishing an ever ready and convenient digest of the law.

Tiffany on Sales follows in the main the arrangement of Benjamin, though the text is greatly modified, for various reasons, by the English Sale of Goods Bill which was enacted in February of last year, being a codification, drafted by Judge Chalmers, of the laws relating to the sale of goods. It is a work worthy in all respects of its predecessors in the Hornbook Series which have achieved a great success both among students and the profession at large.

The West Publishing Co. has some eight additional Hornbooks in preparation, including works on Domestic Relations, Torts, Evidence, etc., making sixteen volumes in all, which together with those not yet announced will form the most complete and comprehensive series of elementary textbooks yet published or projected. Published by West Publishing Co., St. Paul, Minn.

# The Albany Law Journal.

ALBANY, JULY 20, 1896.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE able and exhaustive opinion of Judge Herrick on the civil service law, deciding on the effect of the changes in the Constitution made by the late convention, is printed in full in this issue as not only of great interest because of the increasing attention given to the subject, but also by reason of the comprehensive construction given to this most important change of the fundamental law of the State. The removals made by the now dominant political party has aroused much discussion in the principal cities where the effect has been most noticed and the subject has been debated at considerable length, especially by those who desire that existing statutes should be enforced or else repealed. It is unfortunate that no political party will take a stand for or against such statutes as the liquor law, the civil service law and other enactments of a similar nature so as to have such questions decided by the people. A statute is only of value so long as it responds to the interests and wishes of the majority of the electors, and a failure to enforce the unpopular "blue laws" is a mockery to the respect which should both theoretically and practically be accorded to the statutes of the commonwealth. In Connecticut, there still remain on the statute books the so-called blue laws which do not in any way express the sentiments of the community of the present day, and it is easily seen that in New York the present position of the excise commissioners has not been upheld by popular approval. In the metropolis a majority of the citizens may be in favor of Sunday closing, but if one can judge somewhat by the press it may be ventured that some changes in the present stringent regulations would be received with favor. So in the State either we should live under a strict enforcement and construction of civil service

regulations or we should acknowledge by repealing the existing law that to the victor belongs the spoils. A State, county or city is benefited by a decision of important questions at the polls and our form of government receives its severest blows in the political avoidance by parties of matters of vital importance. Is not a wise and honest stand on vital questions ultimately sustained by an intelligent public and may we not hope that the political dodger will find his insatiate thirst for trickery slacked by a permanent and long merited overthrow?

It is with considerable satisfaction that we are enabled to give part of the very excellent article on the "Salutary Results of the Income Tax Decision," published in the *Forum* for July, from the pen of ex-United States Senator George Franklin Edmunds, of Vermont. A lawyer of national repute, a statesman of unquestioned integrity and ability, and an authority on constitutional law, the retired senator from Vermont is accorded the respect of the people, and articles by him are sought for on every hand. It is remembered that he was retained in the income tax cases, and it is partly at least due to his skill that the early construction of the law was given by the Supreme Court of the United States. Speaking of the results, Mr. Edmunds says, in part:

"The acts of 1861, and subsequent war-time acts, did, for the first time, undertake to impose a tax on personal incomes as falling within the category of 'duties, imposts and excises,' which the Constitution authorized Congress to lay without regard to the population and representation of the States, provided only that they should be 'uniform throughout the United States.' The Constitution also provided that 'representation and direct taxes shall be apportioned among the several States \* \* \* according to their respective numbers,' adding to the free persons three-fifths of all other persons excepting Indians—meaning, of course, the slaves. And the Constitution also provided that 'no capitation or other direct tax shall be laid unless in proportion to the census.' These acts of 1861 and the following ones of the war-time were upheld by the Supreme Court in

Springer's case (all the other cases can fairly be distinguished) as justifying a tax on personal incomes not apportioned among the States according to population. The law under which the Springer case arose was soon repealed, and no income tax was again attempted until 1894. All that the Supreme Court had really to embarrass it in consideration of these recent cases on their constitutional merits was, first, the Hylton carriage tax case of 1796 under a law that was finally repealed in 1814; and, second, the decision in the Springer case in 1880. There had not been a continuous carriage tax acquiesced in—there had been none at all for more than half a century. There had been no personal income tax in the whole constitutional history of the United States for the seventy years of its experience of the urgent needs of more revenue, both in times of peace and war. In this state of things the doctrine of *stare decisis* could have, justly, very little influence in preventing a consideration of the questions involved upon their very merits. The Supreme Court was thus compelled to confront and decide a constitutional question of the deepest importance to the future, as well as to the present welfare and peaceful relations of all the people of the country. It held that taxes imposed by Congress upon personal incomes, or other property as such, were direct taxes; and, if imposed at all, must be imposed upon the people of the States according to their respective populations. It is curious and interesting to note that in the very learned, ingenious and exhaustive brief of the Attorney-General of the United States (than whom there is no better lawyer in the country) defending the law, there are only two or three pages of the whole ninety-nine devoted to suggesting, even, that the true meaning (were the matter *res nova*) of the Constitution could warrant the imposition of a personal income tax otherwise than by apportionment among the States according to population, as provided in the Constitution. It was the high and bounden duty of the Supreme Court, then, to consider and decide the question on just and intrinsic considerations.

"The builders of the political and social state composing the Union evidently intended and endeavored to make the principles and

practice of taxation plain. There could have been no purpose of equivocation or concealment. There was none. The danger and the injustice of allowing the force of mere numbers to impose taxes which they should not bear themselves in due proportion, by any scheme that might be invented, upon the minority of the people of the States, were perfectly understood. And so the relative equality of representation and taxation as such—just as it then was in many and still is in several States—was distinctly and emphatically provided for in the Constitution,—affirmatively by the provision that "representation and direct taxes shall be apportioned among the several States which may be included in this Union according to their respective numbers," and negatively, by the prohibition that "no capitation or other direct tax shall be laid unless in proportion to the census." Those great architects and builders of government well knew—better, perhaps, than we do in these days of much apparent and some real sympathy with doctrines and practices destructive of liberty and social order when the point 'where virtue stops and vice begins' is becoming obscure—that the rule of taxation should not and could not safely be left to the unlimited caprice or prejudice or selfishness of mere majorities represented in Congress.

"One of the most eminent of the counsel sustaining the late income tax statute has, in his brief, quoted that truthful and familiar definition, given by Montesquieu in his 'Spirit of the Laws,' that a tax is 'a portion that *each* subject [citizen] gives of his property in order to secure the enjoyment of the remainder.' This is an obvious truth, and the only thing that was lost sight of or ignored by the defenders of the tax in the recent discussion in 'he Supreme Court was the crucial fact that a just tax must be one that *each* citizen bears in proportion to his ability.

"The fears that have been expressed of the danger that this late decision is supposed to have created of crippling the government in times of war or other sore need are illusory. The whole range of voluntary social and business activities is left open, as the Constitution originally stated it, to uniform and equal taxation, and the whole property of the country,

real, personal and mixed, is left subject to taxation by the just and safe rule originally declared, according to representation—that is, by taxation, that those who impose it are, with their own people in their several States, to share in the burdens of.

Such direct taxation according to representation and numbers in the several States is by no means so unequal as has been suggested. The first direct tax *eo nomine* that has been laid by Congress since the Constitution was adopted was that of 1861. Twenty millions of dollars were required to be raised. This sum was apportioned among States according to population, as the Constitution required. A comparison of the sums apportioned will show how far from real inequality of burden, in the main, such a tax was found to be. For illustration:—The State of New Hampshire was called on for about \$218,000. It had about 9,000 square miles of land. The State of Texas was called upon for about \$355,000. It had about 261,000 square miles of land. Texas, then, had approximately thirty times the real estate resources that New Hampshire had, from which to pay, in round numbers, only once and a half the sum that New Hampshire had to pay. New York was called upon for about \$2,600,000. It had about 49,000 square miles of land. California was called upon for about \$254,000. It had about 158,000 square miles of land. But New York had to pay more than ten times the amount required from California. It will thus be seen that, in the long run, direct taxation upon property in the States, apportioned according to population, will not be greatly unequal. And it is very clear that in respect of duties, imposts and excises the States (usually) that may have the advantage in regard to direct taxes will compensate for it in the case of their far greater payments of these indirect taxes. It will be seen, then, that the patriotic fears of any citizen—whatever may be their stations, or present responsibilities—for the financial future of our country in times of war or other calamity, may be greatly mitigated, if not entirely overcome. But however men may, possibly, differ in respect of some of these matters, there is one great fact not to be lost sight of by those who have faith in, and hope for, the continued success and increase of popular gov-

ernment. This fact is that we have a government based upon the *equal rights and equal responsibilities of all its people*, and so constituted by its founders that no one of its proper agencies—legislative, executive, judicial—can exceed its authorized functions without being checked by another. The triangle of our government—to use a mechanical illustration—makes the strongest possible structure for the security of justice to all.

“The Government is not the State. It is only the agent of the State, and it must act within the limits of its authority. If it acts beyond this, it becomes a usurper, and practises tyranny. The comparison of the governmental tyranny of a single despot, or even of a small body of persons, with the tyranny of the majority of a people, unhappily shows that the tyranny of the mob or commune, or any other tyranny of mere numbers, is far worse than any other while it continues.

“The only possible idea of a State governed by its people is one where the burdens are, equally borne and all benefits equally open and secure to all. It is well to remember that the axiom stated by Jefferson, when he was assisting to establish the institutions we now enjoy, that ‘the whole art of government consists in the art of being honest,’ is one that states broadly the truth that this decision has applied. The court has respected and followed the truth as it appeared to it. That was the greatest and most responsible duty which the organic law—the law of the people—had imputed to it. The chief and only really important reason for written constitutions at all is that the people who ordain them know and feel that they cannot trust themselves to do right and refrain from wrong in times of temptation, excitement or tumult. Constitutions, then, are the pre-ordained acts of the self-control of the people as a body. They erect barriers that they themselves shall not be able to pass when temptation in its thousand forms may overcome their calm judgment of what ought to be or what ought not to be. Organized society can restrain itself only in this way, and nearly all intelligent and progressive communities have taken this the only best and surest of methods to protect their citizens from injustice. This decision goes far to make these principles

permanent, and such rights of equality and justice secure. The socialist and the anarchist should heed the power and the capacity of the government of equal law that has no fear in its various departments in protecting the rights and redressing the wrongs of all citizens."

In conclusion Mr. Edmunds writes:

"The fears that have been expressed in sundry quarters of the danger of the aggrandizement of wealth and the greed of its possessors leading them to try to escape taxation, compels the inquiry, What is wealth? Is it property worth more than four thousand dollars a year? Is the ownership of property or working power of whatever kind, producing less than that sum of income, poverty? Where is the line that places the tradesman, the artisan, the common laborer, the doctor, the clergyman and the lawyer "below the salt?" No arithmetical money-definition of wealth has ever been given; and among a people who are to be free and progressive none can ever be stated. That the tangible wealth of the citizens of every community, be it nation, or State, or county, or town, should bear its financial burdens in due proportion is self-evident both in the science of government and in morals. But the wealth of such a community is *all* its wealth, wherever and in whatever proportions it may be distributed among the members of the community, and where the expenses of a common government are ratably and equally imposed by the taxation of *all* the wealth. Every citizen, sharing by his vote in the management of the government, shares also in his proportion in its responsibilities and burdens, and it is only by such equality of power and duty that he can be the peer of every other. It is such equality, and such only, that will maintain a well-ordered and prosperous State. The Act of Congress which has now been declared void did not proceed upon any such principles, but the very opposite. Now, the essential principles of the people's government of equal rights and equal duties in its management and progress are reestablished.

"There is, perhaps, little or no occasion now, to consider the salient points of inequality and consequent injustice in the provisions of the act; one may be mentioned, however, that was not, it is believed, adverted to in the discus-

sions in the court. The income of the possessor of accumulated property was taxed at the common rate of 2 per cent. The income of the wage-earner (whether an artisan or clerk or professional man) who had no accumulated property, and whose sole funds were the result of his year's labor, was taxed to the same extent. Thus the capital of the property-owner was not taxed at all; while the whole capital of the wage-earner was taxed to the full extent that the mere gains of the man of property were. If this is not a discrimination against labor and industry, what can be?

We desire to call the attention of the bar to a radical change which has recently been effected in the legal procedure of our State. It is well known to lawyers that the Code provides the legal methods whereby objections may be taken to a complaint for defect of parties defendant. If the failure to make some necessary party appears on the face of the complaint, the defendant should demur for non-joinder. (§ 488, sub. 6.) If the defect does not appear on the face of the complaint, the defendant should answer, setting up the defense. (§ 498.) In prescribing this procedure, the Code merely follows the antecedent practice. These questions are thus constituted issues in the cause — questions to be tried like any other issuable question.

Under the chancery system, provision also existed for the case of omission to plead a defect of parties. When the issues in the case came before the chancellor for hearing, and the evidence developed the existence of a necessary party, who had not been brought before the court, the case was ordered to stand over, or be dismissed. The framers of the Code preserved this equitable practice by section 452, which directs that the court shall not determine the case in the absence of a necessary party. The same section likewise provides for applications by non-parties claiming an interest and desiring to come into the case. These various provisions constitute the entire system which has prevailed for many years, and which has been found adequate to meet all the exigencies of justice, in securing the presence of the necessary parties before the court. A defendant could demur, or answer, for absence of necessary co-defend-

ants, and if successful, upon the trial of the issue of law or fact could succeed in defeating the plaintiff.

But an entire change has transpired in this practice, under the ruling in the case of *The Soldiers' Orphans Home of St. Louis*, against Russell Sage and the executors of Jay Gould.

In this action, a motion was made by the defendants that the plaintiff be compelled to join another defendant, or be stayed, until it did so. The point was presented that the court had no power to take questions of non-joinder out of the class of issuable contentions, and convert them into motions made upon affidavits and decided without a trial. This view of our system of pleading and practice was argued before the Court of Appeals, by Joseph H. Choate. But that court affirmed the order granting the motion. It rendered no opinion, and merely referred to the opinion of the Special Term, there being likewise no opinion at General Term.

In examining the opinion at chambers — reported in the *New York Law Journal* — we find no discussion whatever of the question of power. It thus appears that a subject-matter of demurrer and answer is converted into a ground of motion, without any apparent consideration of the fundamental change in our practice. The particular reason given below for ordering the joinder of another defendant is, that its presence is necessary for securing the removal of trustees. We cannot find that the Code excepts suits for removal of trustees from the requirement of demurrer and answer for defect of parties. It may be said that the determination whether or not another party should be joined in a suit for removal of trustees may depend upon the language of the deed or trust, or other evidence to be adduced at the trial. This consideration illustrates the wisdom of the chancery practice and of the Code in reserving *all* questions of defect of parties until the trial of the issue in the cause, whether raised by the pleadings, or appearing upon the full proofs at the hearing. However this may be, the Code provides the remedy for defect of parties, without exception of any ground, or reason, or argument upon which the claim of defect may be based.

In the *Orphans' Home* litigation, it appears that the defendants had pleaded the non-joinder

by answer. The cause stood for trial upon that and other issues. Thereafter the defendants undertook to make this motion and obtained a stay until the plaintiff joins this new defendant, the necessity of whose presence upon the record is one of the very issues to be tried when the cause is reached for trial. It follows that hereafter a defendant can plead the non-joinder of some one whom he claims is a necessary party, and while that issue is awaiting trial he can anticipate the trial by motion and have the plaintiff stayed until he complies with the defendant's pleading. Or he may obtain such an order without pleading the issue of defect of parties at all.

Without commenting upon the above decision, let us note its far reaching effect. Our whole system of trial by issues of law and fact is involved. The same section of the Code furnishes the warrant for demurrers and answers for all other causes, as well as for non-joinder. If they can be superseded in respect of questions of joinder, so can they be in regard to other issues. Any lawyer may take up the several grounds of demurrer (or answer) prescribed in the Code and substitute motions to compel the plaintiff to comply with defendant's theories of plaintiff's case. The alternative is that he be stayed until he does so. Our practice has passed through many tribulations, but this introduction of a torrent of motions to try issuable contentions does seem lamentable. Yet, logically, under this decision, lawyers are entitled to make them and courts are bound to hear them.

For example, this question of practice is sometimes intimately connected, in equity cases, with the cause of action itself. A motion by defendant to compel plaintiff to join another defendant may involve the entire theory of the case. The granting of such a motion may, therefore, subserve the double office of a demurrer for want of cause of action, as well as for defect of parties. It would seem better to follow the Code and let these contentions stand for the trial.

Without protracting this article, it must be apparent that this innovation would disarrange the entire practice. Litigation would thereafter be converted into a series of trials by affidavits; or worse still, into a series of double trials — first, by motions, and in case of failure by the



moving party, then by normal methods of issues of law and fact.

As no opinion appears upon this question of power of the courts to substitute motions for issues, this decision may be the result of inadvertence. If not, it would seem to be worthy of legislative attention.

So far as we have ever been able to find out the failure to consult with members of the legal profession has in many instances resulted in a serious financial loss to the person who has refused the aid of some member of the fraternity. It is needless to argue against the proposition that the training of a lawyer enables him to perform his work better than the untutored layman. To the ignorant and unthinking the popular denunciation of the members of the legal profession is attractive, and the ranting corner orator harangues his too-easily-deluded compatriots with the ills which accrue to the human race from those skilled and learned in the law. The discussion of the subject, however, includes that greatest phenomenon, law and its relation to society, and is altogether above the comprehension of those who ordinarily shout most loudly. Naturally, the absence of law would result in a government by the strong, their accumulation of all property, and would end by the transfer of power from those constituted to exercise executive and other functions to those who conquered by physical force or ingenious invention. Any restoration of peace or resumption of order would at once mark the beginning of a new government and hence the commencement of law, whether written or otherwise. In other words, law and government may continue by the common consent of the individuals of a community to recognize others' rights and to perform their own duties, even though there may be no semblance of officials to execute any of the functions of the State. This is, however, getting away from the main subject, which was to introduce a communication which Judge Z. S. Westbrook, of Amsterdam, recently sent to the *Amsterdam Daily Democrat*, which is particularly worthy of consideration in that it gives striking examples of how individuals have suffered because they have refused to seek legal advice. Judge Westbrook said:

"It seems that some of our older citizens, in

anticipation of death, are deeding away their property to their heirs instead of leaving it to them by last will and testament. The reason of this is to be found no doubt in the fact that it is getting to be such an expensive thing to settle up an estate, and also in the fact that there is so often dissatisfaction among the heirs and a resort to litigation in consequence.'

"This item contains sentiments that we often read in the newspapers and hear from laymen, and requires a few comments.

"In the first place it would seem to be a poor time for an old man to deed away his property to his heirs or others, or to otherwise dispose of the same when in anticipation of death.

"Such important matters, good judgment and prudence would dictate, might better be attended to before a man is disabled with disease or infirmities of age, and disturbed with the pangs of anticipated dissolution, and the supposed conflict of his heirs over the distribution of his estate. Certainly no prudent counselor would ever advise an old man in anticipation of death to deed away his property and put it beyond his control except in a very special case, for it too often happens that after the property is thus obtained all love and respect for the 'old man' soon fade into oblivion, and if the anticipation proves to be premature and he afterwards desires to change his plans in regard to property matters it would require the services of lawyers and much litigation and attendant legal costs to recover the property again.

"There can be no more safe or prudent or less expensive way, for a man to dispose of his property after death, if he is not satisfied with the wise provisions of law for disposing of it, than by a last will and testament, executed when in the possession of health and sound judgment and influenced by a due regard for his just relations with his family and kindred and those having meritorious claims upon his bounty.

"The same legal grounds would probably exist for contesting the validity of a deed, as of a will, made by an old man in anticipation of death, for in either case incompetency, fraud or undue influence, if shown to have entered into or affected the transaction, would vitiate the instrument.

"The great trouble is and always has been that men do not generally use sufficient judgment and care in such matters, while in many cases they are actuated by an avaricious desire to beat the law and the lawyers, and save a dollar.

"Such important business should be attended to by a prudent and just man in time of health, when the infirmities of age have not impaired his faculties and judgment, and he may not be subject to the flattery or intrigues of those surrounding him.

"It is a fact well known to the legal profession that the largest share of the litigation over estates of decedents and in legally adjusting their affairs after death, is the result of incompetency, carelessness and cupidity, and an attempt to disregard the plainest provisions of law applicable to such matters, and too often of an attempt to ignore the natural and just rights of kindred.

"If men with important business in hand would more frequently consult a lawyer when alive, they would save to their heirs and estates much money that is often expended in litigation in settling up their affairs after death. I may say that in my opinion nearly all the expensive litigations in the courts over the estates of deceased persons are the result of their own gross carelessness, incompetency or cupidity, in attempting to transact important business or execute important papers without employing legal counsel.

"I could instance many cases within my own experience that illustrate this. I recall the case of a farmer in the town of Florida some years ago, who gave a justice of the peace one dollar to draw his will and it cost nearly \$1,000 after his death for the courts to legally determine what the word, "anything" used therein meant, whether it applied to a horse, or a mortgage, or a farm, or neither.

"Another case I remember of recent date of a farmer living in Port Jackson who had a justice of the peace draw his will and which after its execution the testator sealed up and laid away with care until his heirs should require it. When the will was opened for probate after the death of the testator and read to the anxious heirs they were astonished to learn that the testator had never signed it, though the two witnesses had signed and attested it in due form.

"A case is recalled of a merchant at Hagerman who had his will drawn and signed by two witnesses in proper form, but he retained the instrument without signing it himself and sometime afterwards in anticipation of death he signed it, but not in the presence of the witnesses as the law requires. I remember the case of a farmer with considerable property, residing in the town of Root, who made and executed his will in proper form, but a long time afterwards in anticipation of death he concluded to alter the will, and to do so upon the advice of his doctor took a pair of scissors and cut off and retained the last or residuary clause which disposed of the entire residue of his estate, to which was attached his signature and the signatures of his witness, and then destroyed the rest of the instrument that preceded this part. Of course all these wills were worthless.

"It is not necessary to cite the many cases of contest over deeds and wills or their legal interpretation, executed by old men in anticipation of death, which were executed as the result of incompetency, fraud, undue influence, and intrigues of various kinds practiced by the beneficiaries of such instruments. The law books are full of them.

"I have in mind the case of a wealthy business man living in this city, who died within a few years, and was always regarded as unusually astute in his business affairs. He had little respect for the legal profession and rarely deigned to seek assistance from its members, and relying on his own assured ability and shrewdness, entered into an important business before his death that he would surely have avoided upon the advice of any good lawyer, had he sought it at the expense of ten dollars. As a result that transaction will now cost his estate at least \$75,000 and provide fat fees for several lawyers.

"Another case of an esteemed citizen of this city, who recently died, illustrates strikingly what I have already attempted to show. This gentleman entertained the highest disrespect for the law and the lawyers, and never could appreciate that there was any apparent necessity for the existence of either. He endeavored in his own peculiar way to transact all his financial business so far as he possibly could, without legal advice or assistance, and it was

quite extensive. As a result his affairs were left in such an unintelligent, complicated and entangled condition that it will require the services of at least half a dozen lawyers to unravel and adjust them, besides a large amount of legal expenses attending their settlement.

"I have no doubt that by the expenditure of twenty-five dollars a year for proper legal advice and assistance, his estate would have been increased at least to twice its present value.

"These cases are sufficient citations for my purpose, though I have many more in mind of the same purport.

"The legal profession is extremely conservative, and the members usually endeavor to avoid litigation in adjusting and settling the disputes and contentions of men. In fact lawyers do not obtain their best or most desirable business or compensation from litigated cases. I believe that in nine litigated causes out of ten the lawyers engaged earn at least twice more than they receive for their services therein.

"If men would consult the members of the legal profession more frequently in regard to their important business matters and property rights and interests, while actively engaged in the affairs of life, they would avoid a great amount of trouble and dangerous complications, and bring to their estates greater wealth and less litigation on account thereof, and afford the legal profession much better and more desirable and profitable business."

The meeting of the Pennsylvania State Bar Association at Bedford Springs the 10th and 11th inst. was very largely attended, more than two hundred members of the Pennsylvania bar being in attendance at this the first annual meeting.

The association was organized during the past winter and the membership already numbers between seven and eight hundred of the leading lawyers of the State. The organization of the association was taken up with much enthusiasm by Edward P. Allinson, of the *Legal Intelligencer*, who was made secretary of the permanent organization and had the principal charge of the arrangements for the annual meeting.

We published last week the address on "The Work of the Bar Association," delivered by J.

Newton Fiero, of Albany. Papers were read by Alexander Simpson, Jr., of Philadelphia, on "The Local Bar Association; Its Functions and Relations to the State Bar Association," and by George Wharton Pepper, of the law department of the University of Pennsylvania, on "Legal Education." We hope to give these papers at an early day.

Not only was this meeting of the association largely attended, but the members were enthusiastic with reference to its work, and entered upon its business with an apparent determination to make the influence of the association felt throughout the State. It is expected that by the next annual meeting the number of members will be at least one thousand. Both the membership and attendance indicate that the association is to be a power in matters relating to the legal profession in the State. The session occupied two days, closing with a banquet on the evening of the eleventh, at which toasts were responded to by distinguished members of the Pennsylvania bar.

The dispensary law in South Carolina seems to receive a black eye on any point that is decided by the courts in relation to it, and the latest blow that it has received comes from the opinion of Judge Simonton, in which he holds that liquors may be brought into the State from outside for personal use. It will be remembered that the first failure of the law came from the failure of grand juries in Charleston to indict violators of the law, and demonstrated the feeling in the State towards the statute. The law is also, from a pecuniary standpoint, one of the most unfortunate pieces of legislation that has been enacted in that State, for though its adherents claimed that in the first year of operation it would net the State a revenue of half a million dollars, and in the second year bring in a million dollars of revenue, it has so far failed to make over six thousand dollars flow into the State treasury. Factional differences may have interfered with the proper working of the law, but its repeal would be of more benefit, at least to the State, than the present mangled and battered statute. When will it become a recognized principle that the morals of a community cannot be raised by harsh measures, or in fact by any sort of legislation?

## CIVIL SERVICE LAW.

Opinion of Justice D. Cady Herrick at Special Term, on the application for a writ of *mandamus* to compel the comptroller to pay the salary of J. W. McClelland, appointed by the superintendent of public works, without having taken the civil service examination.

HERRICK, J. This is an application for a writ of peremptory *mandamus*, to be directed to the comptroller of the State of New York, commanding him to draw his warrant for the payment of the salary of the relator as clerk to the collector of canal statistics, for the month of May, 1895.

It appears that on the 26th of April, 1895, the superintendent of public works issued a commission to the relator, under his hand and seal, in the words following:

"ALBANY, April 26, 1895.

"By virtue of the power vested in me by section 3, article 5, of the Constitution of the State of New York, I do hereby appoint J. W. McClelland, of Albany, N. Y., clerk to collector of canal statistics, at Albany, N. Y.; salary \$65 per month."

The relator had passed no civil service examination for the position in question, and his name was not certified to the comptroller by the civil service commission of the State.

The comptroller bases his refusal to draw his warrant upon chapter 354 of the Laws of 1883, as amended by chapter 681 of the Laws of 1894, which provides for arranging in classes, clerks and employes in the public service of the State, and provides for the certification to the comptroller by the civil service commission of the names of all officers, clerks or other persons appointed to the public service of the State, from either of said classes, and prohibits the comptroller from drawing his warrant for the payment of any salary or compensation to any officer, clerk or other person in the public service, who has not been so certified to him.

The relator contends that the law in question is not applicable to his case, and that there is no necessity for his name being certified to the comptroller by the civil service commission of the State, because, as he alleges, under the laws and the Constitution of the State, the appointees of the superintendent of public works are not subject to civil service laws, but that the power of appointment is lodged exclusively in such superintendent, untrammelled by any laws, rules or regulations whatever.

The position taken by the parties to this proceeding, makes it necessary to examine not only the civil service laws of the State, but the Constitution, not only as it is, but as it was prior to January 1, 1895.

The questions presented are of grave importance, seriously affecting the civil service of the State, and the administration of some of its greatest and most important departments, as well as the title to office

of many subordinate officers of the State, and, therefore, merits a careful consideration.

In 1876, the then existing Constitution was amended by creating an entirely new official, known as "a superintendent of public works," to whom was confided the execution of laws "Relating to the repair, navigation, construction and improvement of the canals, except so far as such construction and improvement should be confined to the State engineer and surveyor."

Being thus made responsible for the care and maintenance of the canals, he was given a corresponding power in the selection of his subordinates. After providing for the appointment by him of three assistant[superintendents, such amendment further provided that "All persons employed in the care and management of the canals, except collectors of tolls, and those in the department of the State engineer and surveyor, shall be appointed by the superintendent of public works, subject to suspension or removal by him." (Cons. section 3, article 5.)

It may be well to observe in passing, that the same year an amendment to the Constitution was adopted, providing for a superintendent of State prisons, who should have the superintendence, management and control of all State prisons, and to whom was given the appointment of all the agents, wardens and chaplains of the prisons; and giving to the agents and wardens of each prison, the appointment of all officers of such prison, except the clerk; and further providing for the appointment of clerks of prisons, by the comptroller. (Cons. section 4, article 5.)

In 1883, the Legislature, by chapter 354 of the laws of that year, authorized the governor, by and with the consent of the senate, to appoint three persons who should constitute a civil service commission. And it was made the duty of said commission "to aid the governor, as he may request, in preparing suitable rules for carrying this act into effect." It was further enacted that such rules should provide, amongst other things, "for open competitive examinations," for testing the fitness of applicants for the public service, now classified, or to be classified hereunder.

Section six of such law provided that "Within four months after the present session of the Legislature it shall be the duty of the governor to cause to be arranged in classes all the several clerks or persons employed or being in the public service, for the purpose of the examination herein provided for, and he shall include in one or more of such classes, so far as practicable, all subordinate places, clerks and officers in the public service of the State."

Section 7 provided that, "After the termination of eight months from the expiration of the present session of the Legislature, no officer or clerk shall be appointed, and no person shall be admitted to or be promoted, in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination or is shown to be specially exempted from such examination in conformity herewith."

That section was amended by chapter 681 of the Laws of 1894, which amendment provided amongst other things as follows: "It shall be the duty of the said commission to certify to the comptroller the name of every officer, clerk or other person in the public service of the State, in either of said classes, appointed or employed therein in pursuance of law and of the rules and regulations made in pursuance of law, stating in each case the title or character of the office or employment, and the date of the commencement of service by virtue thereof; and, in like manner to certify to the comptroller, the name of each officer, clerk, or other person, in the public service of the State, in either of the said classes, appointed or employed therein in violation of law or of the rules and regulations made in pursuance of law; and to certify to the comptroller, in like manner, every change occurring in any such office or employment forthwith, on the occurrence of the change. It shall be unlawful for the comptroller to draw his warrant for the payment of any salary or compensation to any officer, clerk or other person in the public service of the State, in either of said classes, who is not so certified as having been appointed or employed in pursuance of law and of the rules and regulations made in pursuance of law."

It will be observed that the duty of classifying the various officers and employes of the State, and of making rules and regulations providing for the examination of candidates, and other details, is devolved upon the governor of the State, and that he is to determine how far it is practicable to include in any classification the subordinate places, clerks or officers in the public service of the State. That the civil service commission, so-called, is merely to aid him, as he may request, in the discharge of his duties; he is in law, and in fact, the responsible head of the civil service of the State; he is not only to see that the laws are executed, but he is in addition, within the limitations of the Constitution and the acts of the Legislature, to make the laws, that is the rules and regulations, by which the civil service of the State is to be governed.

Pursuant to said act of 1883, the governor of the State promulgated rules and regulations for the government of the civil service, and a classification of

subordinate places, clerks and officers; included in the class subject to competitive examination were the subordinates of the superintendent of public works, and of the superintendent of State prisons, and among others, clerkships of the kind to which the relator claims to have been appointed.

The power of the Legislature to make laws, and of the governor and civil service commission to make rules and regulations, which should subject appointees of the superintendent of public works to examinations, and to limit his appointments to those who should pass such examinations and be placed upon the eligible list of the civil service of the State, was challenged in the case of *the People, ex rel. Killen, v. Angle*, 109 N. Y. 564.

It was there held that it was the intention of the Constitution to confer upon the superintendent of public works the power to select and appoint his subordinates "subject only to his sense of duty and the obligations of his oath of office," and that it plainly intended "to leave to the superintendent, exclusively, the determination of the propriety of such appointments, and the sufficiency of the qualifications possessed by proposed appointees. And that the provisions of chapter 354 of the Laws of 1883, and of the rules and regulations adopted by the governor and civil service commission, were limitations and restrictions upon such power of appointment by the superintendent, which the Legislature had no power to impose, and that therefore his subordinates "did not come under the operation of the act creating the civil service commission."

The principle of that decision applied as well to subordinates of the superintendent of State prisons, and of the agents and wardens of each prison, and to the clerks of such prisons to be appointed by the comptroller.

It will be observed, however, that the civil service law was not declared unconstitutional as a whole, and it can hardly be said to have been declared unconstitutional at all, but simply that it did not and could not include within its limits certain classes of officers; as to all others, it remained upon the statute book a living and effective law, and so remained, with these exemptions from its provisions, down to the 1st of January, 1895.

The new Constitution, adopted in 1894, contains the same provision as to the appointment of subordinates by the superintendent of public works, as did the old Constitution. (See section 3, article 5.) It also contains, however, an entirely new section, being section 9 of article 5, reading as follows: "Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as prac-

ticable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

It is contended by the relator that the same language being used in the present Constitution as in the old, that the same interpretation should be given; while, on behalf of the comptroller, it is contended that the power of appointment given by section 3 to the superintendent of public works is limited by the provisions of section 9 of the same article.

This conflict makes necessary both an interpretation and a construction of the Constitution as it now is. Some discussion has been indulged in as to whether the present Constitution is a new Constitution or an amended one. To me it seems to be a matter of little consequence, whether we consider the present Constitution as an entirely new instrument, coming into existence January 1, 1895, or whether we consider it as an amended Constitution; in either event the same rules of construction will govern, for it has been held, "that an amended constitution must be read as a whole and as if every part had been adopted at the same time," and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part." (People, ex rel. Killeen, v. Angle, 109 N. Y. 564-75.)

The first rule in interpreting and constructing a constitution is to give to it the effect and meaning by its framers, and by the people who adopted it. And the first rule for ascertaining what that intent and meaning was, is, that is to be gathered, if possible, from the plain and ordinary meaning of the words used.

"In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect, and we are not concerned with the wisdom of their insertion. As adopted by the people, the intent is to be ascertained, not from speculating upon the subject; but from the words in which the will of the people has been expressed. To hold otherwise would be dangerous to our political institutions. The Constitution is the basis upon which rests that complicated social organization called the State. It must be presumed that its framers understood the force of the language used, and, as well, the people who adopted it. \* \* \* The latitude allowed in the construction of legislative acts is out of place, and would be unwise, when interpreting

the fundamental law. Legislation aims at arranging the mechanism of the State for the benefit of its members, and the question of intention, necessarily, is often of great importance and must be open to judicial inquiry; but the Constitution which underlies and sustains the social structure of the State, must be beyond being shaken, or affected, by unnecessary construction, or by the refinements of legal reasoning. We may be compelled to have resort to such in the presence of contradictions or of meaningless clauses, but not otherwise." (The People v. Rathbone, 145 N. Y. 434-38.)

Let us turn to the language of the Constitution. "Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made," etc. This language is general, and in itself contains no limitations or restrictions, and is apt language to cover all appointments under the State government without any exception, and "we are not at liberty to presume that the framers of the Constitution and the people who adopted it did not understand the force of language." (The People v. Purdy, 2 Hill, 31.)

Standing alone there would be no question but that, under the language of section 9, article 5, just quoted, was included appointments of the kind in question, but we must not lose sight of the rule of construction that all parts of a constitution must be construed together.

Section 3 of article 5 confers upon the superintendent of public works the power of appointing his subordinates, and as we have seen, the court of last resort in construing the same language in the old Constitution, held that that was an untrammelled and unrestricted power.

The relator has invoked the rule that, "Where a clause of a constitution, which has received a settled judicial construction is adopted in the same words by the framers of another constitution, it will be presumed that the construction thereof was likewise adopted." (Black's Const. Law, 68.)

Thus these two sections are brought into apparent conflict and one of the conditions arises, mentioned in the case of the People v. Rathbone, where we are compelled to resort to construction; and when we are, the same rules apply as in construing a statute.

"The intent of the law-makers is to be sought for. And when it is discovered it is to prevail over the literal meaning of the words of any part of the law. And its intent is to be discovered, not alone by considering the words of any part, but by ascertaining the general purposes of the whole, and by considering the evil which existed calling for a new enactment, and the remedy which was sought to be applied." (People, ex rel. Jackson, v. Potter, 47 N. Y. 375.)

While it is true as a general proposition, as stated above, that where a clause from a former constitution is adopted in a new constitution, it is to be given the same construction as was formerly given to it, still I think that rule is subject to limitations and restrictions. All parts of the Constitution are to be read together, and a construction given that will harmonize the several parts with each other, and in construing a clause of it taken from a pre-existing Constitution we must see whether there are any provisions in the new Constitution different from those from which the clause in question was taken, and which must be read in connection with it, and whether they in any way enlarge, modify, limit or restrict its meaning.

Where the new constitution contains some provisions of the old, and some that are new, I apprehend that in construing such provisions the same rules of construction must govern as apply to amendments to a constitution.

In giving construction to the provisions of the Constitution, its history and the conditions and circumstances attending its adoption must be kept in view, and the effect of subsequent amendments are to be determined by the same rules, applicable to the interpretation of statutes. (*Sweet v. City of Syracuse*, 129 N. Y. 316-80.)

We must examine the history of the Constitution and the laws as they previously existed, and the evils, if any, that were intended to be cured by such new provisions.

We have examined somewhat the history of the law as it existed prior to January 1, 1895, when the new Constitution went into effect. It is to be presumed that in framing the Constitution the convention had in view the then existing laws. (*People v. Rathbone*, 145 N. Y. 435-88.)

Under the old Constitution, subordinate clerks, officers and employes in the civil service of the State were appointed to, and held their positions under radically different laws, some under a law providing for appointments based upon fitness and merit to be ascertained by examination, while the subordinates in the great department of public works and in the State prisons of the State, embracing a large proportion of all the appointees in the civil service of the State, were wholly exempt from any such test. This anomalous condition of the public service under the law, of course, was known to the framers of the Constitution.

We must also assume that they knew that the Legislature had passed a law with the intention of making all subordinate clerks, officers and employes in the civil service, subject to civil service regulations; that it was the apparent intent of such law to include, and its language was sufficient to

include, subordinates of the superintendent of public works, and of State prisons.

That the governor of the State so understood the intent of that law, and classified the subordinates and appointees in such departments, and that the court of last resort held that under the Constitution the Legislature had no power to subject such subordinates and appointees to any such classification, because the same was a limitation upon and a restriction of the power of appointment conferred by the Constitution upon the superintendents of such departments. Bearing these things in mind, it would seem from a reading of these sections of the Constitution, that the framers thereof intended by section 9 to limit or modify the power of appointment conferred by section 3, and that the power of appointment conferred by section 8 is to be exercised, subject to the principles declared in section 9.

If, however, these considerations are not sufficient to render the meaning and intent of the Constitution entirely clear, there are other methods of arriving at the meaning of its framers and of the people who adopted it, to which we may resort, and those are receding and considering the proceedings and debates of the convention which framed the instrument under consideration.

The proceedings of a convention are not always to be relied upon to determine the intent with which any portion thereof was adopted. Different members of such convention may have diverse reasons for voting for its adoption; and it is sometimes impossible to find from such proceedings that the members united upon any single reason, or had a common interest concerning such clause in the Constitution. (*Legal Tender Cases*, 110 U. S., 421-43.)

Still the proceedings of constitutional conventions have always been resorted to by the courts, not as conclusive and binding upon them, but as persuasive aids to assist them in determining the true intent and meaning of the instruments framed by such conventions.

"One mode of construing the Constitution is to take the Constitution as we find it, without reference to the manner in which its different parts were prepared and adopted; another is to look at the proceedings of the convention, and endeavor thereby to discover the probable intention of the framers of the Constitution, as we now find them. In either case we must also look at the actual state of things which existed when the Constitution was framed and adopted." (*Clark v. The People*, 26 Wend. 599; *People v. Purdy*, 2 Hill, 31.)

And, "where the proceedings point out the purposes of the provisions, the aid will be valuable and satisfactory." (*Cooley's Cons. Lim.*, 3 Ed., 66.)

Turning then to the proceedings of the convention, we find that section 9, when first reported from

the committee having it under consideration, read as follows: "Appointments and promotions in the civil service of the State, and of cities, shall be made according to merit and fitness, to be ascertained by examination, which, so far as practicable, shall be competitive. Laws shall be made to provide for the enforcement of this section."

The gentleman having it more particularly in charge for the committee, Mr. Gilbert, in opening the debate upon the question of its adoption, after discussing the principle of appointments to, and promotions in the civil service, upon merit to be ascertained by examination, said: "This principle as the Constitution now stands cannot be applied to public works and to State prisons. The Court of Appeals has so held in respect to one of those departments, and the principle which applies to one will apply with equal force to the other. So that the committee, and a very large number of petitioners of high character, \* \* \* all concur in this, that we want the principle incorporated into the Constitution, and we want to provide for its application in State prisons and in the public works, as well as in the other departments of the State." (Pages 2438-39, Proc. of Con.)

And when the subject was again under discussion, the same gentleman stated: "The Court of Appeals has held that appointments cannot be made in the prison service and in the public works service under the rules of the civil service. The case came up as to one of them, but the same reason that applied to that one obtains as to the others. So that I may say that under the law as it now stands, and under the Constitution as it now exists, the civil service rules cannot be applied to the prison service or to the public works service. I think that is reason enough for the passage of the main proposition." (Pages 2552-53.)

Mr. Root said: "As the matter stands to-day, the court of last resort has ruled that the principle of civil service cannot be applied to the important positions in the State prisons and public works department, and the effect of this amendment will be to extend this reform to State prisons and canals." (Page 2559.)

Mr. Lauterbach said: "In behalf of regularity and order in the appointment of the State prison officials and others, as to whom our attention was called during the process of the investigation by the charities committee, I think it would be a serious error on the part of this convention, if, owing to any flippant spirit in which the matter has been considered, or on account of some local interest that might be prejudiced, we go to the people from this convention while our party has announced itself in favor of civil service reform, that in this convention,

upon a trivial excuse that was presented, we voted it down." (Page 2561).

Much discussion was had in the convention over the proposition to amend the section as presented to the convention, so as to extend its provisions to all the civil divisions of the State, "including cities and villages," and over that portion thereof which was finally adopted referring to honorably discharged soldiers and sailors; but nowhere do I find that any opposition was made to extending the operations of the civil service law to the canals or public works department and the State prisons of the State, or any answer made to the arguments of Mr. Gilbert or Mr. Root in favor of adopting the proposed section in order that such departments might be subjected to the operations of the civil service laws.

After the convention had adopted the Constitution as a whole, it adopted and issued an address to the people explaining its work and the different new provisions of the proposed Constitution. Among other things, that address contained the following:

"10. We have declared in the Constitution the principle of civil service reform, that appointments and promotions are to be based upon merit, and ascertained, so far as practicable, by competitive examination. We sought by this to secure not merely the advantage derived from declaring the principle but the practical benefit of its extension to the State prisons, canals and other public works of the State, to which, under the existing Constitution, the court of last resort has decided that civil service rules cannot be applied." (Proceedings of Cons. Con., page 2683).

I, therefore, take it that the convention had, as to such departments, "a common intent," and intended, by adopting the section in question, to bring the subordinates of the superintendent of public works and of the superintendent of State prisons within the operation of the civil service law, and by the language used intended to, and supposed they had, modified the effect of the language used in sections 3 and 4 of Article V, in reference to appointments to be made by the superintendents of public works, and of State prisons, and had nullified the effect of the decision in the case of *The People, ex rel. Killeen, v. Angle*.

It seems to me, therefore, that in reading section 3 in connection with section 9, and considering the language used, the history and condition of the law as it was under the old Constitution, taken in connection with the proceedings in the Constitutional Convention, that it was the plain intent of the framers of the Constitution, and of the people who adopted it, that all appointments in the civil service of the State should be made according to merit, to be ascertained as far as practicable, by



examination, and that they intended to extend that principle so as to include the subordinates and appointees of the superintendents of public works and of State prisons; and that the power of appointment conferred upon the superintendent of public works by section 3 was intended to be subject to the principles and limitations contained in section 9.

The relator contends, however, that section 9 is not self-executing, and that there has been no legislation to enforce it; that the section itself in terms recognizes the fact that legislation is needed to put it in force, by the clause, "laws shall be made to provide for the enforcement of this section," and that until new laws are made to enforce its provisions, the section in question is of no force and effect, and that appointments are to be made as before its adoption.

The same contention was made in the matter of *Sweeley*, 12 Misc. Rep. 174 (affirmed in the Court of Appeals, not yet reported), and it was there held that pre-existing civil service laws were continued, and that the then relator was subject to them. This case perhaps presents the case in a little different aspect. There it was held that the law under which the then relator sought appointment had been abrogated by the new Constitution, and that there being other laws upon the statute books not in conflict with the new Constitution, which were applicable to the relator's case, that no new legislation was necessary.

It is said that such a construction renders unnecessary and meaningless the clause, "laws shall be made to provide for the enforcement of this section." I think that is a mistaken view, for full force and effect can be given to that clause without holding that it is necessary to re-enact all the civil service laws of the State. When we consider, as before stated, that the framers of the Constitution are presumed to have known the laws of the State, and if they did, they must have known that they did not extend to "all the civil divisions thereof, including cities and villages," and that to give full force and effect to that section of the Constitution, additional laws would have to be passed extending and enlarging the existing civil service laws of the State.

But enough law is already in existence to enforce the provisions of the Constitution as to the department of public works, to determine this case. As before stated, all parts of the Constitution are to be read together, and the sections under consideration must be read in connection with section 16 of article 1, which provides, amongst other things, as follows: "Such acts of the Legislature of this State as are now in force shall be continued the law of this State, subject to such alterations as the Legis-

lature shall make concerning the same; but all parts of the common law, and such of the said acts or parts thereof as are repugnant to this Constitution, are hereby abrogated."

And in construing the Constitution in connection with pre-existing laws, "we must keep in mind that the Constitution was not framed for a people entering into a political society for the first time, but for a community already organized, furnished with legal and political institutions, adapted to all or nearly all the purposes of civil government." And that it was not intended to abolish these institutions, except so far as they were repugnant to the Constitution then framed. (*People v. Draper*, 15 N. Y. 532.)

The members of the Constitutional Convention being assumed to know the nature and effect of then existing laws, and having provided for their continuance, where, in harmony with the new Constitution, we must also assume that they depended upon them to carry into effect the details of the Constitution, being supplemented by such new legislation as should be necessary.

The civil service laws of the State are in harmony with the present Constitution, they are therefore of the same force and effect as if they had been passed after the present Constitution took effect, and can be used, as far as they go, to enforce its provisions.

It is also claimed in behalf of the relator, that assuming that it was intended by section 9 to bring the appointees of the superintendent of public works within the provisions of the civil service law, and admitting that the civil service laws are continued in force, that there is still necessity for legislation to bring him within their provisions. To support this contention he relies upon that portion of section 9 in question, which says that the merit and fitness of appointees "shall be ascertained, so far as practicable, by examination." And his contention is that it is necessary for the legislature to determine whether it is practicable to ascertain the merit and fitness of appointees under the superintendent of public works by examination, and that until such determination is made, that there is no means of enforcement as to that department, the principles of section 9.

I do not think this contention can prevail. While probably the Legislature has the power under this section to determine what officers and appointees it is practicable to classify under the civil service, and in what cases it is practicable to ascertain the fitness and merits of candidates for positions by examination, still I do not think that it is necessary for the Legislature to act in that respect in order to enforce the application of section 9 to the department of public works, because there was, when the Constitution was framed and adopted, a statute in

existence which authorized and directed the governor of the State to determine what subordinate places in the service of the State it was practicable to classify and subject candidates to for examination.

It has been said that a constitution is, "To be held to be prepared and adopted in reference to existing statutory laws, upon the provisions of which in detail it must depend to be set in practical operation." (People, ex rel. Jackson, v. Potter, 47 N. Y. 375-80.)

The statutes in existence at the time when the present Constitution was adopted, authorized the governor to determine how far it was practicable to test the merit and fitness of candidates for subordinate places in the public service, by examination; and the rule that holds that constitutions are "prepared and adopted in reference to existing statutory laws," and in reliance upon their details to set them into practical operation, is much strengthened in this case by the similarity in meaning of the language used in the section of the Constitution under consideration, to that used in the civil service law. Let us compare the language used in each. The Constitution provides that appointments and promotions in the civil service of the State, etc., "Shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which so far as practicable shall be competitive."

The civil service law (chapter 354 of the Laws of 1883), makes it the duty of the Governor, with the aid of the civil service commission, to prepare rules and regulations, which shall provide, amongst other things, "As nearly as the conditions of good administration will warrant. \* \* \* For open, competitive examinations for testing the fitness of applicants for the public service, now classified, or to be classified hereunder."

And again in section 6 of said act, it is made the duty of the governor to "Cause to be arranged in classes of the several clerks and persons employed or being in the public service, for the purposes of the examination herein provided for, and he shall include in one or more of such classes, so far as practicable, all subordinate places, clerks and officers in the public service of the State."

Where the language used in the Constitution and in a previously existing statute is so nearly similar in meaning, it seems to me that we can well say that the framers of the Constitution had such statute in view, and relied upon it to enforce the provisions of that portion of the Constitution under consideration.

The governor has acted under the power conferred upon him by the statute, and had determined that it is practicable to test the merit and fitness of

candidates for positions in the department of public works by examination; for it appears in the papers before me, on this application, that after the adoption of the Constitution, and on the 15th day of April, 1895, the governor, with the aid of the civil service commission, made a classification of the positions in the departments of public works and State prisons of the State, and that under such classification, the position of clerk to the collector of canal statistics was included in what is known as schedule B, and that all appointments required to be made in the positions classified in schedule B are to be made by selection from those persons graded highest as the result of open competitive examinations. And it also appears that at the time of the appointment of the relator to the position in question, there were eighty-eight persons upon what is known as the "eligible list" in schedule B, who were eligible for appointment as clerks to the collectors of canal statistics.

It follows from what I have said that the superintendent of public works should have made his appointments of clerks to the collectors of canal statistics from the eligible list just referred to; that the appointment of the relator was in violation of the Constitution and of the civil service laws of the State, and that his application for a *mandamus* must be denied.

Motion for a *mandamus* denied, not as a matter of discretion, but as matter of law, without costs.

#### INJUNCTION AGAINST USE OF PIANO.

THE Court of Chancery of New Jersey, in Feeney v. Bartoldo, 38 Atl. Rep. 1101, decided that where a saloonkeeper causes a piano to be played in his saloon each night from seven o'clock until ten o'clock, and sometimes later, to the music of which dancing is indulged in, the effect of which is to prevent the occupant of an adjoining building from sleeping, a preliminary injunction will, at the suit of such occupant be granted, restraining the use of the piano after nine o'clock. In view of a recent controversy over a disturbance of this kind in New York city, the case seems to be one which will be noticed with especial interest.

The court said: "This is an application for a preliminary injunction, restraining the defendant from the use of a piano. The defendant is the owner of a saloon next adjoining the dwelling of the complainant. In this saloon the defendant makes sale of beer and other liquors, and on the 5th of January of the present year placed therein a piano, which has been played every night except Sunday nights, from seven o'clock until ten, and sometimes until after eleven o'clock. This is accompanied with dancing and loud noises by the customers of the

defendant. The effect of this musical and pedestrian performance is to so greatly annoy and disturb the complainant and his wife and children that they are unable to sleep at night during the continuance of these noises. Hence the application for the interference of this court.

"That the defendant has a right to the ordinary and proper use of a piano in his saloon, and that his customers have a right to dance to the music as expressed by such instrument, there can be no doubt. There is no distinction between citizens in this respect. Every citizen is permitted to possess himself of the instrument, and also to enjoy a dance. But it is equally well settled that every citizen, in the exercise of his individual rights in the use of his property, is limited to such use as will not interfere with the reasonable rights of others in the enjoyment of their property. With these fundamental principles, concerning which there can be no dispute, and with the cases of *Thompson v. Behrmann*, 37 N. J. Eq. 345; *Walker v. Brewster*, 5 L. R. Eq. 25, and *Soltau v. De Held*, 2 Sim. (N. S.), 133, as a guide, I do not see my way clear to deny the preliminary injunction, so far as to restrain the use of this instrument after nine o'clock in the evening."

### Abstracts of Recent Decisions.

**ARBITRATION AND AWARD—ACTION TO VACATE.**—When, in an action to set aside an award, it appears that the arbitrators exceeded their authority and made an award in respect to matters not submitted to them, the burden is on defendant to show that the plaintiff, after seeing the award and understanding what it contained, assented to its execution. (*Leslie v. Leslie* [N. J.], 31 Atl. Rep. 725.)

**CARRIERS—PASSENGER—DUTY TO STOP AT STATION.**—Statements of a ticket agent that a certain train stopped at a certain station will bind the railroad company only when made contemporaneously with the sale of a ticket, and not when made several weeks before, and not referred to at the time the ticket was sold. (*Atchison, T. & S. F. R. Co. v. Cameron* [U. S. C. C. of App.], 66 Fed. Rep. 709.)

**CRIMINAL LAW—HOMICIDE—INSANITY.**—Evidence that defendant has been in the insane asylum, and that, in the opinion of witnesses, some professional and some not, he is still insane, does not justify the reversal of a judgment of conviction, where the evidence also shows that for some years before the crime he earned regular wages, invested the proceeds, and attended to his affairs properly. (*Meyer v. People* [Ill.], 40 N. E. Rep. 491.)

**ELECTION—AUSTRALIAN BALLOT.**—Though the judges of election do not preserve the ballots in the manner specified by the statute, they may be counted in an election contest if there is evidence that they have not been tampered with. (*Murphy v. Battle* [Ill.], 40 N. E. Rep. 470.)

**JUDGMENT—CONFLICT OF LAWS.**—No suit can be brought in Missouri upon a Kansas judgment after it has by the law of that State become dormant and dead. (*St. Louis Type Foundry v. Jackson* [Mo.], 30 S. W. Rep. 521.)

**LANDLORD AND TENANT—SURRENDER OF LEASE—ACCEPTANCE.**—A lessee removed before the expiration of the term without notice, and left the key with a neighbor for the lessors. The lessors notified the lessee that he would be held for the rent for the whole term unless the premises were re-rented, that they would try to re-rent the same, and that the lessee might aid in procuring a tenant; and the lessors thereupon placed the premises with a rental agent: *Held*, that there was no acceptance of a surrender of the premises. (*Lane v. Nelson* [Penn.], 31 Atl. Rep. 864.)

**MORTGAGE ON GROWING CROPS—ESTOPPEL.**—A creditor of a lessee who, without knowledge of the fact that the lessor had a mortgage on such lessee's crop, induced the lessee, without false representations, to remove his grain to the creditor's farm to be threshed, and afterwards attached it, was not estopped to deny the continuance of the mortgagor's lien on the crop after it had been removed from the land on which it was grown. (*Horgan v. Zanetta* [Cal.], 40 Pac. Rep. 22.)

**REMOVAL OF CAUSES—DISCONTINUANCE AFTER REMOVAL.**—B, a citizen of Indiana, commenced an action for personal injuries, in a court of that State, against three defendants, two citizens of Indiana and one of Ohio. The Ohio defendant removed the cause to the Federal Court on the ground of local prejudice. B then discontinued the action as to the Ohio defendant, and moved to remand. *Held*, that as the cause no longer involved a controversy properly within the jurisdiction of the Federal Court, it should be remanded. (*Bane v. Keefer* [U. S. C. C., Ind.], 66 Fed. Rep. 610.)

**TRUST—TRUSTEE OF LAND.**—The estate of one who held land in trust for a widow and her children, and without their consent expended rents and profits in purchasing an outstanding title to the land, is liable for the amount so expended. (*Shaw v. Devecmon* [Md.], 31 Atl. Rep. 709.)

**WILLS—CONTEST—OPINION EVIDENCE.**—A physician who has attended testatrix professionally for several years can give an opinion as to her mental capacity at the time of making the will, without stating the facts on which his opinion is based. (*Crockett v. Davis* [Md.], 31 Atl. Rep. 710.)

# The Albany Law Journal.

ALBANY, JULY 27, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

SO much has been written in various periodicals in regard to the enforcement of the liquor law in New York city, that the subject has been broadly advertised, and it is apparent that one or the other political party will undoubtedly acquire some advantage from the controversy.

As was intimated in our article on enforcement of law, which appeared in the editorial columns of this journal very shortly ago, it is unfortunate that such issues should not be settled by themselves and on their own merits without regard to the partisan feeling and without being intermingled with other semi-political questions of an election. If the people of New York city and of the rest of the State desire some modifications and changes in the existing law, their feelings should be respected and no political boss or party should be allowed to change their wishes by sharp practices and unfortunate subterfuges. It is a matter of regret that so many statutes are yearly enacted by legislatures, which are affected by varied terests, and it is asserted by corrupt practices, for the value and quality of the work is overlooked in the mad rush which is brought about by catering to the interests of those who are fortunate enough to have a "pull." It is undoubtedly true that if a vote were taken on the question, as to whether the Legislature should meet once in two years, that it would be carried by a large and overwhelming majority. Not that the people have any objection to such statutes as are necessary to carry on legitimate and proper purposes of the government, but solely because it is too apparent that party greed and glittering gold are at the root and foundation of more than half of the laws which receive the sanction of the legislature and the executive.

The liquor question, if submitted to the people, it would seem, would receive their careful consideration and reflection, and would re-

sult beyond doubt in the modification of the law so that it would not have the aspect of some of the blue laws of Connecticut. The possession of money should not entitle one man to a privilege which his unfortunate brother cannot reach, and unless it is desired to have a strict enforcement of a severe and austere law like the present one, it is better that there should be a change so that the people will respect a law because they recognize that it must be and will be enforced.

In Iowa the liquor question is again rampant. A year ago the Republicans flattered themselves that they had got rid of it by passing the so-called "mulct law" under which prohibition was not repealed, but localities were allowed to have saloons and the majority of the voters petitioned for their establishment. The new law has not satisfied all parties and the establishment of saloons under the protection of the law is a perpetual ground of offense to the extreme element on one side, while the rigorous requirements regarding signatures to petitions offend those who believe in a local option system, and a decision as to license or no license by a popular vote. Then, of course, the unfortunate controversy arises as to whether the signatures are genuine, and it is easily remembered that the saloons at Des Moines have been recently closed pending the determination by the courts as to whether there were irregularities in the petition.

In speaking of this question, *The Nation* recently very appropriately said:

"Though prohibition makes no progress, there is in all parts of the country a growing sentiment in favor of such restrictions upon the liquor traffic as public sentiment will enforce. A notable evidence of this tendency is found in the new liquor law passed by the Indiana Legislature, which has just gone into effect. The principle of local option is one of its chief features, the majority of the voters of any ward of a city or election precinct having the power to prevent the establishment of a saloon within its limits by filing a remonstrance, and such remonstrance acts as a bar for two years. Another important feature of the law is the attempt to remove all attractions except liquor itself from the saloon. Neither games, nor music, nor slot machines, nor any other device for attracting patronage will be allowed; chairs and tables

and lunch counters are forbidden. All places where intoxicants are sold must be situated upon a street or alley, and neither screens nor any other obstruction to a full view of the interior from the outside will be permitted. The liquor dealers are going to contest the constitutionality of the law, but unless there are some technical defects not apparent on the surface, it is likely to stand."

It would seem that there have been enough bickerings and subterfuges in relation to the liquor question. Either the people want to have a moderate sale of the commodity on Sunday or they do not, and as our form of government recognizes the majority, a fair submission to the people at a special election will decide the question for many years, and would at least put an end to the unfortunate shilly shallying on the question, which has been of serious detriment to the respect which should be accorded to the laws of the State.

We alluded in these columns a short time since to the decision of the Queen's Bench in *Grilliam v. Trust et al.*, which determined the question as to whether a servant can delegate his authority to another. The facts were, the defendants sent out their omnibus in charge of a driver and a conductor. When the omnibus was about a quarter of a mile away from the defendant's yard, a police inspector, being of opinion that the driver was drunk, ordered him to discontinue driving.

The Court of Appeal, in their decision, Lord Esher writing the opinion, say: "A question of great importance has been raised in this case, whether a servant can in a case of necessity delegate his authority to another person and so make his master liable for the negligence of that person in carrying out the servant's duties. That question we have not now got to decide. A servant employed for a particular purpose clearly cannot delegate his duty to any one else unless, possibly, in cases of necessity. The question for our decision is, not what will happen, assuming that there is a case of necessity. It is, whether there was any evidence before the County Court judge on which he could reasonably find that a necessity existed for the driver of the omnibus to delegate his duty to Veares. In the first place, I do not think that the County Court judge has found that any case

of necessity existed. He seems to have said that the facts found by him raised in law an inference that a necessity existed. But I will assume that he has in his judgment found that there was a necessity. The question for us to consider is, whether there was any evidence on which he could reasonably find that. Has a servant power to delegate his authority without first consulting his master? If a servant has an opportunity of consulting his master, there can be no need for him to act on his own view of affairs. The facts of this case are: That there was an omnibus in the street, the driver being incapacitated through the orders of the police from driving it, and the yard of the driver's master being only a quarter of a mile away. Could not the omnibus have been left in reasonable safety to stand in the street while some one was sent to the yard to ask the master what was the best thing to do? It is obvious that the omnibus might well have been left where it was, while the owner was being communicated with as to what should be done. Then the judge, if sitting with a jury, should have directed them that there was no evidence of any necessity justifying any delegation of authority, or, if sitting without a jury, he should have held that there was no necessity for the driver to act without first communicating with his master. The question for the Divisional Court was, whether there was any such evidence. In my opinion there was no evidence on which it can be said that a necessity arose for the driver to act without first communicating with his master. I may add that I strongly agree with what was said by Parke, B., in *Hawtayne v. Bourne*, *ubi sup.*, and Eyre, C. J., in *Nicholson v. Chapman*, *ubi sup.*, that the implied authority of a servant to act according to the necessity of a case is confined to certain well-known instances, such as that of a master of a ship, and the acceptor of a bill of exchange for the honor of the drawer, and in salvage cases. These cases are all exceptions from the general rule."

Although we cannot agree with many of the arguments used by Edward B. Whitney, assistant attorney-general of the United States, in his article in the *Forum* on "Political Dangers of the Income Tax Decision," yet on account of the ability of the writer, the treatise should

be read with interest, particularly by those who have carefully studied the subject and have watched the progress of Mr. Whitney, and read his brilliant arguments in favor of the constitutionality of the act of Congress. The article is still further of importance in connection with the opinion of ex-U. S. Senator Edmunds, which we recently referred to. Mr. Whitney begins with a statement of how one man has decided by his vote many questions of great moment, such as the legal tender decision. Continuing, he says:

"The Constitution gives Congress the power to lay taxes and duties. It provides that direct taxes shall be apportioned among the several States according to their populations as shown by the census. It puts no such restriction upon duties, which are, on the contrary, to be uniform throughout the United States. The court decided in 1880, in Judge Springer's case, by a unanimous vote of the seven judges then sitting, that an income tax essentially like the late one was a duty and not a direct tax, and therefore valid. A similar ruling had been made in 1868, by a unanimous decision of the eight judges then forming the tribunal, upon the validity of a corporation income tax; and in these and other cases the court had said that the definitions had been substantially settled as early as the case of Mr. Hylton's carriage tax, in 1796. Congress, therefore, in enacting the revenue law of 1894, and providing that a certain portion of the existing deficit should be met by the proceeds of an income tax, acted in reliance upon very clear and definite rulings of the Supreme Court itself. It could not have laid any tax with greater assurance of safety. It could not foreknow the future actions of the court. It had to shape its legislation by the decisions of the past.

"Five judges now rule, however,—and these five are entitled to speak for the court,—that the seven of 1880 and the eight of 1868, that Chief Justices Chase and Waite, Associate Justices Nelson, Miller, Strong and Bradley and the rest, were all mistaken; and that an income tax is a direct tax, not a duty. The argument by which this conclusion is arrived at is, of course, a historical rather than a legal argument. The point in issue is the meaning of certain words in the parlance of the eighteenth

century. A considerable amount of material was laid before the court by the appellants' counsel, such as fragments of partially reported debates, controversial pamphlets, private letters, official reports. Some material was added by the research of the court; some, at the second hearing, by the government, which, at the first hearing, had stood upon the decisions alone; some by volunteer newspaper contributors, who probably gave the court the benefit of their individual researches by means of marked copies. Much of this material will be found valuable by the historian. He will probably, however, regard the result as requiring further review on his own part, for the time was far from sufficient for such investigation as a historian would consider it necessary to devote to such a question, or as a lawyer or judge would under ordinary circumstances expect to spend upon it. The rehearing, for instance, which was not expected before October, was brought suddenly on upon thirteen days' notice; and such preparation as the government was able to make upon these historical matters was made within that period. Probably much evidence of importance bearing upon this question will be found in the future."

Mr. Whitney then gives a short history of some of the opinions and cases which have been decided by the U. S. Supreme Court in regard to taxation.

Speaking of the constitutional limitation as to apportionment, Mr. Whitney says:

"The principle of apportionment is grossly unfair as well as impracticable. The industries of our nation are closely intertwined. Each section is partly dependent on the others for its support. Wherever the men with large incomes choose to settle themselves, the incomes which they enjoy are really the joint product of the industry of the entire nation. Each man should, therefore, pay his own share; and to apportion according to legal residence would be to make a sectional tax, discriminating in favor of those parts of the country where wealthy people like to congregate.

"It may safely be assumed that the nation will levy no income taxes under this new theory of the Constitution. Nor can the States levy such taxes efficiently. The sources

of a large income are often scattered all over the Union, and the State which its fortunate possessor selects to reside in cannot tax them. To make the tax efficient the owner and his property should both be within the jurisdiction. State income taxes never have been successful, and the result of this decision is probably to release individual incomes from all effective taxation."

Mr. Whitney then dicusses the consequences, in part, thus:

"It is easy to make light of such a decision in times of peace, when we have immense revenues from customs duties to help us along. But shall we always be at peace? And can we count upon the customs duties in times of war? Many prominent men—senators, representatives, journalists and aspirants for high office—would like to see us plunge right off into a war with the Kingdom of Great Britain and Ireland. Let us assume that they succeed in getting us to do so. Let us assume that no other nation is dragged into the war against us; that no injury is done to our commerce by hostile fleets; and that our customs duties therefore remain as productive as ever upon imports from neutral nations. Still we lose at once our revenue from the products of the British Empire, two-fifths, say, of the custom-house receipts. Add to this deficit the expenses of the war, and we have the problem confronting the secretary of the treasury. How is the money to be got? It will be wanted quickly, not by any slow process of apportionment and valuation. Doubling the existing duties would be no safe reliance. As customs duties are raised, their product is apt to decline. Excises will of course multiply. Heavy duties will be laid on gross receipts from transportation, most of which, like our present duties and excises, will rest on the shoulders of the poor man. But will this suffice to make up the share which ought to be borne in such a war by the present generation? That will be the problem. And as the Supreme Court has closed the door upon wealth, perhaps the nation will find its way out through another door opened by the same court. Perhaps it will pay its way by a new issuance of greenbacks. Because the wealth of the country cannot be taxed effectively, the impositions upon the poor man will be doubled, and an immense debt again established for his

descendants to pay. Part of this debt will probably be in the shape of more fiat money, to plague rich and poor alike for a generation to come.

"Moreover, in time of stress, it is most important that the nation may have recourse to taxes which will be both certain and elastic; in other words, to taxes which may be increased or diminished with some certainty as to the amount of money which will thus be obtained. This is the case with income-taxes. Great Britain, when it adds a penny in the pound to the tax, knows pretty nearly what additional revenue will come in. This is not the case with excises or customs duties, especially the latter. Increasing the duty on an imported article often means decreasing its importation. On the other hand, if the duty remains unchanged, or even is reduced, still its importation may decrease from decreased use or from growth of domestic manufactures.

"I have said that excises and customs duties rest on the shoulders of the poor man. I mean the man of moderate means, whose income is exhausted in the support of himself and his family in a moderate degree of comfort. Excises and customs duties come mainly from articles of general consumption. It is admitted by most statesmen and economists that they are mainly paid by the man whose income mostly goes out in obtaining such articles; and that this man of moderate means, when the revenue of the country is derived entirely from such taxes, pays far more than his share in proportion to his income. This is especially the case with what are called 'specific duties,' which, as John Stuart Mill said in England, are 'a flagrant injustice to the poorer class of contributors, unless compensated by the existence of other taxes from which, *as from the present income tax*, they are altogether exempt.' So Senator Sherman in 1870 said that the income tax of that day was 'the most just and equitable tax that is now levied by the United States of America, without an exception,' because it was the 'only discrimination in our tax-laws that will reach wealthy men as against the poorer classes of people,' who still 'necessarily pay nine-tenths of all the taxes.' This possibility of a balance between the poor and the rich is removed by the new constitutional interpretation.

"There is another possible effect of this decision, worthy of grave consideration. I have already mentioned one point of similarity between the Federal Supreme Court and the British House of Lords. There is another. Both can be 'packed' if the other branches of the government wish a decision reversed. For this and other reasons it is of extreme importance that the Constitution should be regarded by the voters of the country as a thing fixed and immutable save by an amendment adopted by themselves,— as a form of government which can indeed expand and adapt itself to new phases of civilization, but which is not subject to alteration according to the varying personality of any single body of men, however august. This is of especial moment as to those constitutional provisions which have a political aspect. Much of the reverence paid to Supreme Court decisions is due to the fact that, except in the damaging legal-tender cases, that court has, prior to the present year, so consistently followed the doctrine of *stare decisis* when expounding such provisions. The American people have been taught that the Constitution grows, but does not change, except when they themselves openly set to work to change it. The stability of our government has become the wonder of the world.

In conclusion Mr. Whitney says: "I find it hard to divest myself of a fear that the new principle, if it shall receive any further application, will open a new era for the court. The reasoning which segregates the nine judges of to-day from the nine judges of thirty years ago, which charges the present judges with the responsibility of reviewing the errors of their predecessors, destroys the continuity of the court in the public mind. The same reasoning segregates each individual judge from his eight associates, and properly places his individual portrait at the head of the column which sets forth his individual opinion or records his individual change of mind. But the public is not satisfied with an unlimited veto-power in any individual. If the court establishes the doctrine of change, the people, by adding new justices, can control and direct the movement. They can bring up again this question of the taxability of wealth. That, probably, is inevitable. They can bring up again the national bank, the control of com-

merce, the legal-tender notes. They can inquire into the constitutionality of the Fourteenth and Fifteenth Amendments. When some new socialistic law is wanted, they can demand a convenient constitutional power from their packed Supreme Court, as a Congressional majority looks to its speaker for a convenient parliamentary rule. Will wealth, for the present moment released from a small pecuniary assessment, profit or loss in the end by the new gospel of instability? It may be well for the wealthy reader, laying aside for an hour the newspaper which daily reflects his ideas, to think this question over by himself.

"The Supreme Court decision did not turn upon any of the special objections raised to this particular income-tax. Hence a discussion of this tax, as distinguished from the ideal income-tax, is not appropriate here. The exemptions were unusually great, owing to amendments secured from the Senate by associations claiming to be *quasi-charitable* in character. Otherwise it differed from its predecessors only in details. The lowest income taxed was \$4,000, that being assumed to be the upper limit of the incomes unfairly discriminated against by previous tariff and internal revenue taxation. The limit of the income-tax of 1870 was \$2,000. That of the highest grade of the graduated income tax of 1864, discussed in Judge Sprigge's case, was \$10,000.

"The question whether an income-tax can properly be levied in time of peace is one that cannot be decided by a court. Congress is the judge of the necessity, at any given time, for any tax which can be levied at all. Our ancestors made many promises, when they were trying to secure the ratification of the Constitution, as to the rarity with which direct taxation would be imposed. As soon as they began work, however, they admitted that it was a subject as to which policy must be the only guide. Any tax levied may properly be called a war-tax so long as the treasury is struggling with an immense annual deficit, where, but for pensions to veterans of the civil war, we should have an annual surplus of double the amount."

We publish in this issue of the LAW JOURNAL, an article on "Legal Education and Admission to the Bar," by George Wharton Pep-



per. This article was read at the first annual meeting of the Pennsylvania Bar Association, at Bedford Springs, on the 10th day of July, 1895. The meeting was one of the most successful State Bar Association gatherings of lawyers which has been recorded, and the papers read at the meeting were all of special merit and value. Mr. Pepper is one of the leading lawyers of Philadelphia, and though a young man, has already been recognized as a lawyer of brilliant attainments and well read in his profession. He is a lecturer at the Law School of the University of Pennsylvania, editor of the American Law Register and Review, and has a large practice in the Quaker City. The way in which Mr. Pepper has handled his subject gives a slight idea of his ability, while his thorough knowledge of the subject of legal education gives the article a prestige which few authors could attain.

#### LEGAL EDUCATION AND ADMISSION TO THE BAR.

A paper read before the Pennsylvania Bar Association at its First Annual Convention at Bedford Springs, Pa., by George Wharton Pepper, of Philadelphia.

Ralph Stone, Esq., of Michigan, recently read a most interesting paper before the New York State Bar Association on "The Mission of State Bar Associations."<sup>1</sup> The address was a thoughtful one and it is a significant fact in connection with it that the author considers the primary mission of a bar association to be in the field of legal education. "There is," said Mr. Stone, "no legal problem before the lawyers of this country to-day that should receive more attention than this. On its solution depends the future, first of American jurisprudence, and, second, in a very great degree, of the social and business and commercial interests of the people, since lawyers, of necessity, influence legislation more than any other class." It is, therefore, peculiarly fitting that the Pennsylvania Bar Association, in its first annual gathering assembled, should devote at least a portion of its time to the consideration of certain problems in legal education and certain practical questions with respect to the standard of preparation required of candidates for admission to the bar.

With this end in view, I propose *first*, to say a few words in regard to methods of legal study which have prevailed in the past and to consider how far, if at all, the conditions of legal study have changed in our own time; *second*, to review the efforts that

are being made throughout the country and in this commonwealth to accommodate legal instruction to existing conditions; and *third*, to suggest certain practical considerations with respect to legal study in Pennsylvania and the relation of the Bar Association to that important subject.

I. In referring to methods of legal study which have prevailed in the past, I have no intention of rehearsing in your hearing the now familiar story of the growth of the English system of studying law and of the rise of the Inns of Chauceries and of the Inns of Court. I suppose that this story will always represent to the English-speaking lawyer the romance of the history of the law. It is in connection with these "noblest nurseries of humanity and liberty" that our imaginations like to picture the legal giants of the past, fitting themselves by a long and arduous course of preliminary training for the mighty legal feats which they were destined thereafter to accomplish in a wider arena. Many a pen has traced the quaint and pleasing picture. By no one has the outline of the story been more gracefully given than by one of the officers of this Bar Association, Samnel Dickson, Esq., in his address on "The Methods of Legal Education," delivered four years ago before the Law School of the University of Pennsylvania. He there describes that *sanctum sanctorum* — the Middle and Inner Temple, about which literary, as well as professional associations, are thickly clustered. He reminds us of the worthies who there gained their first acquaintance with the common law, and especially of Blackstone, who wrote part of his Commentaries at No. 2 Brick Court, "in spite," as Mr. Dickson puts it, "of the noise made overhead by Goldsmith and his friends, who played blind man's buff before supper and wound up with dancing." Our purpose is more strictly a practical one and, therefore, we cannot permit our minds to dwell long upon the pictures which such descriptions call before the inward eye. To us, however, it will always be an interesting and significant fact that the learning of the Temple and the inspiration which must have come from work done amidst such surroundings has found its way in direct line of descent into the very midst of our own commonwealth, in virtue of the circumstance that many of those Pennsylvania lawyers whose names we most revere received their legal education in the Inns of Court, and studied at the feet of the Gamaliels who adorned the English bench in the last century.<sup>1</sup>

When I speak of methods of education that have prevailed in the past, I have in mind a much more

<sup>1</sup> The Bar is familiar with the "History of the Antiquities of Inns of Court, first published in 1790. The latest work on this subject is Loftie's "Inns of Court." London: 1895.

<sup>1</sup> See LII *Legal Intelligencer*, p. 185.

recent past than that to which I have just adverted. I refer to the office system of instruction which (having its counterpart in the mother country and in sister States) once represented the only road along which students of the law could travel. To some extent, perhaps, the system still exists in Pennsylvania and elsewhere, but the changes that have taken place in the administration of the ordinary law office and the rise of the modern law school seem to indicate that the system is obsolescent—if not altogether obsolete. I can readily imagine that there are many among you who question the accuracy of the statement just made. They would, doubtless, seek to contradict it by pointing to the hundreds and hundreds of students registered in the offices of practicing members of the bar throughout this great commonwealth at the present time, the head of the office being their preceptor of record and charged (in name at least) with the responsibility of directing their studies. In referring to the system of office instruction, however, I had in mind a relation between preceptor and student which is not merely nominal but real. I am aware that the custom of office registration is still general, and that there are many portions of the commonwealth in which it may be said to be universal. In the old days, however, there was an almost feudal relationship between the law-lord and student. The preceptor actually mapped out the course of study and actually supervised the reading of the student. Regular quizzes were given and given frequently. There was constant intercourse in those days between the head of the office and the merest tyro who was opening his Blackstone for the first time. In return for this instruction and guidance, the student performed services of real value to his preceptor. Before stenography was common, before the typewriter was invented, and before printing was as commonly resorted to as it is now in the preparation of legal documents and briefs of various sorts, the student did the writing of the office, copied letters, wrote briefs, prepared pleadings and, in many instances, drew deeds of conveyance and other title papers. An intelligent attention to this routine office work resulted in giving to the student a training in the principles and practice of his chosen profession which, when tested by its results, unquestionably supplied the bar with a body of trained and competent lawyers.

But, to-day, the mere fact that numbers of students are registered in numbers of offices throughout the commonwealth is a fact which, in itself, gives us little or no information about the alleged decadence of the system of instruction which I have outlined. The true state of the case, as I understand it, is that in the average modern law office, whether in great city or smaller town, the time con-

sumed in attention to office work is so great that the preceptor has little or no time to devote to the serious task of instruction; and, so far as the preceptor himself is concerned, the student derives no benefit from working within the sphere of his influence. The introduction of modern business methods into the law office and the general employment of stenographers and typewriters has put upon other shoulders tasks which formerly fell to the student's share; and as far as the work of running the office and administering its business is concerned, the student has, in most instances, become the fifth wheel of the conveyance. In the city of Philadelphia the offices where careful and systematic instruction is given to the student by responsible persons may be counted upon one's fingers. I use the expression "responsible persons" in view of the fact that in some offices where the system nominally survives, the duty of quizzing is wholly delegated to clerks or assistants of very moderate intellectual ability and of very slight legal attainment. There are many cases in my personal knowledge in which the student, during the three years of his tutelage, never once came in contact with his nominal preceptor in regard to legal matters; and the relation between them (excepting in so far as it existed on paper) consisted in the exchange of conventional greetings.

Upon the whole, therefore, I have ventured to assert that the office system of instruction is, or is fast becoming, a thing of the past. I do not mean to assert that it has been abandoned because it was inefficient. In many respects it was a better system than any which compete for its place. My belief, however, is that a change of conditions has made its continuance a practical impossibility. Its revival, therefore, need not be discussed. If the circumstances under which the modern lawyer practices his profession have led to the decay of the office system, any effort to reinstate it must fail unless we are prepared to undertake the very serious task of effecting a radical modification of modern professional methods.

I venture to suggest, also, the thought that the rapid growth and development of the law during the last half century and the multiplication of new fields within which legal principles must be applied, have led to a demand for a system of instruction more comprehensive in its scope than that which was given under the older system. In the old days the student read his Blackstone and Kent and grappled with Coke upon Littleton and Fearn on remainders. Sometimes Story's text-books on Equity and Contracts were put in his hands, but the office quizzes as a rule were confined to the law of property and to the intricacies of practice and pleading at law. Blackstone's single chapter on Corpora-

tions was thought to be a sufficient treatment of that branch of the law for the student's purpose, and the great commentator's summary of the law of contracts in another chapter, represented the extent to which it was thought desirable that the student should dip into that particular fountain of learning. The separate study of torts as a body of law was not then common. Special developments of the law of contracts—such as insurance, bills and notes, partnership, the contracts of carriers and the like, were not specifically included in the student's curriculum. Constitutional law was taught in its elements; but constitutional law, when the office system was at its height, was a body of law far less formidable in its bulk (although perhaps its outlines were no less grand and imposing) than the constitutional law which we know to-day. A *laudator temporis acti* would, perhaps, sum up the situation by saying that in the old days it was a case, not of many things, but of much. In a sense this is true. A few things were taught, but they were taught thoroughly and well. At the same time the stage of development which the law had reached made it possible to disregard the many things for the few, without leaving a serious gap or hiatus in the student's preparation. One or two quizzes a week enabled the preceptor to give to his students all the guidance that was necessary, and the narrow range of subjects made it possible to conduct an exhaustive examination into the underlying principles of the subjects of study. I think it may safely be said under the conditions that prevail to-day that, in the vast majority of cases, so meagre a supervision of the preparatory work as is represented by two or three quizzes a week will result in bringing to the bar students whose preparation has been fragmentary and lacking in symmetry and proportion, in the sense that their familiarity with a given subject of fundamental importance is greater or less as the case may be than their familiarity with another subject of equal importance. What they have learned as the result of their own unaided efforts, they have learned after wasting a great deal of time in floundering about in mire from which a helping hand might readily have extracted them. Whole fields of law are *terra incognita* to students who complete their studies (if the word "complete" can be used in such connection) without the advantage of intelligent advice in mapping out a course of study and constant assistance in prosecuting it. I know that there are many who will reply that a student's legal education *begins* only upon admission to the bar, and that, for practical purposes, it makes little difference whether or not he is wholly ignorant of the laws of the commonwealth at the time he takes his oath to support them. This proposition would probably not be seriously maintained

by any intelligent person in all its baldness; for if it were, the logical conclusion would be that preparatory study and examinations for admission to the bar might be forthwith abolished, and that the only requirement insisted upon as a condition of entering upon the practice of the law should be (in imitation of the rule prevailing in many of the Western States), the possession of a good moral character and an unlimited amount of assurance. Probably the real view of many of those who make this extreme assertion is merely that preliminary study should be aimed primarily at the acquisition of a knowledge of legal principles in their application to legal problems of ordinary occurrence, and that the student should not be expected to be possessed of extensive and minute information upon a great variety of legal subjects. In other words, they but echo the exclamation of Lord Coke: "God forbid that counsel should know the whole law." While uniting in this pious ejaculation, we must not forget that sooner or later legal knowledge must be acquired by study and not by attrition, and that there are vast domains of legal knowledge which may profitably be explored otherwise than in connection with active practice. It should seem, therefore, to be the part of wisdom so to utilize the three years set apart under our system for legal study as to enable the student to gain a maximum knowledge of legal principles, and to explore as many important fields as possible before the distractions of active work begin. In other words, it surely cannot be seriously disputed that it is an advantage to come to the bar with a large stock of previously acquired legal knowledge; although it should seem that even this proposition would be denied by those who advocate the extreme view above adverted to. Of course, a student cannot master the whole law. Under our system of jurisprudence it is even doubtful if such a result can be accomplished in a lifetime.\* But the conclusion from this consideration is merely that we have before us a *problem of selection* as to what the student shall study and a *problem of method* as to how he shall do it. This is another way of saying, so far as the problem of selection is concerned, that it is necessary to determine what we mean by the proposition referred to a moment ago, that the student of law should familiarize himself with the application of legal principles to problems of "ordinary occurrence." What are the problems of "ordinary occurrence" in the practice of the modern lawyer? To answer this question careful observation and much thought are undoubtedly necessary. It is, to say the least, just as important that the student who comes to the bar to-day should know (for example) what is meant

\* Ihrling, cited by Committee of Am. Bar Assoc., p. 336 of Vol. XIV of reports.

by the proposition that the capital stock of a corporation is a trust, fund for the payment of creditors, as it is that he should know the points of distinction between a contingent remainder and an executory devise. It is as likely that the young lawyer's first client will be anxious to have his rights ascertained and defined as a stockholder in or the creditor of a corporation, as that he will be a landed proprietor with a trust to settle or a will to make. The old-fashioned idea that no lawyer need familiarize himself with corporation law until he has been twenty-five years at the bar, is inapplicable to a commercial condition, where corporations of all sizes, great and petty, carry on an increasing proportion of the business of everyday life. This means that in solving our problem of selection, we must select for the student the field of *corporation law* as a field in which at least some of his time must be spent. A similar observation applies to other special subjects, which twenty-five or fifty years ago were justly thought unnecessary to the student's education. All that I plead for is a recognition of the fact that American jurisprudence is developing; that almost every year brings a change in the relative importance of the various subjects of legal study; and I assert that it is as unintelligent to assume that the student's curriculum of half a century ago is the curriculum best adapted to modern conditions, as it would be to assume that a medical student could gain an adequate knowledge of medical science by following a course of study prescribed before the recent advances of knowledge in respect of the propagation of germ diseases and the possibilities of antiseptic surgery.

I think, therefore, that it may be said with confidence, as the result of the foregoing considerations, that the conditions of legal study have changed and that they have changed because of the decline of the office system of instruction; and I think we can say further that the office system of instruction has become and is becoming less and less effective for two reasons: first, because the introduction of modern business methods into legal practice makes it impossible to give the student the place in the office which he once occupied; and, second, because the multiplication of subjects of study makes it impossible for the preceptor to spare the time and attention necessary for the direction of the student's work. This leads me to speak of the efforts that are being made throughout the country and in this Commonwealth to accommodate legal instruction to the changed conditions.

II. It is to the operation of the causes to which I have referred above that we must attribute the great increase in the number and importance of law schools throughout the country. In the reports of the American Bar Association for 1891 (Vol. xiv) a

tabular statement is inserted at page 353 which shows that between the years 1878 and 1890 no less than seventy-four distinct schools of law were at different times in existence and in operation in the United States. It is in my judgment most unphilosophical to attribute the decline of the office system of instruction to the growth of the law schools. It seems far more natural to suppose that instruction in these institutions is being supplied to meet a demand which is felt throughout the length and breadth of the country. These schools differ greatly among themselves. In some the course is for one year only; in some the course is two years, and in others three. In some instances entrance examinations are required before the student can matriculate, but in the great majority of cases these entrance examinations are so elementary in their character that almost any school boy could pass them; and President Eliot, of Harvard, was substantially right when he said that into most American law schools a man "can walk from the street." They have sprung up here and there in response to a local demand for help and guidance in the prosecution of legal study. For a long time there was no organized effort to bring about co-operation among them in the direction of solving our Problem of Selection—in agreeing, that is, upon a course of study; and even today there is but little effort to bring about co-operation in the solution of our problem of method—in agreeing, that is, upon the way in which instruction can best be given. Within the last six years, however, the American Bar Association has been doing noble work in these fields. Its committee on legal education has devoted much time and thought to the task of gathering statistics from all over the world and of drawing from them such conclusions as form the basis for suggestion and recommendation. The establishment of a section on legal education by the American Bar Association is another sign of the times in this connection.

Another great advantage of the method of instruction by original research is to emphasize the importance of *principles* in the solution of a legal problem presented to the mind, as distinguished from an undue deference to decided cases. This point was made admirably clear by Sir Frederick Pollock, the distinguished professor of jurisprudence at Oxford university, in the address delivered by him a few days ago before the Harvard Law School.<sup>1</sup> The

<sup>1</sup>The occasion was the celebration of the twenty-fifth year of Professor Langdell's connection with the Harvard Law School. This distinguished teacher has consistently advocated the method of instruction in question during this period and the credit for its final triumph is in large measure due to him.

great disadvantage of a system of instruction by lectures or text books is that the student comes to believe that no statement of law can be correct unless a direct decision among the adjudicated cases can be found which supports the statement in the precise form in which it comes up for discussion. The effect of such a habit of thought is to produce a generation of case lawyers whose first thought when a question is propounded to them is to ransack first their memories and then the digest for particular decisions which bear a resemblance to the case in hand. These men are never sound lawyers. They are utterly unable to appreciate the fact that the law, in a given field, may be in effect, the result of a progressive development which is still going forward so that no statement of present law is accurate unless it is, so to speak, a step in advance of the last decided case. They are, except in the case of men of rare intellectual ability, incapable of bringing to bear upon the solution of the problem the accumulated result of their own generalizations from experimental study, entirely apart from the similarity or dissimilarity, upon the facts stated, between the case in hand and any case or cases reported in the books. Considerations of this kind have led to this solution of the problem of method to the more or less complete exclusion of all other methods at institutions scattered all over the country—as, for example, at the Harvard Law School in Cambridge, at the Columbia Law School in New York, at the Law School of our own University in Philadelphia, at the Northwestern University in Chicago, at the University of Iowa in Iowa City, and at the Leland Stanford, Jr. University in California—as well as at many other institutions of recognized standing. A careful consideration of the relative merits of different systems, with a preponderance of authority in favor of this, the inductive method of teaching law, is to be found in the papers read during the last few years before the American Bar Association and published in their annual reports.

It seems, therefore, that the law school necessarily represents the modern method of imparting legal instruction, and I have given in outline the solution of the problem of selection and the problem of method reached by the law school of our own University as being the typical modern American law school. It must not be supposed for a moment, however, that the attendance upon the Law School of the University of Pennsylvania represents the total number of Pennsylvania law students who are receiving law school instruction. You will find that many Pennsylvania men are registered as students in the Harvard Law School, in the Yale Law School, in the Cornell Law School, in the Columbia Law School and elsewhere. Indeed, I understand that

there is a carefully planned movement on foot to establish a law school in the City of Pittsburg, so great is the demand for law school instruction in the western part of this commonwealth. As an instructor in the Law School of the University of Pennsylvania, I may say that it has given us pleasure to welcome within our gates the many students from western Pennsylvania who have come to our school to pursue their studies; and I may say that we are prepared to receive them in the future, no matter in what numbers they may come. I feel certain, however, that if the men of western Pennsylvania establish a law school of their own, we shall find it a difficult task to afford better means of instruction than that which will be obtained there; for I am confident that it will receive the support of a bar which in my judgment has no superior; if indeed it has an equal, within the confines of this great commonwealth.

The result of my review of the efforts that are being made throughout the country and in this commonwealth to accommodate legal instruction to existing conditions is to establish the fact that legal instruction is generally given by means of law schools, and that wherever it is possible to do so, office instruction is in this way either supplemented or superseded. The far seeing committee on legal education of the American Bar Association had recommended as long ago as 1879 that a law school be established in every State in the Union. This recommendation has indeed not been literally carried out, yet (in the words of the report of that committee for 1890, Vol. XIII, page 328) "so decided has been the public and professional verdict in favor of that method of studying law that there are now about fifty law schools in the country, or more than one to each State, even with all the recent additions to the number of the latter." That there is vast room for improvement in our American law schools is a proposition which no one will seriously dispute. The evils that exist and the possibilities of redressing them are forcibly brought out in a paper in the *Forum* for May, 1895, in which President David Starr Jordan, of the Leland Stanford, Jr., University, writes with vigor under the caption "Pettifogging Law Schools and an Untrained Bar." It is the conclusion of the learned committee of the American Bar Association, from whose reports I find it necessary to quote so often, that no American can examine the data relating to legal education in Russia, Sweden, Portugal, Denmark, France, South Australia and certain other countries referred to in the report "without a feeling of mortification and of serious distress at the thought that our own country, claiming to stand in the forefront of the world, so far at least as

intelligence, equal law for all men and the administration of free government, are concerned, should be so far surpassed in this most important matter, alike by countries of even later origin, upon the other side of the world, using a system of law closely akin to our own, and by governments which we have been accustomed to regard as too autocratic for the proper development of a system of private law or legal education. Probably, if most American lawyers were asked respecting the profession in Russia, they would find that their chief notion on the subject was based on the story of Peter the Great, still repeated in all books to illustrate our own happy condition as compared with the subjects of the czar. According to this story, when Peter was shown the courts at Westminster Hall, and the throng of lawyers that conducted their business, he was astonished at their number and said that he had but two lawyers in his vast dominion, and proposed to hang one of them as soon as he returned. But the report received from Russia, and especially the pamphlet on 'legal education' in that country, which has been translated expressly for the committee's use, make it certain that the law schools of the United States bear no comparison in thoroughness, system and the scientific order of instruction with those of this autocratic government."

While, therefore I do not contend that the American law school is a perfect institution, I do venture to assert that it is through the law school that the legal education of the future is to be conducted, and that it is our duty as prudent and patriotic citizens to study the law-school problem, and to contribute our mite to the discussion of methods of improvement and reform. The study of these problems, it seems to me, is peculiarly the province of a great bar association like this, and it is my earnest hope that this assemblage will not disperse until the committee on legal education has been formally charged with the duty of making a patient and intelligent study of the many burning questions which we can all of us see if we will but open our eyes.

III. The subject upon which I was asked to speak included not merely "legal education"—to which hitherto I have confined my attention—but also "admission to the bar." It is to this latter topic that I invite your attention in conclusion, at the same time that I perform the duty which I set before myself at the beginning of this discussion—the duty of suggesting "certain practical considerations with respect to legal study in Pennsylvania and the relation of the bar association to that important subject."

Admission to the bar is usually gained throughout the Commonwealth upon passing an examination before a board of examiners selected by the judge or judges of the local courts from among the mem-

bers of the bar. This board is generally a standing committee, the term of service in which is a year or more. In Philadelphia county, with which I am most familiar, the number of members of the board is twelve, each member serving for a year—the term of one member expiring with each month. In other counties the board of examiners is drawn by the court from the bar for the purpose of conducting a particular examination, and is not a standing committee. The standard of attainment required of the student differs in the different counties of the State, probably the most searching examination being that required for admission to the Pittsburg bar. In some counties the examination is scarcely more than a formality; and there is an entire absence of harmony of opinion in respect of the lines upon which an examination should be conducted and the nature of the questions to which the student should be required to respond. It seems to me that this lack of harmony in the matter of entrance examinations is a serious evil, and I think that it is an evil which this bar association can do much to remedy. I am aware that there are many who maintain that it is proper to have a varying standard and diverse requirements for admission in the different counties upon the ground that each county has peculiarities of legal tradition and practice, and that to substitute an iron rule for the present flexible system would be a thing intolerable for the local bars. This view was expressed by Chief Justice Paxson, when he was asked to reply to the inquiry of the committee of the American Bar Association upon the advisability of taking the power to admit to the bar from the inferior courts and lodging it in the courts of last resort, to the end that there might be a uniform standard governing the examination of all candidates. The committee had sent to the chief justices of all the States a circular letter asking the question just outlined, and also inquiring their views as to the advisability of appointing a commission in each State to hold office for a term of three years, one-third of the members to retire each year, the commission to sit at stated times and at convenient places within the State to conduct the examinations for admission. As just intimated, the chief justice of Pennsylvania was inclined to answer both questions in the negative. "I consider it extremely desirable," said he, "that the subject be left in the control of the inferior or local courts, by which I mean courts of record, who are most familiar with the needs of their communities and of the personal fitness of applicants." (Reports of the American Bar Association, Vol. XIV, 1891, p. 807.) It is to be observed, however, that a large majority of the chief justices were in favor of introducing uniformity into the examinations for admission by delegating

to the State court of last resort the appointment of a commission such as has been described for the purpose of examining candidates for the bar. The evils of the present system were admitted by all those with whom the committee entered into correspondence. Not only are the evils resulting from lack of uniformity obvious to one who gives his attention to the matter, but the evils which proceed from impromptu examinations conducted by busy practicing lawyers are so serious that they cannot escape notice. The committee of the American Bar Association thus sums up the situation: "Every lawyer knows how very lightly the subjects of elementary law, and all such as require a systematic and accurate knowledge of it are passed, almost invariably, by a committee of lawyers taken on brief notice from the busy bar, usually in the busiest days of the beginning term, to examine a class of applicants. There is no time to refresh their remembrance of early studies, or to form a careful and just plan of examination. After a very few calls for the definition of this or that term, so put as to involve merely verbal memory, their inquiries are mostly prompted by cases in their recent experience, or by the latest text-books they have read. Too often they are asked almost at random, and deal with a list of scattered points rather than any important and comprehensive doctrine of the law. Almost inevitably they deal with the points contained in recent cases as most familiar to the questioner; and such law can rarely be elementary or of wide application. The very fact that it has been recently in question shows that the point was not long ago a doubtful one. To examine a class of students searchingly and yet justly so as to learn something more of them than their mere recollection of a few book phrases and a certain aptitude for guessing is not a light task, and requires careful preparation. The United States is about the only nation in the world, we believe, where it is usually permitted to be done *extempore*, and much of the decline in professional learning and professional character, so commonly lamented, may be traced to this lack of well-trained and vigilant watchmen at the entrance gates." Again, it is a hardship for the student to be examined on three years' work at a single sitting. He should be permitted to come up at the end of each year of preparation, and pass off the subjects already studied. Many other suggestions occur to us when we give the subject attention. Largely through the influence of one who is the honored guest of this bar association to-night, J. Newton Fiero, Esq., the New York Legislature has within a year actively recognized the need for reform in the matter of admission to the bar by providing that the examinations shall be conducted by a commission of three

members appointed by the Court of Appeals, the expenses of the commission and the compensation of the commissioners being met out of the proceeds of an examination fee charged to each student.<sup>1</sup>

In view of these considerations, the suggestion that I have to make to the Pennsylvania Bar Association is this: That this bar association delegate to its committee on legal education and admission to the bar, which, by the terms of its existence, must be composed of representative men from the different parts of the Commonwealth, the duty of formulating a curriculum or course of study to be recommended to the courts of the different counties throughout the State, and of preparing each year a standard series of examination papers upon that course, which papers can be put into the hands of such local boards of examiners as may see fit to use them. It will be observed that my suggestion does not contemplate any such radical change in our system as the delegation of the power to examine for the bar to our Supreme Court, nor does it contemplate the appointment of such a commission as has been recommended by the committee of the American Bar Association and actually created in New York. The suggestion contains no feature which threatens the right of the several counties to decide for themselves to what extent they will recognize local traditions in matters of practice and procedure. It is nothing more nor less than a suggestion that this bar association would do well to turn its attention to the problems of legal education and admission to the bar, and begin a campaign of education in this Commonwealth by supplying our local examining boards with the results of all that is latest and best in legal educational science. In this way the local boards would be enabled (without an expenditure of time and labor which it is impossible for them to make) to lay before their students a comprehensive and graded course of studies and finally to subject their students to a fair but searching examination of such a character as will test, not memory merely, but their understanding and their reasoning powers.

Personally, I am inclined to think that, certainly at this stage of the solution of the problem of legal education, it would be a grave mistake to advocate the erection of a central power which would control the local bars against their will. I think that there is, under the conditions which now exist in this State, a balance of advantages in favor of the deposit of the power to admit to the bar with the local judiciary and the delegation of that power to local boards of examiners. I am firmly convinced, however, that these separate boards should not be expected to add to their already onerous duties the

<sup>1</sup> See chap. 760, Laws of 1894.

task of solving knotty educational problems and of keeping abreast with all that is latest and best in educational science, while at the same time they are immersed in the active practice of their profession. This bar association, with representatives from every county in the State, many of whom have served, and are serving, and will continue to serve upon the local boards of examiners, is in a position to do a work of incalculable benefit to the cause of legal education by entering into correspondence with these boards, and by making common cause with them in the way that I have suggested for the attainment of the great end for which they are all striving. If a representative committee of this association were to agree upon a course of study in the essentials of the law and in the principles of jurisprudence which are of universal application, I feel sure that a large majority of our State judiciary and of the local boards would adopt that curriculum as the course of study required of candidates for admission. Such a committee would clearly distinguish between the study of branches of substantive law in regard to which the east and west and north and south of our Commonwealth are at one, and the study of matters of practice and procedure with respect to which a difference of opinion or custom may well prevail in different portions of the State. Our central committee could suggest courses in contracts, torts, real property, equity, corporations, crimes, partnership, evidence, constitutional law, wills and administration, Pennsylvania statute law, etc., etc., coupled with a recommendation of the best text-books and case-books that from time to time make their appearance in these fields, together with references to such current periodical literature as will throw light upon the student's work. Such a work done by a representative body and not put forth with any assumption of the power to command, or with any show of superior learning or intelligence, but solely upon the basis of that community of interest which subsists between those who are engaged in a common work, would undoubtedly command respect, and would, in my judgment, receive on every hand the most careful consideration. It is my earnest hope that the Pennsylvania Bar Association will enter upon the field to which I have endeavored to direct attention, for I feel sure that no department of activity is open to us in which there is more good work to be done, and that there is none in which our efforts can be put forth with greater hope of success than in the field of legal education and admission to the bar.

## Abstracts of Recent Decisions.

**HUSBAND AND WIFE — WIFE'S SEPARATE PROPERTY.**—The only test of the paraphernality of the title of a married woman, during the existence of the community, is to be found in proof of the existence, origin, and investment of her paraphernal funds, under her separate administration and control. (*Rouyer v. Carroll* [La.], 31 Atl. Rep. 292.)

**MARRIED WOMAN — POWER OF DISPOSITION.**—Where land is deeded to one on the express trust that he hold it for a married woman as a *feme sole*, free from any debts of her husband, she cannot, in the absence of express power in the deed, convey it without the joinder of the trustee; at least, where it was deeded to the trustee prior to the adoption of Const. 1868, art. 10, providing that the separate property of a married woman may, with the assent of her husband, be conveyed by her as if she were unmarried, as, even if that presents the imposition of restrictions, in a deed of trust for a married woman, on her power of alienation, it does not affect a prior trust. (*Kirby v. Boyette* [N. Car.], 21 S. E. Rep. 697.)

**MUNICIPAL CORPORATION — REVOCABLE LICENSE.**—Permission granted by a municipality to private parties to construct drains on highways amounts only to a revocable license. (*Eddy v. Granger* [R. I.], 31 Atl. Rep. 831.)

**NEGOTIABLE INSTRUMENT.**—Where one invests the payee of a note with the apparent title to it, and a trust deed securing it, an indorsee of the note and deed will take them unaffected by any private agreement between the payee and the maker. (*Travelers' Ins. Co. v. Redfield* [Colo.], 40 Pac. Rep. 195.)

## Correspondence.

### UNIFORMITY IN STATE LAWS.

*Editor of the Albany Law Journal:*

If you and your able correspondents succeed in the very laudable effort which has engaged your attention for the last six months, and induce the Congress of the United States to pass a well considered act, establishing a bureau or commission charged with the duty of persuading the various States to enact something like a uniform system of laws governing such general subjects as are liable to affect alike the common interests of all the people in all the States of the Union, you will be justly entitled to go down the ages not only as patriots, but as public benefactors.

No one acquainted with our Constitution, and the limited powers of the Federal government, will



contend for a moment that Congress has any constitutional authority to legislate for any particular State, or to dictate to any State what kind or character of laws shall be enacted for the government of its own domestic affairs, for the Federal Constitution expressly declares that all power not directly given to Congress is reserved to the States and the people.

But while this is true, it is further true that the same Federal Constitution that erects all the States into so many separate sovereignties expressly declares that Congress not only has the power, but is charged with the special duty of "providing for the general welfare" of all the States and all the people.

This is perhaps one of the grandest powers conferred upon the general government, and is coupled with a duty as noble and conservative as grand. When the thirteen colonies agreed to become thirteen sovereign States, operating under one general government, which was to be supreme so far as the few limited powers conferred upon that parent government was concerned, leaving the States and the people to be supreme as to the exercise of all other powers, it was but just and natural that in consideration of the surrender of the powers by the States and the people the Federal government should agree and bind itself for all time to come to promote "the general welfare" of all the States and all the people.

This solemn duty has rested upon the general government for more than 100 years, during which time it has often had occasion to step forward in various ways to discharge, in some degree at least, this obligation which it owed to the States and the people—not to any particular State or individual, but alike to all the States and all the people. Instances need not be mentioned. It was a grand compromise when the States, by surrendering a few, to them, immaterial powers, procured in consideration thereof the solemn promise of the general government to diligently promote, for all time to come, and in every emergency that future centuries might engender, the general welfare of all the States and all the people.

And this brings us face to face with the striking feature of the age of which we wish to speak: an emergency in which the entire population of nearly fifty States and Territories are alike interested: and a complicated condition of business affairs in which the entire people have the right not only to invoke, but to expect the much needed action of Congress to promote the general welfare, without in the least encroaching upon any of the rights or privileges so carefully and jealously reserved to the States and the people.

It is a significant fact that while the framers of the Federal Constitution, in a spirit of true patriot-

ism and compromise, were willing to cede to the general government such powers as would enable it to exist for the common good and benefit of all, reserving all other powers to the States and the people, they were careful to specifically enumerate in detail each and every power thus delegated to Congress; and it is equally significant that the power, coupled with the duty of Congress, to provide for the general welfare, is expressed in the very first of the eighteen sub-sections of section 8 of the first article of the Federal Constitution, in these words; "*The Congress shall have power to lay and collect taxes, duties, imposts and excises: to pay the debts and provide for the common defense and general welfare of the United States.*"

How natural that thoughts for the "common defense and general welfare" of the new government should fill the minds of the good and great men who were then about to create it. The defeated British armies had just left our shores and might return. The merciless Indian savages still hovered around the outposts of our little armies of patriots. No wonder the first thoughts of the framers of the general government under such surroundings were for the "common defense and general welfare." And these are the first thoughts of all true friends of the Republic even down to the present hour. They wrote as they thought; the blood shed in recent battles and the still impending danger from the savages caused them to think of their common danger, and hence the grant of power was written "common defense and general welfare," showing that the general government was to first provide for the common defense, and after that for the general welfare. To the credit of the greatest republic that ever honored the world be it said, that up to this good hour the Federal government has at all times most gallantly and successfully discharged its entire duty in providing for the common defense. No hostile fleet now threatens our shores; we are at peace with all the world; and even the States and people lately in rebellion have returned to their faithful allegiance, and are now honestly vieing with those who never rebelled in laudable efforts to advance the growing prosperity and secure the perpetuity of the Union.

But in the closing years of the nineteenth century we find our government no longer consisting of thirteen feeble States, with a sparse population scattered along the sea-shores, with here and there small towns in the more fertile spots where our forefathers delivered their simple crops from ox-carts and carried home in exchange, and in the same conveyances, the rude supplies for their families. Now we have nearly fifty States and territories stretching from the Atlantic to the Pacific, and from the

Penobscot to Puget's Sound, teeming with nearly 70,000,000 of the most enterprising people known to civilization. Railroads connect Portland in Maine with Portland in Oregon, and the telegraph and telephone now girdle all the States and territories in one. The merchant in Boston ships his goods and draws his bills on San Francisco, and the cotton planter in the south sends his crops and keeps his bank account in New York; and in a word, our business and commercial transactions with each other have grown and multiplied and enlarged and become so interwoven, that we can hardly realize that we are in fact but one people, while residing and doing business in nearly half a hundred separate States. While we are practically, from a business point of view, but one people, with one set of hopes and one common destiny, our business relations are hampered, compressed and oftentimes retarded by the fact that we are at the same time the inhabitants of States and territories, each having local statutes which are and must continue to be supreme within the local jurisdiction of each State, as different and distinct from the local laws of the other States, and even of the adjoining States, as the enlightened laws of England and the edicts of the czar. Now these States have the right to enact all these local laws to suit the pleasure and purposes of their citizens, and no one claims that there is any power in congress to nullify or repeal a single one of them. The State is supreme on this subject, and so long as each State preserves a republican form of government, Congress has no constitutional right to interfere. But when it is ascertained beyond a reasonable doubt that the "general welfare of all the States" would be promoted by harmonizing some of these conflicting statutes relating to such general subjects as affect the interests and commercial pursuits of the people of all the States alike, can there be anything wrong in reminding Congress that it not only has the express power, but that the solemn duty rests upon it to adopt some friendly and persuasive means of "promoting the general welfare," by establishing a bureau or commission, if need be, whose duty it shall be for the next five or ten years to gather information on the subject, and correspond in a friendly and respectful manner with the authorities in each State, and in this way ascertain what general laws in the States are in conflict with each other to the extent that any general rights of citizenship or commerce are impeded or denied, with a view to bringing about a harmonious system of general laws in all the States; and all this by the free and independent action of the States themselves? To particularize: No one will deny that it would promote "the general welfare" of all the States if it could be so brought about that the general laws governing

marriage and divorce, and regulating the duties and obligations of husband and wife and parent and child, and the general laws of descent, were substantially the same in every State; that is, uniform throughout the United States. Then there would be no such thing as flocking in droves to one particular State on account of the loose laws on the subject of divorce in that jurisdiction. There would be no such thing as divorce lawyers advertising to guarantee a divorce in ninety days. It seems to me that if the law on this entire subject was reasonable, but fixed and certain and substantially the same everywhere, the general result would be better husbands, better wives and better citizens. A similar line of remark is applicable to the laws governing the limitation of actions, the legal rate of interest, bills of exchange and promissory notes, and the homestead and other laws exempting the property of the debtor from the payment of his debts. When strange merchants from a dozen States in the west go to New York to open accounts for supplies of goods on credit from year to year, that wholesale merchant ought not to be required to search through the statutes of as many States as he has customers to find out what the law is in each State before he will open an account with the proposed customer. How much better it would be, both for the wholesale merchant and the retail one desiring credit, if there was but one statute to consult, with a similar statute to be found in every State in the Union!

And what may be said of the law of common carriers? A man in Rhode Island takes passage on some railroad train from Providence to Puget's Sound; or he ships goods from and to the same places. He purchases his ticket or ships his freight, as the case may be, at Providence for a trip across the continent. I have not examined the map to be sure about it, but at a guess I would say his train would likely pass through between ten and twenty States to reach the Pacific coast. Each one of these States has a separate local State law governing the liabilities of common carriers for negligence in all probability. If he loses his life or goods in the State of New York as he passes through that State, on account of some supposed negligence or imperfection of the railroad company, he may be able to find some New York statute allowing him to recover for that particular kind of negligence; but if the same injury is sustained, and by the same class of negligence, while passing through the State of Indiana, on his trip to the Sound, he may not be able to find any statute to enable him to recover, and his case may not fall within the general law governing the liabilities of common carriers. A case might arise even worse than the one above supposed. It is known to all lawyers that the

Federal courts have jurisdiction of such cases where the parties are citizens of different States. It is also known that the Federal courts often go by the laws of the State in which the suit is brought or the injury sustained, and that it sometimes happens that the same Federal judge holds court in two or more adjoining States. Now suppose an injury has been done and suit is brought for damages in the Federal court of such a judge, in a State where the State law allowed a recovery for the particular kind of negligence of which Smith, the plaintiff in that case, complains. Smith gets his judgment for \$10,000 damages, and goes home satisfied and praising the law and the just judge who administered it. Then suppose that on the very next train from the east comes his neighbor, Jones, who is also going to the South; and he meets with exactly the same injury by the same sort of negligence of the same railroad company, but his injury was received a few feet across the line of another State. He brings suit before the same Federal judge in the adjoining State, where there may be no statute authorizing him to recover; and the same judge who gave Smith a \$10,000 judgment turns Jones out of court because the statutes of the two States on the subject are not alike.

The same line of remark will apply, in a degree at least, to a large number of other business transactions in which the people all have similar interests in common with each other, especially in the general laws governing the making and recording of wills, deeds and mortgages, and assignments for the benefit of creditors, and the creation of trusts. What a grand consummation it would be for the business world if there could be brought about by the free action of all the States such a uniform system of statutes on these subjects, in all the States, that a deed or will or mortgage or other recordable instrument that was valid in Dakota would be equally valid and enforceable in Connecticut and Florida; and what an achievement for enlightened justice and progress would be attained, now that the whole human family have, in a degree, become bankers and brokers, and dealers in railroad, bank and municipal bonds and corporate stocks, if the same uniformity of laws could be obtained governing all these transactions, so that all bonds, stocks and securities that were genuine and valid as to all the forms of law in one State would be equally valid and enforceable wherever found in all the States. What I here desire to suggest is that there may, in certain cases, under the diversified and contradictory laws of different States, be doubts as to the validity, while if the laws of all the States were harmonious on all these subjects, and this was known from one end of the Union to the other, the poor widow who

stock as an investment of her pittance, would rest as easy and sleep as well as the millionaire who has had time and opportunity to examine the entire statutes of all the States before purchasing his blocks of bonds and stocks to lay away in his strong vaults for after years.

It may be said that there is no power to force the passage of such uniform laws, even on these general subjects, affecting all the people of all the States. I readily grant that no such power resides anywhere, and that all the States are free and sovereign alike, and Congress has no power, even if it had the desire, to compel a single sovereign State to alter, repeal or change a single law on her statute books. Then how can such a herculean task as harmonizing the general laws in the States be accomplished? The answer is, go at it in a business-like way. Acknowledge the absolute sovereignty of the States. Convince them that Congress does not claim the right to interfere in any way with their right to pass and enforce such laws as the States think proper. But show them, at the same time, the great good to all the people that would result from a uniform system of laws on these leading subjects. Appoint good and enlightened men to conduct so important an enterprise; men who believe that such a result is desirable, and that it ought to be, and can be accomplished; not in one year, and, perhaps, not in ten; but that it may be reached at least by the time this government has sixty States and 300,000,000 of people. Then let the commissioners go to work as though they were engaged in getting donated to them the right of way to build a trunk line railroad from Boston to San Francisco, or a telegraph and telephone line from Duluth to San Augustine, and the people will not be slow in seeing that the whole thing is but a praiseworthy effort on the part of the general government to comply with and discharge that high duty so long resting on Congress, to provide, in a practical way, for "the general welfare" of all the people of all the States of the Union. Commissions expire, and men die, but their good work, properly begun and set in motion for the common good, lives after them; and while it may be true that the closing years of the present century will not witness the entire accomplishment of all the high purposes you have in view, is it not within the bounds of reasonable expectation to hope that in coming years not only our own people but the inhabitants of all civilized nations will have reason to rise up and bless the Congress of this great republic for making it possible for fifty or sixty sovereign States to dwell together and prosper under such a uniform system of general State laws.

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# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in this issue the opinion of Judge Gaynor at Special Term in the matter of the People v. McLaughlin. Edward C. James, Abraham I. Elkus and Edward E. McCall appeared for the defendant, while John R. Fellows, district attorney, Daniel G. Rollins and Barton S. Weeks appeared for the people. The application was for a certificate of reasonable doubt, and the facts seemed so unusual and the opinion is so able that we think it is more than worthy of space in our columns. It is unfortunate that in many instances popular prejudice enters too largely in the judgment of the jury and that their verdict is influenced by matters extraneous to the facts presented for their consideration on the trial. But when it is considered that the courts themselves appear in some cases to feel the weight of popular opinion it is not to be wondered at that individuals unskilled in legal procedure and without training in law, render a verdict which is founded practically more on public sentiments than on the evidence presented for consideration. By this we do not intimate that the verdict in the McLaughlin trial was brought about in this way or was based on public feeling alone but we merely call attention to the frailty of human nature, which, unfortunately, has to a more or less degree deprived many individuals of their rights.

Judge Gaynor's opinion is very scholarly, while he echoes the sentiments we have expressed, that "history in almost every generation affords instances of trials conducted without due calmness and attention in which some times the innocent and some times the guilty were convicted; but invariably in either case with the like effect in the end, that the conviction was deemed unjust and proved more demoralizing and detrimental to social order than acquittal would have been. It is the maxim of manliness and healthy human nature as old as

the human race that one who cannot be convicted by fair play, should not be convicted at all."

While we are on this subject it will be well to comment on the opinion of the Supreme Court of Oregon in the matter of Schmidt v. The Oregon Gold Mining Company. The decision is a grievous mistake and if allowed to stand must weaken the respect for the courts and the confidence of citizens, in the security for their rights of property and previous investments in that State of capital from other States and from foreign countries. The very bad case, in question, shows to what abuses this remarkable deliverance may lead. A parcel of property sold for \$9,000, the attorneys took \$5,500, and after other costs were paid, the mortgagor received but a little over \$2,500; this certainly was scandalous. The interest was in default and the mortgage might be foreclosed, but the attorneys, instead of taking a decree in favor of their clients, took it in their own favor and against their client for the amount claimed as fees, insisted upon it as the first lien and were upheld by the Supreme Court of the State. Hon. Joseph N. Dolph, U. S. Senator from Oregon, who was one of the attorneys for the appellant, writes a very proper criticism to the *Oregonian*, in which he comments on the opinion as follows and says:

I call attention of the legal profession in Oregon to the recent decision of the Supreme Court of this State, in the case of A. L. Schmidt, appellant, v. The Oregon Gold Mining Company, respondent, not on account of my own or my client's interest in the matter, but because I believe the transaction which the court in that decision sanctioned, to the extent at least of holding that the wrong committed could not be corrected upon appeal, is calculated to bring the legal profession into disrepute, and is such a transaction that no honest man or upright judge can approve of it, and because the court, in my judgment, in supposing that relief could not be given the party injured upon appeal, has mistaken the law, and made a decision which will not commend itself to the bar of this State, or to the profession at large, and which it is to be hoped will not be followed as a precedent by other courts.

This is the first time during an experience of over a third of a century at the bar, I have felt it my duty to discuss a decision of a court of justice in the press.

The case briefly stated is this: The appellant, A. L. Schmidt, was the trustee named in certain mortgages executed by the Oregon Gold Mining Company on mining property in Union county, Or., to secure issues of bonds by the company.

Default having been made in payment of the interest on the bonds, the trustee brought suit in Union county, Or., to foreclose the mortgages.

The mortgages contained the usual provision that, in case of foreclosure, the trustee should be entitled to recover from the mortgagor such sum as costs of foreclosure, including attorneys' fees, as the court should adjudge reasonable.

The complaint contained allegations sufficient to authorize the court to decree to the plaintiff attorney's fees.

The defendant answered, denying some or all the allegations of the complaint, but afterwards, in open court, consented that the plaintiff might have judgment and decree as prayed for in the complaint.

Instead of taking a decree in favor of their client, the plaintiff, as prayed for in the complaint, for the foreclosure of the mortgages, with costs and attorneys' fees, the plaintiff's attorneys, without pleadings and without notice to their client, procured a decree in their favor and against their client, for the amount they claimed against their client for fees in the case.

There was nothing in the case concerning the right of the attorneys to fees, or the measure of their compensation. There was no agreement between them and the plaintiff as to the amount of their compensation. There was nothing in the case upon which a decree in their favor could be based.

The portions of the decree in favor of the attorneys and material to an understanding of the question under consideration are as follows:

"Now, at this time, this cause came on to be heard upon the motion of plaintiff for a judgment and decree, as prayed for in the complaint herein, the plaintiff appearing by T. Calvin Hyde and T. H. Crawford, of counsel, and the defendant by C. A. Johns and W. F.

Butcher, of counsel. \* \* \* Said defendant, by his said attorneys, in open court, here now consents that a judgment and decree may be here now made and entered in this cause in favor of said plaintiff, A. L. Schmidt, trustee, and against the said defendant, the Oregon Gold Mining Company, as prayed for in plaintiff's complaint, and that in said judgment and decree the court shall fix the referee's fees at the sum of \$200; the court stenographer's fees at the sum of \$—, and the plaintiff's attorneys' fees at such sum as the court may find reasonable for the services performed, and that the referee's fees, stenographer's fees and the plaintiff's attorneys' fees shall be a preferred lien upon the mortgaged property of the defendant, and the proceeds thereof in favor of the said referee, stenographer and the plaintiff's said attorneys for the respective amounts found due each as found and settled by the parties and the court, and that they or either of them may have execution therefor against the said mortgaged property.

"Eighteenth — The court further finds that the sum of \$5,500 is a reasonable attorneys' fee in this suit for the foreclosure of the said several mortgages and trust deeds, and that of said sum plaintiff's attorney, T. Calvin Hyde, should receive the sum of \$2,750, and plaintiff's attorney, T. H. Crawford, should receive the sum of \$2,750, and that said amounts so allowed each of said attorneys should be a preferred lien upon the said mortgaged premises and upon the funds arising from the sale of the said mortgaged property for the payment of the same, for the enforcement of which either of said attorneys should have execution."

"It is therefore ordered, considered adjudged and decreed that plaintiff A. L. Schmidt, as trustee for the holders of said bonds, have and recover of and from the defendant; \* \* \* and the further sum of \$5,500 reasonable attorneys' fees herein in trust for T. Calvin Hyde and T. H. Crawford, plaintiff's attorneys herein; and for the further sum of \$150, stenographer's fees herein in trust for John Wheeler, court stenographer.

"And it is further ordered, adjudged and decreed, that the judgment herein made and entered for attorney's fees, referee's fees, stenographer's fees and costs and disbursements be and the same are hereby adjudged and decreed

to be a first lien upon all the property described in the said several mortgaged deeds and the proceeds arising from the sale thereof.

"And that the proceeds arising from such sale be applied first to the payment of the attorney's fees decreed in this suit, the referee's fees and the stenographer's fees."

Claiming to be parties to the decree and entitled to sell the property for their fees, the attorneys secured an order of sale upon this decree and, against the objections of the plaintiff, proceeded to sell the property. It sold for \$9,000.

The sheriff returned that of the purchase price he had paid the attorney's fees \$5,500, costs and disbursements \$512.64, clerk's costs on execution \$18.85, costs and disbursements of the sale \$407.65, and had paid to the clerk \$2,560.86, so that the attorneys received \$5,500 and there was paid to the clerk for the plaintiff \$2,560.86, to defray the other costs of foreclosure and the execution of the trust and for the bondholders.

The attorneys by this process secured \$5,500 for collecting \$2,560.86.

The plaintiff succeeded in having the sale set aside, and then appealed from the portion of the decree which decreed the relief the plaintiff was entitled to to his attorneys instead of himself.

The court dismissed the appeal upon the ground that the decree was a consent decree, and therefore not appealable.

The opinion of the court is published in the number of the Pacific Reporter for June 22, 1895, commencing at page 406.

Attorneys for appellant filed a motion for a rehearing, with an elaborate brief, and the court, after prolonged consideration, yesterday refused a rehearing and adhered to the previous decision.

Notwithstanding that dealings between attorneys and clients concerning the subject matter of litigation are carefully scrutinized by courts, and many courts hold that contracts between them concerning the subject matter of litigation are absolutely void, and notwithstanding the power of an attorney to bind his client concerning the subject matter of litigation is confined to the ordinary powers of an attorney in the management of the suit, the Supreme Court of this State has, after prolonged delibera-

tion, settled the law that in this State an attorney-at-law in a suit brought to enforce the rights of his client can, acting for himself and for his client at the same time, agree for himself on the one side of the controversy and for his client upon the other side of the controversy, without notice to his client that the claims of the attorney against himself are to be litigated or determined in the suit, and in such a suit take a decree in favor of himself and against his client, and such a decree is a consent decree, which is not appealable and which cannot be corrected upon appeal.

Persons loaning money in Oregon and taking notes providing for attorneys' fees in case of suit should understand that under the law as laid down by this decision, when they employ attorneys to collect their notes they place it within their power to have the amount of their compensation fixed and made a first lien on the amount recovered, without any agreement as to what their compensation shall be, without notice that the claim of their attorneys is to be adjudicated, without knowledge that it is being done, and without any opportunity to be heard.

In other words, that their attorneys may make a contract for themselves and for them and have it adjudicated and the judgment executed not only in their absence and without their knowledge, but in spite of any legal remedies they may invoke.

The following is quoted from appellant's brief on the petition for rehearing:

"Such a judicial proceeding is a scandal upon the administration of justice, and if allowed to stand must weaken the respect for the courts and the confidence of citizens in the security for their rights of property, and prevent the investment in Oregon of capital from other States and from foreign countries. There could be but one greater reproach upon our judicial system and the legal profession, and that would be to have the law deliberately settled by the highest court in the State that the party injured in such a case was precluded by the act of his attorney from having the error corrected and the wrong righted on appeal."

Much has been written of late on the so called "government by injunction," which has been started by the action of Judge Buchanan in South Carolina in the enforcement of the

State Dispensary law. An exchange, in speaking on the subject, says :

"A case has arisen in South Carolina which has aroused some very strong criticism against the growth of 'government by injunction.'

"Judge Buchanan, of the State Circuit Court, sitting in chambers at Charleston, issued injunctions restraining several alleged liquor dealers from further violation of the State Dispensary law. Two of these dealers, on affidavits of a policeman that they had continued to sell liquor, were summoned before the court to show cause why they should not be punished for contempt. One of them appeared by attorney and submitted affidavits from patrons of his restaurants to the effect that he had steadfastly refused to sell liquor. The other ignored the summons, and was promptly sentenced 'to pay the sum of \$200 and be imprisoned in the State penitentiary at Columbia for the term of four months.'

"The contempt of court for which this sentence was imposed was in part the ignoring of the summons to appear before him, and in part the selling of liquor in violation of the injunction order. The sentence was imposed, of course, without a preliminary arrest to bring the accused into the presence of the court.

"In commenting upon this proceeding an exchange says:

"We cannot help feeling that there is in this new use of injunctions a violation of the spirit of our fundamental law more important than the occasional violation of any statute. When the Federal Constitution (sixth amendment) prescribed that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury; \* \* \* to be confronted by the witnesses in his favor, and to have the assistance of counsel for his defense,' it is safe to say that the punishment of crime as the violation of a civil writ was not contemplated.'

"The question raised by this South Carolina decision — the question how far the modern use of injunctions is in conflict with the fundamental principles of our political life — is discussed with rare power and insight by F. J. Stimson in the last number of the *Political Science Quarterly*. After speaking of the strong popular sentiment against the growing use of

injunctions, Mr. Stimson continues, in brief, as follows :

"I believe it is never wise to ignore a general sentiment of this magnitude. And I believe that in the particular case in hand this disquiet is reasonable. We have seen in private lawsuits between individuals and corporations courts of equity involved to restrain, not alone parties to the suits, but anybody, the whole world, with or without actual notice of a court order or injunction, not merely from interfering with property which is the subject of the suits, but also from committing or advising others to commit acts which are criminal; and sometimes on the ground that they are criminal acts. We have seen more; we have seen persons committing, or about to commit, or said to be about to commit, such acts, arrested by these civil courts, deprived of their liberty, and punished by imprisonment. And we have seen persons so punished without the usual safeguards of liberty afforded by the criminal law — without indictment, without right to counsel, without being confronted with witnesses, without trial by jury — and sentenced without uniform statute, at the discretion of the judge.

"We have seen more; we have seen courts, not content with ordering all the world what not to do, order at a word the ten or twenty thousand employes of a railroad system to carry out each and every the definite and indefinite duties of their employment as directed by any of their superior officers, or by receivers of the courts themselves, so that for any failure or omission or merely negative act on the part of one of these employes, he may be summarily brought into court and punished, either at that time or later, as the court may find leisure to sentence, or its attorney to file complaints.'

"This course of things,' continued Mr. Stimson, 'does away with the criminal law, with its safeguards of indictment, proof by witnesses, jury trial, and a fixed and uniform punishment. \* \* \* It makes the courts no longer judicial, but a part (and it bids fair to be the most important part) of the executive branch of the government. \* \* \* It tends to make our judiciary either tyrannical or contemptible.' This new use of injunctions is a revival of that introduced in England five centuries ago, against the same popular opposition, and upon

the same plea that 'the common law is no longer adequate to protect the public against disorder or oppression. In Queen Elizabeth's time the Court of Chancery recognized that its injunctions were no longer necessary for the repression of crimes, and from about 1590 to 1894, three hundred years, this extraordinary jurisdiction in the equity courts has been given up or has lain dormant.' 'Liberty and property are not to-day,' concludes Mr. Stimson, 'so insecure as to justify resort to this long since repudiated procedure. The courts of equity must go back to their proper jurisdiction as civil courts, or 'there is danger that all equity jurisdiction, so valuable and so effective, which was established in so many States only after a fifty years' struggle with the suspicion of the people and the jealousy of the common law courts, may be repealed at a blow.'"

There appears to be a great deal of controversy in regard to infringements of copyright, and we have already alluded to many important decisions in this country and in England on this subject. The *Law Journal* sums up the English decisions on "Copyright in Titles" in a very interesting article, which is as follows:

"The question whether there can be copyright in the title of a book derives a present interest from some observations in a contemporary *a propos* of Mr. W. S. Gilbert's new opera, the title of which is stated to have been anticipated some years ago by the late Charles Mathews. The same authority gives a more famous illustration of this kind of literary coincidence in 'Paul Pry,' which was really written by John Poole, though afterwards brought out, with some trifling alterations, under the same title by Douglas Jerrold. The importance of protecting the titles of works is so obvious that it is strange to find so much misapprehension apparently existing on this subject. To say that, generally speaking, there can be no copyright in a title is to state what is known to the few lawyers who have studied this subject, what the majority of the profession would be surprised to hear, and what the world of authors and publishers would probably scout as absurd. Yet it is undoubtedly correct, and the impression to the contrary has arisen from con-

fusing two things which are perfectly distinct—viz., copyright and trade-mark.

"Copyright—*i. e.*, in published works—is now entirely regulated by statute, an author's rights over his unpublished MS. depending upon the common law (*Prince Albert v. Strange*, 18 Law J. Rep. Chanc. 120; *Gilbert v. The Star Newspaper Company*, 11 Times Rep. 4). Copyright in books is defined by section 2 of the Copyright Amendment Act, 1842, 5 and 6 Vict., ch. 45, as 'the sole and exclusive liberty of printing or otherwise multiplying copies;' and 'book' 'means and includes every volume, part or division of a volume, pamphlet, sheet of letterpress, map, chart, or plan separately published.' There is nothing referring to such a thing as the title of a book, the only words at all capable of including it being 'sheet of letterpress' or 'part of a volume.' In *Maxwell v. Hogg*, 36 Law J. Rep. Chanc. 433; L. R., 2 Chanc. 387, Lord Cairns said: 'There cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the act must be not in a single word, but in some words in the shape of a volume or part of a volume.' In *Dicks v. Yates*, 50 Law J. Rep. Chanc. 809; L. R., 18 Chanc. Div. 76, the Master of the Rolls (Sir George Jessel) said: 'I do not say there could not be copyright in a title, as, for instance, in a whole page of title or something of that kind requiring invention.' There must, at any rate, be originality; and certainly the mere adoption as a title of words in common use does not give it protection under the Copyright Act. But the better opinion seems to be that not even an original title can, *per se*, be copyright. 'It is only as part of the book and as the title to that particular literary composition that the title is embraced within the provisions of the act. \* \* \* The right secured by the act is \* \* \* the product of the mind and genius of the author and not in the name or title given to it. The title does not necessarily involve any literary composition. \* \* \* It is not necessary that it should be novel or original. It is a mere appendage which only identifies \* \* \* the literary composition. \* \* \* When the title itself is original, \* \* \* and is appropriated by the infringement as well as the



whole or a part of the literary composition itself, in protecting the other portions of the literary composition, courts would probably also protect the title. But no case can be found, either in England or this country (America), in which, under the law of copyright, courts have protected the title alone separate from the book which it is used to designate.' (*Per* Shipley, J., in *Osgood v. Allen*, 1 Holmes [Amer.] 185.) This, it is submitted, is a perfectly accurate statement of the law of copyright on this point. It therefore follows that no protection can be obtained by registering a title in advance of publication or a dummy book. But it does not follow that a title cannot be protected from piracy. Such protection is, however, really analagous to that of a trade-mark. The title is the trade-mark under which the property to which it is applied—*e. g.*, a book—is sold, and the sale of a book under a title already adopted for an existing publication would be restrained, if at all, on the ground of actual or probable injury to property or as a common law fraud. In *Dicks v. Yates* (*sup.*), the Master of the Rolls (Sir George Jessel) said: 'The adoption of the words as the title of a novel might make a trade-mark, and entitle the owner of the novel to say to anyone else, 'You cannot sell another novel under the same title, so as to lead the public to believe that they are buying my novel when they are actually buying yours,' and Lord Justice James said: 'Where a man sells a work under the name or title of another man or another man's work, that is not an invasion of copyright, it is common law fraud, and can be redressed by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts.' Herein really lies the gist of the distinction between copyright and trade-mark. In the case of the former the subject of the copyright must be publicly registered before proceedings for infringement can be taken, and these must be brought within twelve months of the date of the offense, and the fact of infringement of a registered copyright entails the statutory penalties and gives the statutory right to damages as well. In an action for infringing a title regarded as a trade-mark, these conditions do not exist; but the material question to be

determined is, injury, actual or probable, or fraud, proof of which may often present considerable difficulty.'

At a recent meeting of the Ohio State Bar Association Judge Charles Pratt delivered one of the principal addresses which was devoted largely to the discussion of reform in procedure which has been one of the "fads" of this Journal. The suggestions on this subject are summed up most clearly by the judge under nine heads, which are as follows:

*First*—Abolish all pleadings upon money contracts, or upon claims founded upon account, and provide for the enforcement of such demands by summary process, making service upon the debtors of copies of the contracts or accounts, verified by affidavit, and stating the amount claimed.

*Second*—Provide for service of these by the creditor, or by his agent; and upon failure to pay or give notice of defense within some short time, say five or ten days, file the papers with the clerk of the court, who should be empowered to at once enter judgment and issue execution.

*Third*—In case the debtor disputes the claim made, in whole or in part, require him to serve notice of his defense, supported by affidavit, on the creditor, and then file these papers in court, and proceed at once to trial, before court, jury or referee.

*Fourth*—In actions other than on money contracts or account, let the claimant prepare and serve on defendant a copy of his petition. If no answer is served within the time named in the notice, let the petition be filed in the court, and trial had before the court or jury, as might be proper.

*Fifth*—If answer is served upon the plaintiff or his attorney, file the answer with petition in court, and let the case proceed to trial. So far as the pleadings to be filed are concerned, I would return to the old sections 84 and 101 of the Code of 1853, limiting the number unless extended by order of court.

*Sixth*—Where personal service of notice cannot be obtained, let the papers be filed in court with proof of service by publication, and the case submitted to court or jury for judgment or assessment of damages.

*Seventh* — In case of appeal or removal in any way from a justice of the peace or other inferior court to the court of common pleas, file the papers in the original case, certified by the inferior court and let the trial be had in the common pleas without other pleadings, unless leave is granted by the court.

*Eighth* — I would abolish appeals from the common pleas to the circuit court and for review of any case, would provide that the clerk certify the record direct to the circuit court, to be heard upon notice to the opposing party or his attorney, without other pleadings, or process.

*Ninth* — I would embody in the statutes, in so far as practicable, the forms to be used for all notices, affidavits and pleadings, carefully following the rule that two words should not be used where one is sufficient. This last proposition I consider of the utmost importance. The commission that framed the code of 1853 attached to their report certain forms of pleadings. These were brief and simple, following the idea on which the code was based; and if they had been followed as it was at first supposed they would be, we should have had a much less complex and elaborate system of pleading than that now in existence. But these simple forms found little favor with the older lawyers. This would be one way to relieve the supreme court and it may possibly be the only way to do it practically. If it should be said that the records of this association will show that I have theretofore taken a different view as to this, I can only reply that although no longer a young man, I am not too old to learn.

No English election of late years has aroused so much interest and feeling as the one which has just ended, and it is noteworthy to read the comments of the English press on the changes of the ministry. The *Law Times* publishes a very interesting article on the Constitutional Aspects of the Ministerial Crisis which is as follows:

"The Ministerial crisis through which the country is passing has been marked by some incidents which illustrate the development of constitutional practice as distinguished from the strict letter of the law. Sir William Harcourt, in announcing the resignation of the cabinet on

Monday, stated that he regarded the position he had occupied as one of 'greater obligation and higher responsibility than any office under the Crown.' Sir William Harcourt's allusion was evidently to his position as leader of the House of Commons. In 1854 Mr. Cayley moved for a select committee to consider the duties of the member leading the government business in the House of Commons. The motion was withdrawn after being opposed by Sir Charles Wood (Viscount Halifax), Mr. Walpole and Lord John (Earl) Russell. Sir Charles Wood described the post of leader of the House as 'an office that does not exist and the duties of which cannot be defined;' while Mr. Walpole spoke of it as a 'position totally unknown to the Constitution of the country.' Yet every one knows that Sir William Harcourt was leader of the House, although no one could give a legal definition of his position.

"Again, according to the strict letter of the law, the sovereign chooses all his ministers. A century ago the Crown had a real choice of ministers. They were not only in name, as now, but, in fact, the sovereign's servants. Remnants of this great prerogative remain. On the resignation or dismissal of a previous government it is customary for the sovereign to 'send for' some eminent statesman and to intrust him with the task of forming a new administration. The sovereign may, at times, have the opportunity of finally choosing between two, if not three, statesmen. But, as a rule, the prime minister is virtually selected by the legislature through indications of opinion which the sovereign recognizes. With the designation, however, of this one person, the initiative of the sovereign is at an end. According to modern usage the premier alone is the direct choice of the Crown, and he possesses the privilege of choosing his own colleagues, subject, of course, to the approbation of the sovereign. (See Bagehot's *English Constitution*, p. 11, and Traill's *Central Government*, pp. 12, 13.) Formerly, however, each minister was a servant of the Crown, responsible for his own department, and with little or no dependence on his colleagues. Mr. Gladstone remarks that we have not even now learned 'to designate the chiefship in the ministry by a true English word,' but 'by the imported phrase 'premier.' Lord North, the

minister of the American war period, although he had an ascendancy in his cabinet, always disclaimed the title of prime minister as inconsistent with the Constitution and wholly unknown to the law. Mr. Freeman in this connection marks a change in language which has happened within his own memory, and which, like other changes in language, is certainly not without its meaning. 'We now,' he says, 'familiarily speak in Parliament and out of Parliament of the body of ministers actually in power, the body known to the Constitution, but wholly unknown to the law, by the name of 'the government.' We speak of 'Mr. Gladstone's government' or 'Mr. Disraeli's government.' I can myself remember the time when such a form of words was unknown, when 'government' still meant 'government by king, lords and commons,' and when the body of men who acted as the king's immediate advisers were spoken of as 'ministers' or 'the ministry.' ('Growth of the English Constitution,' pp. 123, 124.) We have seen, likewise, the practice of the Constitution renders it quite incompatible with honor or self-respect for ministers to retain office whose public action has been condemned by the House of Commons. The establishment of this principle is, however, very recent. Mr. Pitt, towards the end of the last century, kept office in defiance of repeated votes of the House of Commons, and at last by a dissolution at a well-chosen moment showed that the country was on his side. Such conduct would at the present time be regarded as highly unconstitutional. Again, the cabinet, which is, of course, the mainspring of our constitutional system — 'the hyphen,' to use the words of Mr. Bagehot, 'which joins the buckle which fastens the legislative part of the State to the executive part of the State,' is not mentioned by writers like Blackstone and De Lolme. 'The cabinet,' says Lord Macaulay, 'strange to say, still continues to be altogether unknown to the law, the names of the noblemen and gentlemen who compose it are never officially announced to the public, no record is kept of its meetings and resolutions, nor has its existence ever been recognized by act of parliament.' These illustrations, which might be indefinitely multiplied from circumstances attending the present ministerial crisis, prove the importance of that unwritten

and conventional code of rules of which we speak as the Constitution."

The full text of the decision of the Illinois Supreme Court on the whisky trust case has just been published. It contains a somewhat extended reference, not alluded to in the newspaper summary, in regard to the position of the courts of various States toward the monopolistic combinations known as trusts, premising that, while the proceedings instituted against these combinations have generally had for their object some of the corporations entering into the trust, and not the trust itself, the Illinois judges point out that, so far as the courts have had occasion to speak on the subject at all, they have held such trusts to be illegal. In Nebraska suit was brought against a distilling company which had become a party to the whisky trust, and in holding this action to be an abuse of its corporate powers, and therefore *ultra vires*, the court took the position that the trust, having a tendency to destroy competition and to create monopoly, was contrary to public policy, and unlawful. So in the Ohio case of a corporation which had entered the Standard oil trust, the court, after referring to the monopolistic purpose of the latter organization, declared all such associations to be contrary to the policy of the State and void. The proceeding brought by the attorney-general of New York to vacate the charter of the North River Refining Company for its action in becoming a member of the sugar trust brought out opinions from both the Special and General Term of the Supreme Court to the effect that the trust was organized for an unlawful purpose, and that the action of the defendant corporation in entering into the association justified its dissolution. The Court of Appeals affirmed the judgment of the courts below without expressing an opinion as to the legality of the trust.

More directly, the legal status of the Diamond Match Company came up before the Michigan courts on a motion to enjoin the sale of some of the stock of the company held as security for a loan made to procure its purchase. It was shown that the object of this corporation was to buy up the property of all individuals and corporations engaged in the manufacture of friction matches, exacting from

the seller in every case a bond that he would not, for a term of years, engage in or assist any one else in the manufacture of matches in any place where his action might conflict with the interest or diminish the profits of the Diamond Match Company. The appellate court declared the purposes of the company to be unlawful, and it was held that any contract made to further them was void, as against public policy, and such as the court would neither enforce while executory, nor relieve against when executed.

The whisky trust decision makes an important addition to these judicial rulings, because it brushes aside the defense greatly relied on by the trusts that monopolistic combinations cannot be charged when there is but one corporation in the case. In other words, while it may be unlawful for two or more corporations to combine to control production or stifle competition, the moment they lose their individuality and become merged in one corporate organization, they cease to be obnoxious to anti-trust law. But the Illinois court holds that if a trust agreement between individuals or corporations be repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation of which it is the basis. "There is no magic in a corporate organization which can purge the trust scheme of its illegality" is a dictum in which the skillful organizers of some of these combinations will see a premonition of coming dissolution. The anti-trust law of Illinois happens to be one of exceptional severity, but, without express statutory enactment, trusts stand condemned by the common law as combinations in restraint of trade in every State of the Union.

#### STARE DECISIS.

THE doctrine of *stare decisis* is peculiarly interesting at this time in view of its recent discussion and application in the income tax cases. It may be safely asserted that no doctrine is so thoroughly fundamental, of such wide application and so vastly important in the law as that embodied in the maxim *stare decisis, et non quieta movere*. Adjudged cases are to juridical science what ascertained facts and experiments are to the natural sciences. On these as a foundation the legal system grows, expands and becomes symmetrical. Leading decisions are the mile-stones which mark the pathway of judicial pro-

gress. The importance, then, of this doctrine is at once apparent.

The rule has to do only with direct decisions upon important and vital issues. The decision (not *dicta*) of our higher courts furnish precedents which are to control the future disposition of similar issues. The binding authority of adjudged cases is called for on grounds of public policy and convenience. In *Harris v. Clark*, 2 Barb. 94, when pressed with a former decision, Gridley, J., responded as follows: "In opposition to this doctrine, however, the case of *Wright v. Wright* (1 Cow. 598), is pressed upon us as an authoritative adjudication which we are bound to follow. We believe in a rigid adherence to the doctrine of *stare decisis*. We regard it as necessary to preserve the stability, the certainty and the symmetry of any system of jurisprudence; and therefore, if we had any reason to believe that the decision in this case was made upon deliberate consideration, and that the adoption of the reasons assigned by the judge was necessary to the decision of the question before the court, we should certainly regard it as an authority binding upon us and leave the error, if any there were, to be corrected in the court of last resort."

The knowledge that a judicial decision is to form a part of the substantive law, that it is to operate as a rule of civil conduct, that it is to control similar controversies in the future, begets a more careful and conscientious consideration on the part of the court, and inspires a more profound respect for the court and its decisions on the part of the public. Were the solemn utterances of the court upon a vital issue to end with the decision, and to exert no influence upon subsequent litigation, clients would be wholly ignorant of their rights and counsel helpless to advise. So that a wise policy demands that the deliberate decisions of our higher courts should be followed or at least respected.

There is something of a distinction between the doctrine of *stare decisis* and the doctrine of *res adjudicata*. The latter is largely a rule of evidence and operates upon the particular case. It is more limited in its scope than the former. In order to make a matter *res adjudicata* there must be a concurrence of four conditions, viz.: Identity in the thing sued for; identity of the cause of action; identity of persons and of parties; identity of quality in the persons. (2 Bouv. Law Dict. 467 and cases cited.) The object of this rule is to protect suitors from interminable litigation of the same questions.

The rule can be invoked only where there has been a previous adjudication of the same matters in a previous action by a court of competent jurisdiction and between the same parties or their privies. On the other hand the doctrine of *stare decisis* operates upon principles of analogy. That it may

be invoked it is not necessary that there be an identity of parties or of facts. It is not confined in its application to a subsequent questioning of the same matters. It will be difficult to find two cases parallel in all respects where this doctrine has been applied. Similarity and not identity of issue and of fact will be found to prevail. Again, under the rule of *res adjudicata*, a decision though erroneous is absolutely conclusive upon the same matters between the same parties until that decision is reversed. Under the rule of *stare decisis* a clearly erroneous decision is not binding as a precedent except in certain cases which we will hereafter consider. When a decision is rendered by a court of ultimate appeal in any case, that decision must be regarded as conclusive in that particular case. Where the question arises in a case similar to one already adjudicated in a prior case, while the force of precedent is strong, the court may overrule, affirm or modify any previous decision. In the same case any ruling is final, in a different one it is only an established precedent. (23 Amer. & Eng. Ency. of Law, p. 38, and cases cited.)

Where a trust deed was adjudged to be void by the Appellate Court, that decision was held to be the immutable law of the case to govern all subsequent proceedings therein, notwithstanding that afterwards in another case a different decision was made on a similar deed. (Thompson v. Albert, 15 Md. 285.)

It seems that where there has been a solemn adjudication by a court of last resort, the decision rendered is the law of the particular case and will not be disturbed upon a subsequent review on the principle of *res adjudicata*; while viewing the decision as a precedent, it may be followed, modified or overruled.

"There are clear and palpable mistakes of law which should be corrected, especially where it can be done without injury to any person or property. If no injury or injustice would result to any one, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good to the public is to be considered rather than any particular case or interest. \* \* \* Precedents should not have an overwhelming or despotic influence in shaping legal decisions \* \* \* whenever a correction can be made without working more harm than good, it should be done. \* \* \* The reason that the rule of *stare decisis* was promulgated was on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it." (23 Amer. & Eng. Ency. Law, p. 37.)

Where a decision has become thoroughly imbedded in the law and has become a rule of property so that vested rights are dependent on it for their existence and continuance, such decision, though erroneous in its inception, will be followed as a precedent in subsequent cases.

The law in regard to titles to real estate especially requires stability. As injurious as are frequent changes in the law, no decision as to personal property or damages requires such permanency as those relating to realty. Even one decision in the latter case will be scrupulously guarded. Titles to real estate are for all time, and should stand as passed upon if possible. Titles may be largely or wholly dependent upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in interpretation or construction of legal principles. (Lion v. Burtiss, 20 Johns. 487.)

In this connection I quote from the argument of Joseph H. Choate before the United States Supreme Court in the income tax cases: "The reason of the rule is, that it is often better on public grounds, where a question of law has been decided — where it has been repeatedly decided — that the court should let it remain rather than, by the declaration of another, though a better rule, dispense with it. Where is that chiefly applied? Where ought it chiefly to be applied? Where has it always been applied? When the former decision has grown into a rule of property, and vested rights in a trusting community, relying upon the past decision, have become fixed, where rules of conduct have come to be governed by it, as in the making of contracts and other arrangements between man and man and between citizens and corporations, I acknowledge that there may often be cases where less damage to the public, less injury upon the whole arises from letting the bad rule stand. Everybody has acquiesced in the rule, everybody knows it to be the rule, everybody has acquired his property under the rule, and made his contracts under the rule."

In Welch v. Sullivan (8 Cal. 188), the court said: "Courts are permitted to exercise a wide discretion, and judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion, simply because some abstract principle of law has been incorrectly established at the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves or their predecessors, and at the same time refused to overthrow the rule established. That judge, who, for petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overthrow a rule which for years has settled the rights of property, should be

regarded as the common enemy of mankind, and unworthy of the high trust that has been confided to him." (See *Bates v. Relyea*, 23 Wend. 340.)

In *Harrow v. Myers*, 29 Ind. 470, the court, speaking of real estate titles, said: "The question at the threshold is, whether a rule of property thus repeatedly declared by the court of last resort after earnest contest, and, it must be supposed, upon the most careful deliberation, should be deemed open to further controversy. The repose of titles is important to the public. Upon the faith of these decisions our people have, for a considerable period of years, invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed. There must be a just basis of confidence in the stability of judicial decision somewhere in the history of a controverted legal question, where it may be confidently relied on that the question is settled. It is not always that the courts may freely inquire, in determining a case before them, what is the law. Sometimes investigation should stop when it has been ascertained what has been decided upon the subject. The doctrine of *stare decisis* should be applied to the question now presented. Such is its relation to the interests of our people among whom real estate is so much an article of traffic, that it is not possible to estimate the extent of the evil which would follow a decision of this court overruling *Strong v. Clem* (12 Ind. 37), and the cases which followed it. If the doctrine of those cases be admitted to be wrong, it is yet quite obvious that it has already accomplished most of the harm that ever can result from it; while a change now would sow a wide crop of serious evils to the injury of those who are innocent, and who have purchased and sold real estate upon the faith of a doctrine declared by this court no less than half a dozen times within the last ten years."

In further illustration of this doctrine I quote from one more authority. In *Rockhill v. Nelson*, 24 Ind. 424, the court, speaking of a rule of descent which had been assailed by argument, said: "This position so forcibly addressed to this court before the decision in the case of *Martindale v. Martindale* (10 Ind. 566) would have been entitled to grave consideration, and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in the law the final settlement of which is vastly more important than how they are settled; and among these are the rules of property long recognized and acted upon, and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute books, is not remarkable for precision and clearness, and that vexatious questions are often occurring requiring judicial interpretation

of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the court of last resort, is unjust or even distasteful, the Legislature can change the rule without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion into questions of property by overruling the previous decisions of this court. We have had occasion in the last few months to overrule a number of cases, but only in that class in which the rulings operate upon the future and not upon the past, and which, in our opinion, will be attended by unmixed good."

Rarely are the decisions of inferior courts followed by the higher courts. On questions of the construction or application of provisions of the Federal Constitution, of treaties and of Federal law, the decisions of the United States Supreme Court are binding upon the State courts. On questions of the construction or interpretation of State statutes or constitutions, the decisions of the court of the State whose constitution or statute is in question are followed by the Federal Courts

*Equator Min., Etc., Co. v. Hall*, 106 U. S. 86; *Hamilton Bank v. Dudley*, 2 Pet. 492; *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Chambers County v. Clews*, 21 Wall. 317; *Union Bank v. Kansas City Bank*, 136 U. S. 223; 23 Amer. & Eng. Ency. Law, pp. 38-39. WALTER I. HOVER.

Amsterdam, N. Y.

#### THE PEOPLE OF THE STATE V. WILLIAM W. M'LAUGHLIN.

GAYNOR, J.: The law does not cast upon me the duty of concluding whether error was actually committed in the defendant's case. On the contrary the statute is that if any assigned error gives rise to "reasonable doubt whether the judgment should stand," it is my duty, without going further, to grant a certificate of reasonable doubt, to operate as a stay of the judgment pending appeal. I have such doubt, and being unable to resolve it after careful deliberation, I must unhesitatingly respond to the injunction which the law lays upon me, and allow the stay, without regard to my personal inclination.

Whether this ruined defendant shall be imprisoned pending his appeal is insignificant indeed, compared to the importance of maintaining a deliberate and orderly administration of criminal justice, and the necessity of preserving those individual rights which, while they shield the innocent and the unfortunate, do not protect the guilty. I have not merely this defendant's case in mind, but the

case of everyone hereafter to be tried for a criminal offense.

I shall specify two alleged errors. The defendant was tried in the Court of Oyer and Terminer. His first trial ended on Saturday, May 11, 1895, by a disagreement of the jury. The case was at once set down for another trial in the same court nine days ahead, namely, on Monday, May 20. Counsel for defendant then decided to make a motion in the Supreme Court for a change of the place of trial to another county, on the ground that a fair and impartial trial could not be had in the county of New York. They prepared a voluminous record for that purpose, setting forth that the difficulty of getting impartial jurymen was so great that it took three weeks to get a jury on the first trial; that the deliberation of the jury was marred by unusual passion, those voting for acquittal reporting in open court that they were threatened with State's prison by those voting for conviction; that immediately after the discharge of the disagreeing jurymen, their intelligence, honesty and motives were assailed in public meetings and elsewhere, all of which was reported in the newspapers; that in addition some newspapers joined in the attack, which was also levelled in advance against any jurors who should vote for acquittal upon the second trial; and the defendant also claimed that the learned judge who presided at his first trial, and was also to preside at his second, participated in these public discussions in a way adverse to a fair and calm consideration of his case, and calculated to deter jurymen from being independent. In this state of things the defendant's counsel claimed that he had not had and could not have in the county of New York that deliberate, fair and impartial trial which the law guarantees to everyone.

I need form no opinion as to the truth of these allegations; it is enough that they were by no means light or frivolous, and that defendant was entitled to have them calmly heard; for the law, taught by the experience of the past, had wisely so provided. From the irregular and disorderly trial of Jesus down to the present time, history in almost every generation affords instances of trials conducted without due calmness and attention, in which sometimes the innocent and sometimes the guilty were convicted, but invariably in either case with the like effect in the end, that the conviction was generally deemed unjust, and proved more demoralizing and detrimental to social order than acquittal would have been. It is a maxim of manliness and healthy human nature as old as the human race that one who cannot be convicted by fair play should not be convicted at all.

The defendant having decided, as was his unquestionable legal right, to move the Supreme Court to

change his place of trial, what followed? He was confronted with a difficulty; for while the statute was explicit that he could bring on such a motion only "upon notice of at least ten days to the District Attorney" (Code Crim. Proc. Sec. 346), his second trial had been set only nine days ahead, as has been seen, and would therefore supersede his motion, and make it useless. But the law did not leave him in such evil case; for it provided that any justice of the Supreme Court might grant a stay of the trial until the motion should be heard and decided (Code Crim. Proc. Sec. 347.) By the exercise of diligence the defendant's attorneys had the record necessary to the motion ready in four days, viz., on Friday, May 17th; and regularly presenting the same to a justice of the Supreme Court on that day, they obtained of him the temporary stay of the trial which the law allowed, until the motion should be heard, viz., on Monday, June 3rd. The following morning, viz., Saturday, copies of the motion papers, including the stay and notice of motion, were served upon the district attorney. The defendant had acted strictly in accordance with law. He could not have noticed his motion for any day prior to the day set for the trial, for the statute, as has been seen, required that he should give a notice of motion of not less than ten days.

On the following Monday morning, however, at the unusual and irregular hour of six o'clock, the district attorney caused to be served upon the defendant's attorney an order requiring the defendant to show cause at 10:30 o'clock that same morning, before the Special Term of the Supreme Court in New York city, why the defendant's motion to change the place of trial should not then there "forthwith" proceed and be heard. The senior counsel for defendant was under engagement to be before the Court of Appeals at Albany on that day, and went there. The junior counsel appeared before the Supreme Court at the hour required, and submitting affidavits bearing evidence of the unseemly haste in which he had been forced to prepare them, objected to the court proceeding, and, denying its jurisdiction to do so, asked that a time be set to argue the question of jurisdiction. The court refused the request, overruled every objection, and required the defendant to proceed at once to present to it his motion to change the place of trial. This his counsel refused to do. The court thereupon made and entered an order to the effect that the motion was heard and denied, and vacating the stay, but reciting the refusal of defendant to make the motion before it, and thereupon the Court of Oyer and Terminer, which had awaited the outcome, immediately commenced the trial of the defendant, against the objection of his counsel that the Supreme Court had acted without jurisdiction,

and that, therefore, the stay of the trial was still in force and the trial could not be had.

I have a reasonable doubt of the validity of this precipitate proceeding in the Supreme Court. If it is to be allowed in this defendant's case, then it can be repeated in any one's case. It is quite as important that justice appear to be done as that it be done. It is important that crime should be punished, but far more important that the rights of the individual should be held inviolable, for that alone is all that stands between him and tyranny, whether executive or judicial.

If the order of the Supreme Court was void, then the stay was in force when the Court of Oyer and Terminer tried the cause. I do not see how a court may force a party to bring on a trial or application of any kind within less time than he has legally noticed it for, unless by express statutory authority to shorten the time, which did not exist in the present instance. It might as well try to make a party bring on a trial or application that he had not given notice of at all. The notice was shortened in this case by the aforesaid order of the Special Term of the Supreme Court upon the ground that the public interest required that there be no delay of the trial of defendant. If there be a valid ground, then a notice of trial or of motion in any case involving public interests may be shortened or disregarded by a court. It seems to me the learned district attorney mistook his course, and that the court acted without jurisdiction. The way for the district attorney to prevent delay of the trial was plain. The law had not left it in the power of the defendant to delay the trial at will. He had to get a stay pending his motion in order to delay the trial at all; and the district attorney had the right to apply to the judge who had granted the stay to vacate it, unless the defendant would stipulate as an alternative to argue the motion in a shortened time. The like is often done in civil causes in respect of both notices of trial and of motion. But that a court has inherent jurisdiction to shorten at will notices essential to give it jurisdiction, I cannot believe. There was no due process of law by which the Special Term of the Supreme Court was able to do what it assumed to do in this case.

Another assigned error raises a grave question. The indictment was for the extortion of fifty dollars from one Seagrist. To make out the crime it became necessary for the prosecution to prove a continuing illegal concert between the defendant and his ward man Burns, to extort money; for the acts necessary to constitute the particular crime for which defendant was being tried were not at all committed by defendant personally, but, on the contrary, some, or, as the prosecution finally claimed, all of them, were done by Burns. This illegal con-

cert being established, then the act of either one was the act of the other; and in that way the defendant could be convicted. Evidence had been produced from which the jury could have found that the illegal relation existed. Next, it was proved that Burns stopped the work of pulling down a building which Seagrist was engaged in, and told him he could not go on with it till he saw the captain, namely, the defendant. This was the coercion used to extort the money. Seagrist says he went to the station to see the captain, but he was not in. The next thing to prove was that the money was paid. Seagrist swore positively that he paid fifty dollars to either the defendant or Burns, but that he could not remember which. His dubiety was upon this point only. He then testified that he made a true memorandum of the occurrence at the time of payment, and produced it. Being requested to look at the memorandum to refresh his memory, he did so, and then said: "I have no distinct recollection by looking at the book to whom I paid it, because it was a double entry." The memorandum was then offered and received in evidence against the objection of defendant's counsel. It is as follows: "November 21, 1891. Material. Paid to McLaughlin for protection per Sergeant Burns, Ordinance officer, \$50." Seagrist said, as we have seen, that he could not tell from this memorandum to which one he paid the money, because it was a "double entry," not referring to double entry book-keeping (for no such thing was before him), but meaning that the entry was double in meaning, or equivocal. And so the memorandum seems to be; for who can say from it, any more than Seagrist could, whether it conveys the statement that the money was paid to McLaughlin per or through Burns for protection, or paid directly to McLaughlin for protection to be given per or through Burns. It follows that this delphic memorandum was not competent to prove to which one the money was actually given by Seagrist. That was the only point upon which his memory failed; and the memorandum could not be competent to prove anything except something which the witness could not recollect. (*Ulster Co. Bank v. Madden*, 114 N. Y. 280; *Rice on Evidence*, Vol. 3, p. 100.) He remembered positively that he paid the \$50 to one or the other, so that the memorandum could not be received to prove that. But in another aspect it seems that the memorandum could not be legal evidence. The rule allowing an original written memorandum of a fact to be used as evidence of such fact in the absence of recollection of the fact by the person who made the memorandum, relates only to memoranda of facts, and not to memorandum of inferences or conclusions. The memorandum in question is of a conclusion. It con-



tains a conclusion that an illegal concert existed between McLaughlin and Burns; that payment to Burns was payment to McLaughlin for his protection or else that payment to McLaughlin was for his protection through Burns. Indeed, it contains a statement of a conclusion that the very crime for which the defendant was being tried was committed. It was competent for Seagrist to testify that he paid the money to Burns, but not competent for him thereupon to state the conclusion that such payment amounted to payment to McLaughlin. Yet that is what this memorandum was interpreted to state by the prosecution. If one could make a written memorandum of his conclusions, and in that way afterwards have them received in evidence, no one would be safe in liberty or property. There would be no end of fabricated memoranda. Even an original memorandum of a simple fact is received in evidence with hesitation, and only from necessity, and such caution is necessary, as our highest court has said, "until the moral infirmity of human nature becomes exceptionally less than it yet has." (114 N. Y. 285.)

The motion is granted.

#### PRIVATE INTERNATIONAL LAW.<sup>(a)</sup>

The effect of the recent decision of the judicial committee of the Privy Council in the case of *Sirdar Gurdial Singh v. H. H. The Raja of Faridkot* being to judicially affirm the sovereignty of the independent native State within its own territorial limits, it becomes easy to understand that private international law has for the Indian student a practical no less than a theoretical interest. It would indeed be difficult to conceive an author alleging a better *raison d'être* for his work than Sir W. Rattigan has done. India, like classical Hellas, now consists of a number of separate independent States, but the enormous number of those States (no less than 629) shows how far India transcends the classical parallel. Though Sir W. Rattigan explicitly announces that this manual is written primarily for the Indian or English student of law, no one who looks into this work can doubt that it possesses interest for a much wider class of readers. On the psychological principle of *variatio delectat*, there must be something to attract the mind in the extraordinary variety of legal systems that obtain throughout

(a) By Sir William Henry Rattigan, LL. D., of Lincolns-inn, Barrister-at-Law, Vice-Chancellor of the University of the Punjab. Author of "The Science of Jurisprudence," "Roman Law of Persons," etc. London: Stevens & Sons Limited, 119 and 120 Chancery lane.

the globe — however much the demand for harmony — the *elegantia juris* of the Romans — might desire the removal of all antinomies. But, as the author in a passage of great power at the close of his work points out, the rights of the foreigner are gradually assuming recognition in our courts, in spite of that positivism which gives our English school of jurisprudence so marked a contrast to the jurisprudence of the continent. One of the most salient features of modern legal history is the same as that which the student of the Antonine jurisprudence encounters, the increased facility for acquiring citizenship. The means employed are not the same, but in this respect, as in others, the aphorism of Sir H. S. Maine holds good — that it is not possible to overstate the value of Roman jurisprudence as a key to international law. That which Sir H. S. Maine wrote the Cambridge essays of 1856 *would* one day be true of our municipal law, is, in the sphere of private international law, *un fait accompli*. Sir W. Rattigan points out "that it is one of the instances of the final triumph of the Roman principles of jurisprudence that this (the principle of *jus sanguinis* in fixing nationality) is the theory which is now more and more largely recognized in Europe." But no one can peruse the pages of this work without having to make the admission that the want of a *Gemeines Recht* in the sphere of international intercourse is only too palpable. Private international law is, in fact, the appropriate sphere of *le conflit des lois*. It has been well pointed out by a recent writer on international law that the antinomies of different legislation are but ineffectually met by treaties. What is wanted is uniformity of legislation. Thus the Berne convention of 1885, adopted in England under the sanction of the international copyright act, while doubtless an act of international betterment in itself, brings into full relief the fact that the copyright of an author in his works is protected longer in some countries than in others. A signal illustration of *le conflit des lois* exists in the law of nationality respectively obtaining in France and England. Though the under secretary for foreign affairs (Sir James Fergusson) stated in the House of Commons in 1889, that the British government had no ground of protest, yet grandchildren, born in France of natural born British subjects, who have British nationality conferred upon them by various statutes of Anne, George II., and George III., become, by virtue of the French naturalization act of 1889, French subjects, and are now liable as such to military service. This illustration may serve to show that, though the Roman law is a key to international law, it is still far from being the *Gemeines Recht* of the nations. The private international law of copyright, being a purely modern creation, bears no trace of derivation from the Roman law.

The fundamental notion of public international law is the territoriality of sovereignty. In private international law, the student's attention is frequently directed to exception to this principle—to the extra-territorial application of certain laws. This conception of personal laws extending their empire and authority so as to attach to the person everywhere was first asserted by the Italian jurists of the thirteenth century. As Sir W. Rattigan formulates the problem, Private International Law "solves the difficult questions arising from the inquiry, as to what extent the native law is bound to respect the foreign law, and the conditions under which the latter must always yield to the former."

Sir W. Rattigan, in his chapter on the Law of Things, says that "the jurisprudence of Continental Europe, following that of the old Civil Law, knows no other classification of things except mobilia and immobilia." It is significant to observe that this division into mobilia and immobilia does not occur in the eighth title of the First Book of the Digest—*de divisione Rerum et qualitate*. The French Code Civil, adopted in Italy after 1866, certainly does say (art. 516): "*Tous les biens sont meubles ou immeubles*." But this is invariably translated: "All property is either personal or real." In excellent French dictionaries like Gasc's, the substantive *immeuble* has the meaning of real estate, landed estate, or property, but not immovable thing. The criticism so frequently directed against the English division of property, that it designates leaseholds for a term of years as chattles real, and therefore a personal property, is adopted by Sir W. Rattigan, who quotes Lord Selborne's dictum in *Freke v. Lord Carbery*, that land, whether held for a chattel interest or a freehold interest, is, as a matter of fact, immovable and not movable. But it may be observed that the Code Civil goes nearly the same length in unduly extending the meaning of the term real property, as the English law does in restricting it to freehold interest in land. Thus, by Code Civil, under certain circumstances, cattle, pigeons, warren rabbits, and farming implements may be designated real property (cf. art. 524). One of the most interesting chapters in this work is the chapter on Immaterial Rights of Copyright, Trademarks and Patents. These rights have been slow to receive international recognition. It is much to be regretted that Russia and the United States did not join in the Berne convention. The decision in *Routledge v. Low* leaves it uncertain whether the presence of a foreign author within British territory at the time of publication is necessary or not in order to enable him to claim the benefit of 5 and 6 Vict. c. 45. Fourteen years previously to this decision such presence was explicitly

declared to be necessary in the case of *Jeffreys v. Boosey*. It only remains to say that the elaborations and wealth of reference of this little manual will render it no less useful to the practitioner than its lucidity of exposition will render it attractive to the student.—*Law Times*.

### Abstracts of Recent Decisions.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.**—Where an assignment purports to convey all the debtor's property to be equally distributed among all his creditors, and the same is accepted by the assignee, and by a majority in number, if not in amount, of all the creditors, it cannot be held fraudulent on its face, although it contains provisions which might be objectionable if the assignment were one granting preferences; nor can such assignment be set aside because of the fraudulent intent of the assignor, not shown to have been participated in by the assignee and the accepting creditors. (*Porter v. James* [U. S. C. C. of App.], 67 Fed. Rep. 21.)

**FEDERAL COURTS—PRACTICE—PRODUCTION OF BOOKS AND PAPERS.**—The right given by Rev. St. § 724, to compel the production of books and papers in action at law, is not limited to requiring their production at the trial, but the court may, in its discretion, grant an order for inspection, with permission to copy, prior to the date of the trial. (*Lucker v. Phoenix Assur. Co. of London* [U. S. C. C., S. Car.], 67 Fed. Rep. 18.)

**FEDERAL COURTS—SUPREME COURT—DENIAL OF RIGHTS UNDER FEDERAL CONSTITUTION.**—When the ground of jurisdiction is the alleged denial of a title, right, privilege or immunity, secured by the Constitution or laws of the United States, it must appear that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way; and cannot be recognized as properly made, when set up for the first time in a petition for rehearing after judgment. (*Sayward v. Denny* [U. S. S. C.], 15 s. c. Rep. 777.)

**MECHANIC'S LIEN—COMMUNITY PROPERTY.**—The husband may contract for the erection of buildings on the community real estate, so as to subject it to mechanic's liens therefor. (*Douthitt v. McCulsky* [Wash.], 40 Pac. Rep. 186.)

**PRINCIPAL AND SURETY—SUBROGATION.**—Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security. (*South Omaha Nat. Bank v. Wright* [Neb.], 63 N. W. Rep. 126.)

**TRESPASS ON LAND.**—Where a complaint alleges a continuing trespass by defendant, through its

agents, on plaintiff's land, and the cutting and conversion of timber growing thereon, in a single count, the entire cause of action is local, and only a federal court within the State in which the land lies has jurisdiction. (*Ellenwood v. Marietta Chair Co.* [U. S. S. C.], 15 S. C. Rep. 771.)

### New Books and New Editions.

#### MANUAL OF PUBLIC INTERNATIONAL LAW.

Mr. Thomas Alfred Walker, fellow and lecturer of Peterhouse, Cambridge, Eng., has produced a most valuable and interesting addition to the subject of International Law.

The book is designed as a comprehensive general introduction to detailed study of the subject, and such a work the author has certainly produced showing moreover a thorough and clear knowledge of the subject in hand. The style is extremely clear and the treatment careful.

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#### HALL'S INFRINGEMENT OUTLINE.

This is an extremely brief and succinct outline of the law of the infringement of patents for inventions (not designs) from the pen of Thomas B. Hall, Esq., of the Cleveland bar, the author of the well-known works, "Hall's Patent Infringement" and "Hall's Patent Estate."

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#### HORNBOOK SERIES — GLENN'S INTERNATIONAL LAW.

Glenn's International Law is the ninth and latest, hand-book of the now widely known Hornbook Series, from the press of the West Publishing Co., of which series we had occasion to write at some length two weeks ago.

The general merit of the series cannot but be enhanced by the present work, which is a most broad and admirable treatise of international law, stating the controlling principles of the law in a readily accessible style, and giving copious references to the many ramifications of these principles met with in actual practice.

The author, who is a member of a profession from which additions to the number of our text-book authorities would scarcely be dreamed of, Captain Edwin F. Glenn, acting judge advocate of U. S. army, deliberately and in praiseworthy contrast to so many authors, disclaims any original work in this ancient field of the law, and emphatically states that he has "freely copied from authorities of recognized standing," claiming for his work the greater merit in a treatise of this kind of careful compilation and clear and accurate statement.

Published by the West Publishing Co., St. Paul, Minn.

#### AMERICAN ELECTRICAL CASES, VOLS. II & III.

The second and third volumes of this valuable compilation of cases of a branch of the law the importance of which is only of late beginning to be felt, have just been issued by Matthew Bender, Albany, N. Y., being edited by William H. Morrill, the well-known writer on legal subjects.

The wide scope of these volumes makes them of unusual merit, embracing as they do, the decisions of the Federal Courts and of almost every State in the Union from 1886-1892. The cases in these volumes are arranged most advantageously for reference, not being, as usual in such works, placed in chronological order, but grouped together according to the subjects of the decisions.

In his preface to Volume III, the author comments on the rapid increase of adjudications in electrical law, especially in the newer field of applied electricity by reason of the many new questions arising from the interference of the powerful currents of power and light companies with the weaker currents and more delicate apparatus of telephone companies.

The question as to the rights of abutting owners as affected by the maintenance in highways of apparatus required by users of electricity, occupy an important place in Volume III.

These reports are of the greatest value to every lawyer of the present age of electricity.

Published and sold by Matthew Bender, Albany, N. Y.

# The Albany Law Journal.

ALBANY, AUGUST 10, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE question is being raised in a somewhat peremptory way as to the right of a corporation owing its charter to another State to do business according to methods condemned by the laws of a State in which it has established itself. There is a popular impression that a corporation organized, say, under the laws of New Jersey, has a constitutional right to do business in the State of New York. But what may be called the interchangeability of American citizenship guaranteed by the Constitution of the United States does not extend to those artificial persons known as corporations. These, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where they were created. In the language of the United States Supreme Court: A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty. The recognition of its existence, even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interest or repugnant to their policy."

This latter statement is not so obviously true as when it was written in deciding the case of the Bank of Augusta v. Earle, because it was not then common to combine corporations "to limit production, stifle competition and monopolize the necessities of life." As Mr. Justice Brown remarked in his recent address at Yale, the extent to which this has already been carried is alarming, the extent to which it may hereafter be carried is revolutionary. But there is no reason why a combination in unlawful restraint of trade, which could not be legally formed under the laws of Massachusetts,

should be tolerated here merely because it was organized in another State. If it were a lottery company it would be promptly suppressed, however clear might be its right to do business in the State of its origin. A State that desires to check the spread of monopolistic combinations has the remedy in its own hands. It need not allow its people to be imposed on for a day longer than they are willing to be.

The law on the subject is very fully set forth in the opinion of the United States Supreme Court delivered by Justice Field in the "leading case" of Paul v. Commonwealth of Virginia. It is there laid down that as a corporation has no absolute right of recognition in any other State save that of its origin, but depends for such recognition and the enforcement of its contracts upon the assent of other States, it follows that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. It is clearly an anomaly that corporations should be allowed to do business undisturbed in States where their charters would be annulled were they of domestic origin. If the laws of any State have been deliberately framed to favor the formation of trusts and monopolies, or if they are so administered as to protect the existence of such combinations, there is no reason whatever why other States should allow their laws to be similarly perverted.

One of the first cases decided in England in some years as to the dispossession of the real property of one party by another was in Marshall v. Taylor which was determined by the English Court of Appeals recently. Lord Halsbury in writing the opinion of the court says:

"So far as the facts found by the Vice-Chancellor are concerned, I am not disposed to interfere with anything he has found. But I cannot concur with him in the inference he has drawn from those facts. With reference to the origin of this strip of land, 4 feet wide and

80 feet long I do not feel very strongly either one way or the other ; but, if I were compelled to give a judgment upon it, I think I should hold that the plaintiff originally possessed it. I am afraid I am more influenced perhaps than I ought to be by the exact coincidence of the measurements. I do not know whether there was or was not originally a drain there, and I place no reliance at all upon any supposed presumption that arises from the position of the hedge and the ditch. I do not know whether it was a ditch or not. Very likely it was a small grip formed by the lie of the land, and the wash of the rain water rushing down gradually enlarged it until it became what people agreed to call a ditch ; but the undoubted fact remains that at one period the plaintiff's predecessor in the title did cover it in and did make a drain, although that fact also is qualified by this, that, in making the drain, it was made a drain for both houses, and one perhaps might infer that it was done at the joint instance of both parties, as it undoubtedly did drain both houses. We do not know anything at all about the facts except that it was done by the plaintiff's predecessor in title, and it might possibly have been done by him at the expense, or with the assent, of the defendant's predecessor in title. But, coupling the description on the defendant's conveyance with the undoubted fact that it was the plaintiff that in fact did cover in this thing which has now become a sewer (I hardly know how to describe it), the inclination of my opinion undoubtedly is that it did once belong to the plaintiff. But then the question arises whether, under the Statute of Limitations, the occupation of it since that time has not been such as to exclude the plaintiff and to give it to the defendant. I come to the conclusion that it has. It is impossible, I think, to speak with exact precision about the degree of possession or dispossession that will do unless you have regard, as Cotton. L. J. said in *Leigh v. Jack* (*ubi sup.*), to the nature of the property. In that case, which the Vice-Chancellor himself quoted, the person who set up a possession inconsistent with the rights of the person to whom the property originally belonged, had a strip of land on either side of an intended road, and he incumbered that intended road with various articles of his trade,

but in no sense was there any exclusive possession, as I read the facts, and the arbitrator there found there was no exclusive possession calculated to make the possession of the land change so as to put it in him, and dispossess the real owner. But such a piece of land and such a user seems to me to have no relation at all to such a thing as we are now discussing. The true nature of this particular piece of land is that it is inclosed. It cannot be denied that, according to the ordinary course of procedure, the person who now says he owns it could not get to it. I do not deny that he could have crept through the hedge, or, if it had been a brick wall, that he could have climbed over the wall, but that is not the ordinary and usual mode of access. That is the exclusion—the dispossession—which seems to me to be so important in this case. It is true that for a certain number of years — say fifteen years — which is, I think, the longest period of which there is actual evidence, the owner of the adjoining garden (perhaps the original owner of this piece of land) was in the habit, by his agent, of going into the other garden and clipping the hedge. But the very same witness who proves that, proves that he had at some time deposited the clippings on the midden belonging to the defendant, and that sometimes he left them at other parts of the ground ; but, as was very candidly and fairly admitted, he was doing acts which by no possibility could be acts done as of right. Neither, as far as I can see, was there any right to go through the gate. The very fact that he could have got through the hedge indicates, to my mind, that there could have been no right to go through the gate, which admittedly belongs to the present defendant. Then are we to infer, although it is accompanied by a request to be allowed to go through the gate of the present defendant, accompanied by acts which undoubtedly are done by permission, that there is still a possession in the plaintiff which entitles him to say he has never been dispossessed, because he did clip this hedge ? I confess that does not appear to me to be a reasonable inference. When one comes to see what the property of the defendant is — that part of this piece of land is covered with cobble stones and made a part of the yard ; that over part of it trees have been planted ; that over another

part of it a rose garden, or a portion of a rose garden, has been made; when one considers the continuity of the pathway which is cindered and treated as part of the defendant's garden, it seems to me it is about as strong an aggregate of acts of ownership as you can well imagine for the purpose of excluding the possession of anybody else. I think the letter from the solicitors in 1893 does possess an importance which I had not at first attached to it, because it is plain that from whoever the solicitors who wrote that letter got their information, the belief on the part of the plaintiff and his advisers was, that the hedge was the boundary and that the complaint was of injury done to the hedge. Their belief would not perhaps be in itself very important, but I think their belief reflects light upon what must have been the character of the entering into the defendant's garden from time to time during the fifteen years relied on. If the plaintiff believed the hedge was the boundary he would naturally do what I have a strong suspicion he did do, namely, get permission to go through the gate and also to throw the clippings upon the midden. Under these circumstances I come to the conclusion that, whatever may have been the original state of the title, there has been complete dispossession of the plaintiff here, and that, subject to the right, which is also left in obscurity, for the joint occupation and user of the drain pipes themselves for the purpose of carrying the drainage from both houses, the defendant is now entitled to the possession of this piece of land in dispute.

It will be of interest in this State, as well as in the other parts of the United States to read the article of the Legal Immunities of Trades Unions which recently appeared in the *Law Journal*, and which discusses the decisions and statutes in England. The article in question is as follows:

"Several incidents arising out of recent strikes and labor troubles have called attention to the strange and anomalous position in which trades unions at present stand as regards the law, and the accession to office of the Duke of Devonshire, who appended a valuable supplement dealing with the matter to the report of the royal commission on labor, over which he presided, gives ground for expectation that it will soon receive the attention of the govern-

ment. The unions are active, and often aggressive, bodies; they control and direct the operations of numerous agents, and support their actions by the aid of the large funds at their disposal; but they have no legal corporate existence, and, consequently, no general legal responsibility. No successful litigant can hold their funds liable for costs or damages. Thus the union embarks on litigation with a limitation upon its risks which no other litigant enjoys; it may be guilty of maintenance, as a society, without responsibility, and its officers and servants, acting in the scope of their employment, may commit torts without entailing any liability upon it. Its actual existence as an institution is, of course, perfectly well known, and is, for certain purposes, recognized by law. Its control over its agents, who are often indeed its directors, and its normal acquiescence in or concurrence with their acts, not only in cases where these are legal, but also where they chance to overstep the limit of the law, are notorious. But, unlike every other principal, it is not answerable for the acts of its agents, because it is not a corporation, and has no legal personality.

"The anomalies of this position are not, it appears, the result of accident. They were designed when the unions were formally legalized by the Trade Union Act, 1871, by the promoters of the act on the workmen's behalf, for the protection of the union funds. The act, in providing that the purposes of a trade union shall not be deemed to be unlawful merely because they are in restraint of trade, expressly stipulated that nothing in its provisions should enable any court to entertain legal proceedings to enforce agreements between the members of a union, or certain other specified agreements. It stopped short of the obvious step of incorporating the union, and, while vesting the union's property in trustees for the protection of the members' interests, it constituted payments out of the funds by the trustees for any purposes other than those directed by the union rules a penal offense. It follows that the union cannot, as a principal, be held accountable for the acts of its agents. And there does not appear to be any means whatever by which a collective responsibility can be brought home to its members. (See *Temperton v. Russell*, 62 Law J. Rep. Q. B. 300.)

"It can hardly be doubted that the facility thus afforded to a trade union to direct or maintain the operations of the active partisans in a trade dispute with immunity is conducive to infractions of the law. Its pickets will care little for the risk of fines when they know the defense will be conducted at the union's cost, and the amount of the fine will usually be measured by the poverty of the prisoner, although it is paid out of the war chest of his backers. Its agitators will be reckless in publishing libels, or in urging workmen to break their contracts, if they also are defended by union funds, and are too poor to fear a judgment for damages or costs. The apparent unfairness of forcing an employer, competent and compellable to pay if he is in the wrong, to proceed against or to answer proceedings by workmen who have nothing to pay with, and behind whom their union stands to provide funds so long as it pleases, and no longer, it is not necessary here to dwell upon. But there are other considerations which suggest that the incorporation of the unions would be for the public benefit. Collective bargaining between the union, representing the workmen of a trade, and an employer or group of employers, is regarded by many observers as the most hopeful proposal for the determination of industrial quarrels. The modern trade union has always declared this to be one of its primary objects. But effective bargaining is impracticable, and effective contract is out of the question, unless each party can be made responsible to the other if he attempts to break the agreement. And, further, if the experiment of arbitration—whether optional or compulsory—is ever to be fairly tried, the incorporation of the unions is an essential condition of the undertaking. To allow the authority of a union to be exerted, and its funds to be employed for the purpose of urging or aiding its members to disregard the award of the referee, would be to strike his jurisdiction with impotence. No employer would continue to submit to the chances of arbitration if, in the event of a determination in his favor, his real opponent were permitted to disobey it with impunity. The obvious inapplicability of this peaceful method of settlement for industrial disputes to the present legal positions of the parties has led Sir John Lubbock in the Arbitration Bill, which he intro-

duced into the late Parliament to require the trade union as a term of the submission of any question as to future wages to arbitration to give security for its observance of the award by making a deposit of money. But this device for the partial and indirect solution of the difficulty would rarely commend itself to the officials of a union for adoption, even if they happened to have sufficient funds available for the purpose.

"There can be no doubt that, just and expedient as the alteration of the law here suggested appears to be, it would not be agreeable to many of the trade union leaders. 'The bare legalization' (by which, it is presumed, is meant the incorporation of the unions) 'would have brought trade unionists under the general law and subjected them to the constant and harassing interference of courts of justice. The spirit of the law and the prejudice of lawyers were and are alien to the purposes and collective action of trade societies,' say Mr. and Mrs. Webb. And in a minority report of Messrs. Abraham, Austin, Mawdsley and Tom Mann, attached to the report of the royal commission on labor, these gentlemen state that, in their opinion, the proposal is open to the gravest objection. 'This suggestion,' they say, 'is, that it would be desirable to make trade unions liable to be sued by any person who had a grievance against the action of their officers or agents. If every trade union were liable to be perpetually harassed by actions at law on account of the doings of individual members; if trade union funds were to be depleted by lawyer's fees and costs, if not even by damages and fines, it would go far to make trade unionism impossible for any but the most prosperous and experienced artisans.'

"No doubt it would be advisable to maintain the rule of the act of 1871, which denies the court's jurisdiction over agreements between the members in regard to membership, or in respect of sick fund and other benefits. Perhaps it would also be necessary to require the sick and insurance funds to be separated from the strike and other funds of the unions, and to protect the former from liability. But the exemption of the union and its funds from liability to the law which its officials have broken on its behalf ought not to commend it-

self to the law-abiding sections of the community."

In *People v. Sheldon*, 139 N. Y. 251; 34 N. E. 785, certain coal dealers organized a company known as the Lockport Coal Exchange. The object of the organization was to prevent competition in the price of coal among the retail dealers in that city, by constituting the exchange the sole authority to fix the price which should be charged by the members for coal sold by them. Sheldon and others, members of the exchange, were indicted, charged with the offense of doing an act injurious to trade or commerce. The trial judge submitted the case to the jury upon the theory that, if the defendants entered into the organization for the purpose of controlling the price of coal and managing the business of the sale thereof, so as to prevent competition in the price between the members of the exchange, the agreement was illegal. The jury found the defendants guilty. It was held that the principle upon which the case was submitted to the jury was sanctioned by the authorities.

Andrew, C. J., in delivering the opinion of the court, said: "The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, one upon which the law fixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Again, he says: "Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests, both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. \* \* \* If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of

such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

Undoubtedly there is a peculiar prejudice on the part of many Americans against individuals who either have titles thrust on them or who earnestly seek them. Their is no particular stigma attached to the numerous military and political titles in this country which many have prefixed to their names. The article on the *Anomalies of Law Peerages* which appeared in the *Law Times* was as follows:

The fact that the peerages to be conferred on Sir Henry James and Mr. Matthews are to be granted in special remainder, and will descend respectively to the brother of Sir Henry James and the nephew of Mr. Matthews, may render it of interest to note that in the last and present centuries several peerages granted to legal personages have been in special remainder. Thus, in the last century, the peerages of Lord Mansfield (lord chief justice), of Lord Thurlow (lord chancellor), and of the Earl of Rosslyn, better known as Lord Loughborough, the immediate successor of Lord Thurlow in the lord chancellorship, were all granted in special remainder; while, in the present century, the peerage granted to Lord Brougham on becoming lord chancellor, and to Sir Edmund Beckett, Q. C. (Lord Grimthorpe), were likewise in special remainder.

In one instance, at least, a peerage granted in special remainder has raised questions of the highest legal and constitutional interest. Thus, in 1800, an Irish peerage was granted to Mr. Blake, limited to him and to his heirs male, and "in default thereof to the heirs male of his father." Mr. Blake died without male issue, and predeceased his father, to whose heirs the peerage was limited, but *Nemo hæres est viventis*. The editor of the *Cornwallis Correspondence* thus wrote, fifty years after this creation: "At Lord Wallscourt's death his father was still alive with an heir apparent only in the person of a grandson. Doubts arose as to whether in law the peerage was not therefore extinct, and, although the young man succeeded to his uncle's title, neither he nor any subsequent Lord Wallscourt has ever brought the question



to issue by claiming to vote for an (Irish) representative peer."

Then, too, it has not been unusual to confer a peerage on the wife of a law officer of the Crown whose services in the House of Commons could not be spared to his party. Thus, the wife of John Wolfe (afterwards Viscount Kilmardon and Lord Chief Justice of Ireland) was, during his Attorney-Generalship in 1795, created Baroness Kilmardon; so to the wife of John Toler (Earl of Norbury and Lord Chief Justice of the Common Peas in Ireland) was, while he was Solicitor-General, created Baroness Norwood. In England the wife of Sir John (Lord Campbell) was, in 1836, when her husband was Attorney-General, created Baroness Stratheden. She died a year before her husband, who was also elevated to the peerage, and on her death her son, the present Lord Stratheden and Campbell, in the lifetime of his father, became a peer of the realm.

It is, moreover, a curious circumstance that all efforts at the reform or modification of the constitution of the peerage have been made in the cases of peerages conferred on legal personages. Thus, in 1856, when an attempt was made to create life peerages, Sir James Parke, a baron of the Exchequer, was created by letters patent, under the title of Lord Wensleydale, a peer for life only. The House of Lords, at the instance of Lord Lyndhurst, an ex-Lord Chancellor, whose speech, full of quotations from black-letter authorities, repeated from memory, his sight being impaired, was regarded as one of the greatest of intellectual efforts, refused admission to a life peer. The Crown yielded to their pretensions, and Lord Wensleydale received a fresh creation by a patent referring to his heirs male, although he had no male issue. Again, when the Lords of Appeal in Ordinary were first constituted under the provisions of the Appellate Jurisdiction Act in 1876, they were to sit and vote so long only as they held office, but they were to rank for life as Barons, with such titles as the Crown might appoint. By an amending Act in 1887 Lords of Appeal in Ordinary, on vacating their office, still continued to be Lords of Parliament. Under the provisions of the original Act of 1876 we should have, in the case of resignation or removal from office of a Lord of Appeals in Ordinary, a non-Parliamentary

Baron, and Lord Russell, the Lord Chief Justice of England, would not have, as an ex-Lord of Appeal in Ordinary, a seat in the House of Lords.

In line with much that we have said in regard to simplicity in legal procedure and the steps in the right directions is the adoption by the Illinois Legislature of the Torrens act, which this winter became a law. The *Chicago Legal News*, in speaking of this statute, says:

"One of the most important acts passed by the Legislature of this State at its session which ended the 14th of June, is the "Act concerning Land Titles," commonly called the Torrens law, after Sir Robert Torrens, who first proposed the system for South Australia, where it had been in operation since 1858. Illinois is the first in this country to put that system upon its statute books. It will be found in the *Legal News* edition of the session laws of 1895, which will appear in a few days. By the terms of the act, however, it is not to take effect in any county until it is adopted in that county by a vote of the people. The friends of the act believe it will be adopted in Cook county by an overwhelming vote at the next November election.

"Under this act the title is registered in contradistinction to the registration of the evidences of title. The central principle of the act is that every question, whether of form or substance, that may affect the title or interest intended to be conveyed, shall be settled once for all at the time of the transfer.

"As a consequence there will be no going back of the certificate of title. The history of the title back of this certificate is rendered of as little consequence as the history of the title to a share of stock in a corporation. There will be no occasion to inquire into it. This will, in time, do away with abstracts of title altogether. The manner of keeping the books in the registrar's office is very simple. It is like keeping a ledger account with each piece of property; but few books will be required. By reference to the tract index, one will find on what page the account with a given piece of property is to be found, and by looking at that page, the condition of the title will be seen at a glance. No transfer can be made or lien put upon the property except upon the record.

This will do away with the acquisition of title by adverse possession. Squatters are given no quarters under the act. No new offices are created if we except examiners of titles, who are deputies of the registrar. The recorder is *ex officio* registrar of titles in his county, and the offices of the recorder and registrar are kept together. No person is compelled to register his title, but may do so at his option. A title once registered must continue under the system.

"The most difficult questions which the act has to deal with, are those pertaining to first registration—the effect to be given the first certificate of title. In Australia, England, Prussia, Canada, etc., where the system is in operation, there is no difficulty about giving the certificate conclusive effect immediately upon its being granted, but in this country that cannot be done. The Constitution of the United States, and of the several States, render it impossible to divest one of his interest in property except by due process of law, and the act does not attempt to violate this principle. The registrar is not made a judicial officer, and the granting of the certificate of title is not a judicial act. The certificate is not by its own vigor conclusive. By the terms of the act, the registration of this certificate starts the running of the statute of limitations contained in the act. It is this statute of limitations running upon this matter of record, which concludes adverse claims, and not the finding of the registrar. The time given in which one may claim adversely to the registered certificate is five years.

"In other words, no one can gainsay a certificate who does not come forward with his claim within five years after the first certificate is registered. This limitation cuts off all claims of every nature, whether in favor of infants, lunatics, or other persons. But the law provides for an indemnity fund, out of which anybody, whose interest is cut off by this limitation or by any mistake or wrong of the registrar or anybody else, may obtain the value of such interest. The registration becomes effective at once as to all persons dealing with the land after it is bought under the act. It is only those who may possibly have an interest adverse to the registered title who have the five years to bring forward their claims. The act

fully provides for protection in all interests that cannot be brought forward within five years, such as contingent remainders, reversionary interests, and the like.

"One of the prominent features of the act, which it is thought will protect the rights of infants, is that there can be no dealings with the real estate of the deceased person till the heirship is proved in the probate court, and the court has found the rights of the several heirs or devisees and has entered an order for the transfer of the title to them. On the filing of that order with the registrar, and the surrender of the certificate of title, he registers the title in the heirs or devisees pursuant to the order. If any interested party is dissatisfied with the order of the probate court, he can appeal, but when the title is once registered pursuant to the order of the court that is final, and anyone who wishes to deal with the property can thereafter do so safely. The policy of the act may be likened to that with reference to negotiable instruments, which enables one to deal in them with safety so far as latent equities are concerned, and with the least expense or delay."

Part of the argument made by William D. Guthrie, Esq., on the rehearing of the income tax cases is printed in the *American Lawyer* and is so scholarly and affective that we publish it. Mr. Guthrie said in part:

May it please the court: No one could be indifferent to the responsibility of opening this argument, nor fail to be almost awed by the consciousness of the great importance, to the whole people, of the questions about to be discussed. It must be a subject of regret that the generosity of Mr. Seward has prompted him to push his junior forward when he would, so much more satisfactorily, have presented the results of his scholarly research. So, too, of our associates, Gen. Bristow and Mr. Wilcox.

We cannot consider the merits of this controversy or seek for the true interpretation of the words "direct taxes" found in the Constitution of the United States without realizing how intimately connected and interwoven are the science of government and the principles of taxation. The most essential attribute of the sovereignty of the union is the taxing power; and when we discuss it, we enter the realm of national

statesmanship. As civilization is but the art of governing the peoples of the earth, so political thought and activity constitute one of the supreme interests of man. History, philosophy, ethics, the nobler truths of religion itself, in a word, all the highest thoughts of mankind, become mere guides and ministrants to the service of politics in its grandest signification. Each new day has needs and difficulties of its own; new emergencies constantly arise incident to new modes of thought and new ways of life. The problems of to-day require for their solution that intellectual integrity and moral courage which are ever so much rarer and nobler than even the loyalty and bravery of the battlefield.

The Constitution is the political creed as well as the embodiment of the conscience of the nation; and as this court shall preserve it intact, according to its spirit and its letter, or permit error to affront and darken its light, so will our future be progress or decline, happiness or misery, glory or shame.

In presenting our petition for a rehearing, we anticipated and faced the censure and criticism it invited on the part of many who were opposed to the enforcement of the income tax provisions of the law of August 28, 1894. According to ordinary methods and practice, it was obviously inexpedient to risk reopening questions already decided in our favor. The mandate of the court was about to issue upon an opinion which, the Government would be compelled to conclude, logically excluded from the operation of this particular law, because not apportioned, the tax upon all the real estate of the country as well as its invested personal property. Yet many questions were left still undetermined, probably because not adequately presented, although unlimited time was allotted. It was certain that the tax would be paid by all under protest, or the collection of it contested in the courts. The Department of Justice would be overwhelmed with litigation. Nor were suggestions wanting that the decision of any circuit judge in our favor might be affirmed by a divided court. Even when we did file our petition, no aid was furnished by the Government, but simply the intimation that it a rehearing became inevitable, then and then only it would ask to be heard anew on the questions already definitely decided.

But, if your honors please, we felt that a great constitutional controversy, involving questions of vital and transcendent interest to the whole country ought not to be permitted to resolve itself into a rivalry of shrewdness or a problem of tactics. Advocates at this bar, inspired by its traditions, we could not for a moment imagine ourselves released from the responsibility and obligation of patriotism. According to our conception of duty, it was incumbent upon us, as well as upon our adversaries, to bring about a speedy determination of these important questions, to put an end, if possible, to litigation, in the interest of the republic itself, to lay the facts before your Honors as fairly and as clearly as we could, leaving you to analyze their significance and to adjudge the truth.

We signally fail in making our motives clear if we create the impression that we are seeking the vain and empty satisfaction of a personal triumph, or desire the worthless honor of success in the obscurity of doubt, through the lottery of health, or by accident or technicality.

¶ If your Honors please, we are not challenging the power of Congress to reach by direct taxes all the real and personal property of the country, but we insist that the procedure and method of the assessment and levy of this tax are unconstitutional. Doubt as to the method in which Federal taxes should be laid ought to be removed at the earliest opportunity. Months were about to elapse before the Court would again convene. We contemplated that in these days, when events follow each other with such startling rapidity, an emergency might suddenly arise requiring the prompt and decisive exercise of the taxing power of the Federal Government; and that as matters now stood, Congress might be embarrassed or hampered by the suggestion that there was doubt, not as to the power, but as to the method of laying taxes; not as to the power of Congress to reach personal property — all the personal property of the country — but as to the method in which Congress should tax it. There were also questions unanswered as to whether or not the Constitution required equality in taxes; as to whether or not the Constitution permitted Congress to discriminate in favor of individuals and partnerships and against corporations; and, above all, as to whether or not Congress could arbi-

trarily exempt from taxation certain classes of favored corporations holding vast accumulations of real and personal property.

We thought, therefore, that there ought to be a rehearing at the earliest opportunity, not merely for our clients' sake, but for the sake of the Government, for the sake of the court, for the sake of the people. The decision in these cases will settle one of the most important constitutional questions ever passed upon in this court. The rule announced should unfold a standard of truth as to the interpretation of our organic law, not for a party and a day, but for all parties and all times, thus meriting the obedience and respect of men. We took it upon ourselves, so far as it lay in our power, to see to it that the decision of this court, as soon as it was delivered, should not be impaired or nullified or undermined by the suggestion, in court or out of court, that the questions decided had not been fully argued, or that the Government had not been prepared, or that its representatives had not had the fullest opportunity to be heard.

We, therefore, invite, here and at this time, reinvestigation and reargument upon all points. Let us have every view, every suggestion, every historical fact, every argument, tending in any way, even in the slightest degree, to meet our contention and to convince the court that it has misconceived the true purpose and intention of the framers of the Constitution and of the people who voted to adopt it. Our adversaries need have no misgivings and no apprehensions. The courage and patriotism of the opinions which have thrilled us with confident hope in the living strength of our institutions, will not hesitate to confess and correct error, if any can be shown.

If your Honors please, no statute and no decision inconsistent with the Constitution can be allowed to stand. A century of error should not overrule the Constitution. The people are not to be deprived by erroneous precedents of inherited rights, imbedded in the Constitution. Those rights may slumber, but, nevertheless, they live and breathe. Where would we be to-day if the rule of precedent had controlled our forefathers? Is the Constitution to be enslaved by any such technical doctrine as *stare decisis* and thus manacled with parchment

chains? When Franklin stood at the bar of the English Commons ought he to have been satisfied to abandon the claims of the colonists because the school of Mansfield, Thurlow, Eldon and Boston-born Copley could have demonstrated to him that precedent upon precedent fully sustained the right and power of Parliament to tax the colonists without giving them representation?

The rule of precedent and *stare decisis* presupposes error, and closes the door on reason and on truth. The most technical work in the common law, Fearn on Contingent Reminders, is cited to sustain the claim that an erroneous interpretation of the Constitution must be perpetuated. We can answer in the language of our great historian: "Woe hangs over the land where the absolute principles of private rights are applied to questions of public law, and the effort is made to bar the progress of the undying race by the despotic rules which ascertain the property of evanescent mortals."

A person who signs an instrument without reading it, when he can read, cannot, in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature, because not informed of the contents of the instrument. The same rule would apply to one who cannot read, if he neglects to have it read, or to inquire as to its contents. This well-settled rule is based upon the sufficient reason that in such case ignorance of the contents of instruments is attributable to the party's own negligence. But the rule is otherwise, where the execution of an instrument is obtained by a misrepresentation of its contents; where the party signed a paper he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper, for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing.

This is the clear-cut manner in which the Supreme Court of Alabama, in the case of Beck & Pauli Lithographing Co. v. Houppert et al. (16 So. Rep. 522), reiterates the wholesome doctrine that a person cannot take advantage of his own wrong or negligence.

## OPERATION OF FOREIGN GENERAL ASSIGNMENTS AS AFFECTED BY A CONFLICT OF LAWS.

PROBABLY there is no feature of the law of general assignments for the benefit of creditors more confusing, as well as interesting, than that concerning the validity and effect of a foreign general assignment as effected by a conflict of laws. The decisions of the various States are not all agreed, and in endeavoring to lay down the general principles we are confronted not only by a conflict of law but with a conflict of decisions as well.

Much confusion arises because of the variety of interest represented; the assignment may be executed in one State, the property situated in another, the creditors may be residents of either of those States or of another, and the litigation may arise in still another State. And with the extraordinary diligence on behalf of creditors to reach the estate of their failing debtor this subject becomes an important and practical one.

The question at once arises, assuming there is a conflict of laws, by the laws of what State are the rights of the parties to be determined? Can the law or adjudications of one State have any operation in another State? In other words, can the law of one State be extended beyond the limits of that State into the jurisdiction of another State and control the decisions of its courts? Hence in deciding a particular case four questions must be considered, to wit: 1. The legal situs of the property. 2. The nature of the assignment, whether voluntary or involuntary. 3. The nature and policy of the law of the situs. 4. The domicile of the creditors invoking the law of the situs. And these will be discussed in their order.

### REGARDING THE LEGAL SITUS OF PROPERTY.

Regarding the legal situs of property the rule differs as to real and personal property. It is no longer a question of dispute or doubt that the validity of an assignment or other transfer to dispose of lands depends entirely upon the law of the State or country where the land is actually situated at the time. This is an invariable rule; and an assignment in order to invest a valid title in the assignee, in any event, must be executed in all respects to satisfy the law of the situs. (Nicholson v. Leavitt, 4 Sandf. 252; Chapman v. Peabody, 159 Mass. 420; Moore v. Church, 70 Iowa, 208.)

And of course in case of tangible personal property as well as real estate the legal situs is where the property is actually situated, except in case of ships at sea, which, by a fiction of the law, are supposed to remain a part of the territory of the State from which they sail while on the high seas, and hence have their situs in such State. (Crapo v. Kelly, 16

Wall. 610.) In this case an assignment was made by the owners, residents of Massachusetts, of the ship "Arctic," while the ship in question was on the high seas. She sailed into port at New York city, where she was attached by creditors, residents of New York. The United States Supreme Court held that the assignment executed in Massachusetts carried with it the title to the ship and thus defeated the lien of the attachment.

Regarding choses in action we find it more difficult to determine their exact situs; but under general jurisprudence they follow the person of the owner or creditor and have their situs at his domicile. And a transfer valid where made will be recognized as valid everywhere although not valid by the law of the debtor's residence. In a leading case in this State the court laid down substantially this rule, to wit: That personal property follows the person of the owner and has no other situs, and a transfer valid according to the law of the situs would be valid everywhere, unless the corpus of the property is situated in another State and the transfer is invalid according to the law of that State. And this is a general rule. In other words, the law of the place of transfer governs unless it is in conflict with the law of the situs, in which event the law of the situs controls; and as a rule the situs of the debt and the debtor's domicile are the same.

But this general rule is not invariable, and always yields where the law or public policy of the State, where the corpus of the property is actually situated, has provided a different rule of transfer from that of the State where the owner resides, (Kelly v. Paine, 107 N. Y. 83); and so local laws may fix the situs of the debt at the domicile of the debtor for the purpose of subjecting it to legal remedies provided by the statutes of the State of the debtor's residence, such as attachment, garnishment, execution, etc. (Williams v. Ingersoll, 89 N. Y. 508; O'Neil v. Nagle, 15 St. Rep. 358; s. c. 19 Abb. N. C. 399, and Note; Connor v. Hanover, 28 Fed. Rep. 549; Matter of Estate of Romaine, 127 N. Y. 80.)

In O'Neil v. Nagle, a well considered case, the facts were that a voluntary general assignment was made in New York, containing preferences, part of the property included in the assignment being debts owing to the assignor by merchants residents of New Jersey. The New Jersey statute provided for the attachment and garnishment of the debts, and also prohibited preferences of any kind. Now applying our first proposition we see that the debt followed the person of the owner and had its situs in New York, but by applying our second proposition we find that the New Jersey statute has fixed the situs of the debt in New Jersey for the purpose

of attachment, and hence the assignment, being in conflict with the law and policy of New Jersey, could not operate to pass title to the assignee as against the attaching creditor a resident of New Jersey.

The tendency of the decisions is to do away with the fiction of the law that personal property has no situs away from the person of the owner, and to substitute the truth in its stead, where, in a specified case, there is any good and equitable reason for doing so; and the power of the State to fix its situs for a specified purpose, such as attachment, taxation, etc., can hardly be doubted. (Matter of Estate of Romaine, *supra*; O'Neil v. Nagle, *supra*.)

#### NATURE OF THE ASSIGNMENT.

The fact that the situs of the property is determined does not settle the question, and we must inquire into the *nature* of the assignment. And here we notice a marked distinction between *voluntary* general assignments and assignments executed under bankruptcy and insolvency laws; the former is the *voluntary* and the latter the *involuntary* act of the assignor. The one has the universal effect of a contract, the other the territorial effect of a statute. As the foreign statute which gives life to the involuntary assignment can have no extra-territorial effect of its own vigor, so it is a general rule that such assignments have no effect on property outside the jurisdiction of the State where it was executed. One State has no power to dictate to another State the terms of administration and distribution of its property. A State by its sovereign power has the exclusive prerogative of determining the status of its citizens and their property within its borders. As to a State's power over its citizens, see *Cole v. Cunningham*, 133 U. S. 107.

A few leading cases will serve to illustrate this distinction:

The leading case in this State is the Matter of Waite, 99 N. Y. 433, which reviewed the conflicting authorities and settled a long mooted question. The facts were as follows: The firm of Haynes & Sanger, doing business in the city of New York, on October 15, 1885, made a general assignment to Charles Waite, a member of the firm of Pendle & Waite, who were doing business both in New York city and London. Waite was a citizen of New York and Pendle a citizen of England. The assignment contained a preference in favor of Pendle & Waite for about \$14,000. Subsequently Pendle & Waite failed, suspending business in London in February, 1885, and Waite went to England, and they filed a petition in the London Court of Bankruptcy for a composition with creditors; but the composition failed. Then upon an application by their creditors, which was opposed by Waite, the firm of Pendle & Waite were declared bankrupts,

and one Schofield was appointed trustee of the firm property, which, according to English law, vested in him the legal title to all firm property wherever situated. Waite continued to act as assignee of Haynes & Sanger, appropriating to himself under the preference to Pendle & Waite the sum of \$14,000. The American creditors of his firm had been fully paid. Upon his accounting as assignee, Schofield appeared by attorney and claimed said sum as trustee of Pendle & Waite by virtue of the English bankruptcy proceeding. Waite's counsel argued that the bankruptcy proceeding could have no extra-territorial force as against a resident of New York State, and hence that his title was paramount to that of Schofield. The Court of Appeals decided against this contention. Earl, J., writing the opinion, said: "No principle of justice, no public policy requires the courts of this State to ignore the title of this assignee (Schofield) at the instance of one of the bankrupts. No injustice will be done to Waite if this money is taken to pay his creditors, and public policy does not require that the courts of this State should protect him in his efforts to cheat his creditors or his partner." After a careful consideration of the decisions on this question, the learned judge stated the following rules, to wit: 1. The statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. 2. But the comity of nations allows a certain effect to titles so derived, and the title of foreign statutory assignees will be recognized and enforced here when they can be without prejudice to the rights of creditors pursuing remedies under our statute; provided, also, that such titles are not in conflict with the law or public policy of our State. 3. Such assignee can appear and, subject to the proceeding rules, maintain suits in our courts against debtors of the bankrupt whom they represent.

These principles were reasserted by the Court of Appeals in the late case of *Barth v. Backus*, 140 N. Y., 230. In this case the contest arose between the assignee of a Wisconsin corporation and attaching creditors residents of New York, pursuing their remedy in New York. These creditors were assignees of claims formerly due Wisconsin creditors against the corporation, and took their title subsequent to and with full knowledge of the Wisconsin assignment. Thereafter they procured attachments against personal property of the Wisconsin corporation situated in the State of New York. The Wisconsin statute governing the assignment provided that the assignor "may be discharged from his debts as a part of the proceedings under such assignment, upon compliance with the provisions of this act," and that every creditor who should accept a dividend out of the assigned estate, or in

any way participate in the proceedings, would be "deemed to have applied for a discharge and should be bound by any order or discharge granted by the court." The court held that the statute gave it the effect of an involuntary bankruptcy assignment, and that the lien of the attachment was paramount to that of the assignee's title. Writing the opinion, Chief Judge Andrews said: "Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extra-territorial effect to the law of that State. The assignor had no power to make such a condition, and if it is legal it is by force of the statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law." The corporation acted voluntarily in the sense of executing the transfer, for it might well have refrained from executing it at all, but the statute by effecting a discharge of his indebtedness without the creditor's consent, was, nevertheless, involuntary and coercive as regards both the corporation and its creditors. The Wisconsin statute above referred to, has received a similar construction by the courts of Illinois in a well considered case. (*Townsend v. Coxe*, Ill. Sup. Ct., 1894; 37 N. E. Rep. 689; *Rhawn v. Parce*, 110 Ill. 350, is also an instructive case on this subject.)

And as a rule there is no difference whether by virtue of an act in bankruptcy the debtor is coerced into making an assignment of his estate, or whether he by a voluntary assignment sets the law in motion which discharges him of his indebtedness without the consent of his creditors. (*Barth v. Backus*, *supra*; *Rhawn v. Parce*, *supra*; *Townsend v. Coxe*, *supra*; *Warner v. Jaffray*, 96 N. Y. 254; *Weider v. Maddox*, 66 Texas, 372; *Hutchinson v. Peshine*, 16 N. J. Eq. 169; *Holmes v. Remsen*, 20 Johns. 229.)

Proceeding on the same line of reasoning it is held that as between the States of the Union, a discharge in bankruptcy by the law of one State will not bar the rights of a creditor who is a citizen of another State, and not a party to the proceedings, from pursuing his remedy against the debtor in such other State. And this is said to be settled by a substantial concurrence of authorities. (*Phelps v. Boreland*, 103 N. Y. 410; *Goodsell v. Benton*, 13 R. I. 225; *Hills v. Carter*, 74 Me. 156.)

As to *voluntary* general assignments, it is a general rule that if they are valid under the law of the place of execution, they will be recognized as valid and effective everywhere, unless contrary to the positive law or public policy of the place where the property is situate; that is, if there is no conflict between the *lex loci contractus* and the *lex rei sitæ* then they are effective to pass title to the assignee as against all creditors of the assignor, but if there is a conflict, the law of the situs supercedes and controls. (*Egbert v. Baker*, 58 Conn. 319; *National*

*Bank of Rockville v. Walker*, 61 id. 154; *May v. First National Bank*, 122 Ill. 551; *Henderson & Co. v. Chase*, 35 Ill. App. 155; *Lipman v. Link*, 20 id. 359; *Chafee v. Fourth National Bank*, 71 Me. 514; *Cafin v. Kelling*, 83 Ky. 649; *May v. Wannamacher*, 111 Mass. 282; *Butler v. Wendle*, 57 Mich. 62; *Askew v. La Cynge Exchange Bank*, 83 Mo. 366; *Guillander v. Howell*, 35 N. Y. 657; *Ockerman v. Cross*, 54 id. 29; *Warner v. Jaffray*, 96 id. 254; *Thompson v. Fry*, 51 Hun, 296; *Kelstadt v. Rieley*, 55 How. Pr. 373; *Nassau Bank v. Yendes*, 44 Hun, 55; *Varnum v. Camp*, 13 N. J. Law, 326; *Long v. Girdwood*, 150 Pa. St. 413; *Weider v. Maddox*, 66 Texas, 372; *Schroder v. Tompkins*, 58 Fed. Rep. 672; *Caskie v. Webster*, 2 Wall. Jr. 131; *Barnett v. Kinney*, 147 U. S. 476; *Bholen v. Cleveland*, 5 Mason, 175; *Hanford v. Paine*, 32 Vt. 443; *Cook v. Van Horn*, 81 Wis. 291.)

#### NATURE OF THE LAW OF THE SITUS.

The question as to the nature of the law of the situs arose in the case of *Warner v. Jaffray*, 96 N. Y. 248. A resident of New York made a general assignment for the benefit of creditors of all of his property, part of which was personal property situated in Pennsylvania. The assignment was recorded in Pennsylvania March 18, 1881. Prior to that time, and on March 1, 1881, the defendant went into the State of Pennsylvania and obtained a warrant of attachment on the personal property there situated. The question before the court was, whether the assignment effected a transfer of such property to the assignee, so that it could not subsequently be attached in the courts of Pennsylvania by creditors residing in New York.

The Pennsylvania statute provided that all assignments by non-residents should be recorded in the county where the property, real or personal, was situated, and that they should take effect from the date of such recording only.

The Court of Appeals held that the assignment, until recorded, was in conflict with the positive law of Pennsylvania and could have no effect there as against such attaching creditors. Earl, J., writing the opinion, said: "It is a general rule that a voluntary transfer of personal property is to be governed, everywhere, by the law of the owner's domicile, and this rule proceeds on the fiction of the law that the domicile draws to it the personal estate of the owner wherever it may happen to be. But this fiction is by no mean of universal application, and yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined, and always yields when the law and public policy of the State where the property is located have prescribed a different rule of transfer from that of the State where the owner lives."

The question arose squarely in the leading case of *Guillander v. Howell*, 35 N. Y. 657, over a general assignment executed by an insolvent debtor in New York, containing preferences, valid under the laws of that State, part of his property being situated in the State of New Jersey, where it was subsequently seized by attaching creditors residents of New Jersey. The statute of New Jersey declared all assignments, containing preferences, void as against the public policy of the State. Here was clearly presented a conflict of laws. It was held that such assignment could have no extra-territorial effect, it being hostile to the policy of the laws of New Jersey, as against such creditors. Peckham, J., said: "The law of New York cannot operate there except by comity or courtesy, and as to property actually situated in New Jersey, that State has the conceded right to legislate; she may declare what alone will transfer the title as against her citizens, creditors of the assignee."

Discussing the question in *Weider v. Maddox*, 66 Texas, 372, Stayton, J., said: "It seems, however, to be everywhere admitted that a general voluntary assignment for the benefit of creditors, made by an insolvent debtor, in accordance with the laws of the place of his domicile, will pass all his personal property, wherever situated, unless the operation of such assignments is limited or restrained by some law of the State in which the property is situated." In the opinion the learned judge cites many authorities.

Again, it was said in the *Princeton Mfg. Co. v. White*, 68 Ga. 98, that "Whatever may have been the rulings in the past relative to the general operation of bankrupt or involuntary assignments, it is now well settled in most States that all voluntary assignments, if valid where made, and not repugnant to the *lex rei sitæ*, will be enforced."

Thus we see that a voluntary general assignment is effective to pass title to all the assignor's personal property wherever situated, if it is not in conflict with the *lex rei sitæ* as against both foreign and domestic creditors. But in *Frank v. Babbitt*, 155 Mass. 115, a late case, the court said: "This court has frequently held that a voluntary assignment made by a debtor living in another State, for the benefit of his creditors, would be regarded as valid here," the only qualification being "that this court would not sustain them, if, to do so, would be prejudicial to the interests of our own citizens or opposed to public policy." This and other Massachusetts cases are often cited as departing from the general rule, and making a distinction in favor of creditors residing in Massachusetts. But this is only an apparent, and not a real, distinction, at most, which may be explained away by the fact that the common law, as declared by the Massachusetts

courts, differs from that of the other States, in that they hold the assignment to be invalid and inoperative to pass title until the creditors, or some of them, have given their unqualified assent to it in some manner, and is inoperative against attaching creditors, except to the amount due the assenting creditors, and to that amount it is operative. This distinction is suggested in *Faulkner v. Hyman*, 142 Mass. 53; and we submit, assuming the assignment is valid according to the common law above referred to, and is in derogation of no statute law of the State, that it will be valid and effective to pass title to the assignee even against domestic creditors of Massachusetts.

In Indiana, Louisiana and Vermont by the common law, an assignment is held inoperative to pass title to the assignee until he has taken possession of the property, either personally or by agent. (*Woolson v. Pipher*, 100 Ind. 306; *Reynolds v. Adden*, 136 U. S. 354; *Rice v. Curtis*, 82 Vt. 460.) But in New York the assignment takes full force and effect as soon as it is executed (*Nicoll v. Spowers*, 105 N. Y. 1) and actually delivered (*McCarthy v. Chambers*, 117 N. Y. 523).

Under the law of the situs we may note for convenience four general features, to wit:

*First.* That when there is no conflict between the law of the place of the assignment and the law of the situs, the assignment will be enforced as against all subsequent leinors, both foreign and domestic.

*Second.* When the assignment contravenes some statute defining a great public policy of the law and prohibiting transfers deemed to be injurious, it will not pass title to the assignee of the debtors' estate situated within the State where such statute governs, except as a matter of comity or courtesy.

*Third.* When there is a statute requiring the recording or filing of the assignment, in terms intended to govern all assignments, both domestic and foreign, as the Pennsylvania statute, an assignment not so recorded or filed will be ineffectual to pass title to the property within such State.

*Fourth.* Statutes which regulate the mode of execution, distribution, filing of schedules, and the like, and secure a just distribution of the estate of the debtor, usually, are applicable to assignments executed by debtors residing in such State, and can have no extra-territorial effect so as to effect assignments executed without the State.

As to the nature and policy of the law of the situs which may be in conflict with the operation and validity of the foreign assignments, expressions are to be found in many opinions from which the inference may be drawn that it rests in the discretion of the court to declare the policy of the law, and to give or deny effect to such assignments as they may or may not appear injurious to the rights of citizens



of the State, whose laws the courts administer, and within whose limits the property may be found. Speaking of this, Stayton, J., in *Weider v. Maddox*, said: "Such a rule seems to us to confer upon the courts a power too little restricted, too unqualified and unlimited, to be tolerated in any country governed by laws. What, upon such a matter is to be deemed injurious to the rights of the citizens of the State in which the property is situated, should be the subject of *legislative* and not judicial discretion."

The majority of cases arise over the construction of statutes regulating the recording or filing of assignments, or preferences contained therein.

An interesting case lately came before the Supreme Court of the United States, *Barnett v. Kinney*, 147 U. S. 476. A citizen of Utah made an assignment of all his property for the benefit of his creditors, containing preferences, to another citizen of Utah, which was valid by the laws of Utah and by the common law. Part of his property was situated in Idaho, of which the assignee had taken possession. This property was subsequently attached in Idaho by a resident of Utah. The Revised Statutes of Idaho provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors, \* \* \* that creditors should share pro rata without priority or preference whatever," and for a discharge of the assignor upon a compliance with the statute. Was the assignment in conflict with the laws of Idaho? Chief Justice Fuller, in writing the opinion, remarked, that "while the statute of Idaho provided a pro rata distribution without preferences in assignments under the statute, it did not otherwise deal with the distribution of his property by a debtor, nor *prohibit* preferences by *non-residents* debtors and creditors through an assignment valid by the laws of the debtors' domicile. No just rule required the courts of Idaho, at the instance of a citizen of another State, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid because preferring creditors elsewhere, and, therefore, in contravention of the Idaho statute and the public policy therein indicated in respect to its own citizens, proceeding thereunder. The law of the situs was *not incompatible* with the law of the domicile."

By a mere casual reading of this decision it is difficult to harmonize it with the decisions construing the New Jersey statute forbidding preferences, and like statutes; but there were certain features, looking at the context of the statute, which led the court to conclude that it was not the legislative intent that it should apply to all assignments both domestic and foreign — it is a question of legislative intent.

Again the question arose over the construction of a similar statute as effecting an assignment executed in the State of New York covering property situated in the State of South Carolina. (Ex parte Dickinson, 29 S. C. 453.) The statute of South Carolina contained this provision, "Any assignment by an insolvent debtor of his or her property for the benefit of creditors, in which any preference or priority is given to any creditor by the terms of said assignment, over any other creditor, \* \* \* shall be absolutely null and void and of no effect whatever." The court held that this statute declared a great public policy of the law forbidding preferences, and that the word "any" covered every assignment, either foreign or domestic, affecting property in the State of South Carolina. The court said: "The language of the Act is 'any assignment,' etc., and to adopt a construction contended for by the respondent it would be necessary for us to interpolate some such words as are found in the Missouri statute, 'hereinafter made in this State,' or some equivalent words; and this we have no right to do."

The marked tendency of the decisions is that the policy of the *lex rei sitæ* must be declared and fixed by positive rules of law, if not by legislative enactment, and not left to the discretion of the courts in determining each particular case. In *Guillander v. Howell*, there is a dictum by PECKHAM, J., as follows: "What is injurious to the rights of citizens where the property is situate, should be the subject of positive legislation, and not left to the discretion of the courts and this is probably the true rule, assuming the transfer to be valid according to the common law of the situs, although the rule is sometimes more broadly expressed.

It has long been the policy of commercial States not to embarrass the full transmission of the title to personal property; and has justly been considered a discourteous and illiberal policy in one State to abridge or fetter the operation of foreign contracts or to embarrass foreign owners of personal property within its limits, in the full and free enjoyment of its beneficial use or its ready and unrestricted transfer. (*Hanford v. Paine*, 32 Vt. 443.)

Regarding such statutes for the protection of creditors it has been held that if the Legislature had intended such acts to apply to the case of foreign assignments making them invalid when but for the act, they would have been valid, that purpose would have been particularly expressed. (*In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136.)

These authorities show us the nature of the law of the situs which may or may not interfere with the operation of a foreign assignment, and that a voluntary assignment will be given a universal effect unless there is some meritorious and well defined

policy of the law intervening. And the true rule seems to be, assuming that we have a voluntary assignment valid at common law, that until such legislative policy is positively declared, and interposes a direct obstruction, to the operation of such assignment, it would be effectual to transfer the debtor's property wherever it may have its situs.

#### DOMICILE OF THE ATTACHING CREDITORS.

By the domicile of the parties seeking a remedy we mean any party or creditor invoking the law of the situs and pursuing a remedy thereunder. And the fact that we have determined the situs of the property, the nature of the assignment, and the nature and effect of the *lex rei sitæ* does not quite settle the question; for here again the courts are divided, many of them holding that in case of a conflict only creditors residents of the situs can invoke the law of the situs to defeat the assignment. This is the rule in Illinois, Pennsylvania, New Jersey, Maine, Massachusetts, Missouri, and some other States.

In Illinois the question arose as to the effect of a New York assignment on property situate in Illinois as between the New York assignee and a New York creditor pursuing his remedy by attachment in Illinois subsequent to the assignment. The assignment was valid by the law of New York, the common residence of the creditor and assignee, but in conflict with the law of Illinois. The court gave full force and effect to the assignment in preference to the lien of the attachment. (*Julliard v. May*, 139 Ill. 87.) The question again arose upon a similar state of facts except that the attaching creditor was a resident of Massachusetts. The court upheld the assignment executed in New York. (*May v. First National Bank*, 122 Ill. 551.) *Sheldon*, Ch. J., writing the opinion said:—"The true rule of public policy is this, that a voluntary assignment made abroad, inconsistent in substantial respects, with our statute, should not be put in execution, to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." In that case the assignor being a resident of New York, the creditor a resident of Massachusetts attaching property having its situs in Illinois, the question was squarely presented.

So in a late case in Pennsylvania it was held that a resident of a foreign State could not by an attachment in Pennsylvania obtain a lien paramount to that of an assignee's title under an assignment executed by a citizen of another State. The rule rests upon inter-state comity, and the courts will make no discrimination by allowing citizens of other states to invoke the aid of such courts to defeat the assignment; only domestic creditors can question its validity. (*Long v. Girgwood*, 150 Pa. St. 413.)

The Federal Courts have been considered as taking a contrary view on this subject of domicile, and as allowing all creditors, both domestic and foreign to invoke the law of the situs against the validity of the assignment when there was a conflict (*Green v. Van Buskirk*, 5 Wall. 307; s. c., 7 Wall. 159), but in a late case before the U. S. Supreme Court, Ch. J. Fuller reviews and discusses at length the decisions holding the same principle as the Illinois courts just mentioned, and seems to favor that view. But all this discussion was unnecessary for the decision; the real point for decision was, whether the assignment was in conflict with the laws of Utah? The court held that it was not, and when that was determined the whole case was decided, and the discussion as to the residence of the attaching creditors was *obiter dictum*. Notwithstanding this decision the question in the United States Courts is an open one yet to be decided; but with a strong dictum by the chief justice in favor of the Illinois doctrine.

In many States it is the settled rule of law that only domestic creditors can invoke the *lex rei sitæ* in opposition to the validity of the foreign assignment. (*Chafee v. Fourth National Bank*, 71 Me. 514; *Frank v. Babbitt*, 155 Mass. 114; *Julliard v. May*, *supra*; *May v. First National Bank*, *supra*; *Green v. Wallis Iron Works*, 49 N. J. Eq. 48; *Thurston v. Rosenthal*, 42 Mo. 474; *Halstead v. Strauss*, 32 Fed. Rep. 279; *Bently v. Whitmore*, 19 N. J. Eq. 462; *Bryan v. Brisbain*, 26 Mo. 423.)

In New York and some other States a contrary view is firmly established. It is a general rule in this State that a foreign creditor rightfully in the courts of this State may enforce his remedy to the same extent, in the same manner, and with the same priority of lien as a citizen of this State. (*Hibernia National Bank v. Lacombe*, 84 N. Y. 367, which is a leading case on the subject. And this rule applies to foreign creditors coming into this State to invoke the aid of our courts against a foreign general assignment which is repugnant to the policy of our law. (*Barth v. Backus*, 140 N. Y. 280; see statement of facts above.) In this case it was urged that the attaching creditors stood in no better position than the creditors from whom they took title, who were residents of Wisconsin, the State in which the assignment was made, and hence were bound by the assignment; but the court, Ch. J. ANDREWS writing the opinion, held that the attachments were liens paramount to the title of the assignee under the assignment, assuming that the attachment creditors stood in no better position than the Wisconsin creditors, and quoted approvingly from the *Hibernia National Bank* case as follows: "A foreign creditor rightfully in the courts of this State, pursuing a remedy given by the

statutes of the State, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as a citizen of the State." (To the same effect are *Warner v. Jaffray*, *supra*; *Keller v. Paine*, *supra*.)

The foregoing is the rule adopted in Maryland, Connecticut, South Carolina, Minnesota, New Hampshire, Iowa and Maine. (*Brown v. Smart*, 69 Md. 327; *Paine v. Lester*, 44 Conn. 196; *First National Bank of Rockville v. Walker*, 61 Conn. 154; *Ex parte Dickinson*, 29 So. Car. 453; *Jenks v. Ludden*, 34 Minn. 482; *Kidder v. Tufts*, 48 N. H. 121; *Moore v. Church*, 70 Iowa, 208; *Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 591.)

This is said to be the strictly logical doctrine. The Constitution of the United States provides that "The citizens of each State shall be entitled to the privileges and immunities of citizens in the several States." (U. S. Constitution, Art. 4, Sec. 2.) The New York doctrine accords to a non-resident creditor who invokes the aid of our courts and complies with all the requirements of the law, a right paramount to that of a non-resident debtor who utterly ignores the policy of the law and seeks to transfer his estate by a conveyance at variance with the laws of the State where the property is situated. If in any case, by interstate comity or courtesy the courts of one State ought to recognize an assignment, in conflict with the policy of the law, there would seem to be a greater reason why they should recognize and enforce the rights of a non-resident creditor who voluntarily comes into that State, invokes the aid of its courts, submits to its remedy, and complies with its laws. It is a choice between non-residents; one seeks to avoid the law of the situs in transferring his property by an assignment in conflict thereto, the other voluntarily invokes its aid, submits to its remedies and complies with all its provisions. To which should comity accord the better right? The court in *Jenks v. Ludden*, commenting on the Illinois doctrine, above referred to, denominates it as "narrow and provincial, and of questionable constitutionality."

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### Abstracts of Recent Decisions.

#### CRIMINAL PRACTICE — RECORD OF CONVICTION. —

Where one indicted for murder in the first degree was convicted of murder in the second degree, and the clerk inadvertently entered in the record that he was found guilty as charged, instead of guilty of murder in the second degree, the court could, during the term, order the clerk to correct the error, without first requiring the presence of defendant. (*State v. McNamara* [Ark.], 30 S. W. Rep. 762.)

**EMINENT DOMAIN—DAMAGES.**—The refusal of the court to allow a reversioner, upon his application, to be made a party defendant in a suit brought by the holder of the life estate against a city for damage to the land caused by the widening of a street, was error, although such reversioner had refused to join in the suit at request of the plaintiff. (*Jones v. City of Asheville* [N. Car.], 21 S. E. Rep. 691.)

**MUNICIPAL CORPORATIONS—CHANGING BOUNDARIES.**—What the boundaries of a municipal corporation are, where they are, and whether a particular piece of territory lies within or without the corporate limits of a municipality are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative ones.—(*City of Hastings v. Hansen* [Neb.], 63 N. W. Rep. 34.)

**JUDGMENT—RES JUDICATA.**—Where, in a suit for divorce, the bill shows that a former bill was filed for the same cause, and that such bill was dismissed by the complainant, but neither the pleadings nor the evidence shows whether any answer to the former bill was filed, or whether the dismissal was without prejudice or not, such former suit is not a bar to the second suit. (*Gerber v. Gerber* [Ill.], 40 N. E. Rep. 581.)

**RECEIVERS — SELECTION — OFFICER OF CORPORATION.**—While an officer of a corporation, whose misfortunes have made a receivership necessary, is not ineligible to employment as receiver, yet, where the corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, an officer should not be appointed without careful scrutiny of his official and personal antecedents, and one who is or has been a speculator in the stock of the corporation should never be appointed. (*Olmstead v. Distilling and Cattle Feeding Co.* [U. S. C. C., Ill.], 67 Fed. Rep. 24.)

**REMOVAL OF CAUSES.**—Under Act Aug. 13, 1883 (25 Stat. 433, § 2), a cause cannot be removed from a State to a federal court on the ground that it is one arising under the Constitution, laws, or treaties of the United States, unless the fact so appears by the plaintiff's statement of his own claim. (*Caples v. Texas & P. Ry. Co.* [U. S. C. C., Tex.], 67 Fed. Rep. 9.)

**REMOVAL OF CAUSES — RIGHT OF INTERVENER TO REMOVE.**—An intervener who introduces himself into a pending action in a State court, solely to assist in its defense and to protect himself against a liability for indemnifying the original defendant, can confer no jurisdiction on the federal court that the original defendant could not confer. (*Olds Wagon Works v. Benedict* [U. S. C. C. of App.], 67 Fed. Rep. 1.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THROUGH the kindness and courtesy of Judge Dillon, we are enabled to publish this week the proceedings and judgment in the case of Wright & Co. v. Hennessey, which was decided in the Queen's Bench Division late in July. Judge Dillon is taking a much needed rest at Karlsbad, and it is greatly appreciated by the JOURNAL that he took some of his leisure time to write us of the decision, which is most important. As Judge Dillon shows, there are three points involved in the decision.

First. Under the Common Law of England no person or association of persons has a right to boycott another; for example, to say to another if you do not employ members of such and such an organization we will injure you in your business by inducing employers to refuse to employ you or to break their contract with you, or by inducing men employed by you to strike.

Second. Such conduct, if done intentionally and for the purpose of injuring the person so boycotted, is in law malicious and is actionable in damages.

Third. Under the existing procedure acts in England, such an action for damages may be brought, and their may be united therewith an application for an injunction restraining the defendants from inducing or endeavoring to induce persons to break the contract made with the plaintiff and from continuing to write or publish libels concerning the plaintiff in connection with his business.

There are, however, two phases of the decision which are specially pleasing and which if followed in this country will bring many beneficial results. Both parties to labor controversies and fights must realize that each have their rights which will be strictly enforced by competent and trustworthy courts. All talk of other tribunals is unworthy of notice and

our only hope for proper solutions of such unfortunate strifes lies in the legal judges who should have at their back the trust and confidence of the people. If judges fail in such matters, then public confidence is lost and all faith in our legal institutions fail. While writing on this subject let us look at the account of the mass meeting held last Saturday night in New York, it says:

"The meeting was called to order by Lucien Sanial, who presided. He said: 'In the name of the Hebrew trades I congratulate you tonight upon the size of this meeting. Many of you came here from Russia to escape from the tyranny of the Czar, and now you find yourselves tyrannized by capitalists to an even worse extent.

"You are the men who make the presidents and judges of this country, and you can take them from their high office by the ballot.'

"He was followed by Daniel De Leon, who said: 'The fight is on every day in the shops, and at the polls on election day. The judges of the Supreme Court are put on the bench by the capitalists, and they obey them. The capitalists control the judges.'

"Several speeches to the same effect were made, and Patrick Murray offered the following resolutions, which were adopted:

"Whereas, nine cap manufacturers have locked us out for twelve weeks for the purpose of breaking our union and denying to us our constitutional right to organize into a lawful organization, and,

"Whereas, The scheme was made and attempted to be carried out not for the purpose alone of reducing our wages to a point of starvation, but also for the purpose of increasing the prices of the hats and caps in the market, thereby misrepresenting the present difficulties to the community at large to draw the inference of a strike, the difficulty being only a lockout, and,

"Whereas, The manufacturers have employed different ways and means to utterly destroy our union, and, after taking legal steps, secured an order of injunction depriving us of the liberty granted us by the Constitution from walking in the public streets, persuading individuals, etc., and going to the extent of preparing false and defamatory charges of conspiracy, and yet have failed to

hurt us or to discourage our ranks, although the courts have always supported the manufacturers; then, be it

“*Resolved*, To publish the names of manufacturers who have entered into the conspiracy and denounce them as tyrants. Further, be it

“*Resolved*, To stand firm together, one for all and all for one, until the unions shall receive recognition and our demands are granted; and it is also resolved that all among us who are now employed by other manufacturers will assist our locked out brothers, paying them their wages, so as to enable them to stay out as long as it may be necessary, and further resolved to call the attention of the working classes of the city of New York to the fact that the highest court in the city, the Supreme Court, is assisting the manufacturers in their unjust and uncalled for battle against labor, and unless wage slavery be abolished such injustice will continue.’”

On the one hand there appears the attempt to organize laboring people, while on the other the employers refuse to recognize any such body and attempt to disrupt it.

On the one hand the courts are bound to protect the rights of labor and on the other they must insure individuals from any injustice from any person or association. In this instance we believe the Supreme Court of New York city did its duty and we also can see the vast good that the Queen's bench did in *Wright & Co. v. Hennessy*. Perhaps, however, the pleasantest and least important result of the case in question will be to recognize the simplicity of remedies in joining them in one action. Our own code and practice has many instances of this kind but many others may be introduced with good results.

The unfortunate results of each State having statutes which differ from others becomes more and more apparent as time passes and decisions are made by various courts.

The recent decision of the Oklahoma Supreme Court, invalidating a number of divorces granted in that territory within the last few years, has directed attention anew to the need of an uniform national divorce law. Under the decision of this court, many people who have assumed new marriage vows as lightly as they

had renounced the old are pronounced bigamists. Not only this, but the ownership of property is involved in much litigation. The consequences are too apparent and disagreeable to require to be commented upon.

The inconsistencies of our State divorce laws are so notorious and numerous that they have tended somewhat to discredit the marriage relation. In this State adultery only is accepted as reason for an absolute divorce, and only the party aggrieved may remarry within the State. But the party who is prohibited from remarrying in this State may go across the State line into New Jersey or Pennsylvania, remarry, return to New York State, and his marriage then be accepted as legal. More than that, couples who cannot obtain divorce in this State may go to other States for reasons the most trivial, such as incompatibility of temperament, which is a legal term for natural cussedness, may rid themselves of the old love to be on with the new.

The facility with which divorces are obtained in South Dakota, Oklahoma and Chicago has afforded a rich field for the humorous paragraphers, but they have a serious and scandalous side. The fact that couples thus lightly divorced almost always remarry has resulted in a sort of progressive polygamy.

America, the most enlightened and Christian country in the world, is scandalized and put to the blush before all Christendom by her divorce laws. The God-given and divinely sanctioned institution of matrimony was not intended to be entered into lightly or ill-advisedly. There are cases where great mistakes are made by innocent parties, but if divorces are difficult to obtain, there is likely to be a more mature consideration of marriage and all it involves before the words are spoken that should never be unsaid. The attitude of the Roman Catholic church in opposing all divorces may lead to some unhappiness, but taken as a whole it conforms more closely to the teachings of religion than that of any other church. If the Protestant body do not teach divorce, they at least tacitly sanction it.

“What God hath joined together let no man put asunder.” And even the non-professor of religion, if he be an earnest man, can but view with alarm the increasing lightness with which our courts hold the marriage tie and the home,

upon which depend the perpetuity and the stability of American institutions.

Justice Howell Edmunds Jackson of the United States Supreme Court, who died at West Meade, Tennessee, on August 8th, was born in Paris, Tennessee, on April 8, 1832. He spent his school days in the town of Jackson, and at the age of sixteen graduated from the West Tennessee College. The next two years he spent in the study of law at the University of Virginia, and in 1855 he attended the law school of the Cumberland University. He practised his profession in Jackson, and later in Memphis, where he was twice appointed judge of the State Supreme Court, and when the civil war broke out he entered the civil service of the Confederacy.

At the close of the war he established himself in Memphis again, and was quickly recognized as a jurist of ability. In the Democratic State Convention of 1878 he came within one vote of being nominated for the office of Supreme Court judge, and two years later he was a member of the House of Representatives of his State. The following year he was sent to the United States Senate on the combined votes of Republicans and Democrats. He remained in this office until 1886, when President Cleveland appointed him judge of the United States Circuit Court for the Sixth Judicial District.

At the death of Justice Lamar, in 1893, Mr. Harrison, just as he was about to retire into private life, appointed Mr. Jackson, a Democrat, a justice of the Supreme Court.

As senator and justice of the Supreme Court, Mr. Jackson had resided in Washington about eight years. His associates here were confined largely to his colleagues on the bench and in the Senate chamber. By them he was universally esteemed, as was evinced in nothing so much as in his appointment to the Supreme bench by President Harrison and his confirmation by a Republican Senate, notwithstanding he was a Democrat.

The last time Judge Jackson was in Washington was on the occasion of the rehearing in the income tax case last May. He had been absent since the preceding fall, when, soon after the convening of the October term of the court,

he had been compelled to go South on account of his rapidly declining health.

Mr. Jackson had the reputation of being very sensitive concerning any public discussion of his health. The other members of the court were poorly advised as to his condition, and this is said to have been the reason for the equivocal character of the announcement of the decision to grant a rehearing in the income tax case, which of necessity depended upon Judge Jackson's presence.

He sat through the argument, which continued for three days, took part in the consultation of the court, and when the day arrived for the announcement of the decision not only listened patiently to the opinions of most of the other members of the court, but delivered a vigorous opinion in support of the validity of the law. This was on May 20, and was his last public appearance.

The address of Judge Brown of the United States Supreme Court before the Yale Law School on "Twentieth Century" continues to be greatly discussed and we print the parts in relation to the character of litigation and municipal misgovernment which are particularly attractive. On these subjects he said:

"The character of litigation has changed as much as the law itself. The lawyer of the last century looked askant at a court of equity, brought his actions at common law, and demanded a jury of his peers. He had imbibed the prejudices of Lord Coke against tribunals proceeding according to the course of the civil law, and thought his chances of success there were measured by the length of the chancellor's foot. But we have changed all that. The multiplicity of corporations, the enormous growth of the patent system and of the internal commerce of the country, have given rise to questions with which juries are incompetent to deal. The result is that the great litigation of the country is now carried on in courts of equity and admiralty. In some States juries have almost disappeared, except in criminal cases and actions for torts, where their well-known generosity still finds ample scope; in nearly all there is a large proportionate decrease. Forensic eloquence has declined, and the man who can state clearly a complicated series of facts has taken the place

of the typical lawyer of the last generation, who could move a jury to tears. Where there is a choice of remedies, the resort is usually to a court of equity; and large interests are treated as safer in the hands of a single upright, passionless judge, or bench of judges, than in those of the average jury. It is certainly a tribute to the purity of the American judiciary that this confidence is so rarely misplaced, and that their decisions are so seldom the result of fear, favor, affection or the hope of reward.

"I have thus briefly summarized the changes of the past century to emphasize the point that we are entering a more than usually critical period. Old things are rapidly passing away, and the question presses itself upon us, what will the twentieth century furnish to take their place? The problem whether the Constitution of the United States embodied a feasible plan of government is already settled. Weak spots have undoubtedly been developed, some changes seem almost imperative; but it still remains the most marvellous work of constructive genius that was ever created. It has grown with each decade in the affection of the people; the danger is, not that it will be changed, but that it will be regarded as too sacred to be changed, a product of superhuman wisdom, a mere fetish. If the power of the Federal government has been strengthened, that of the States has not been materially impaired. The country has survived the shock of a great war. The loyalty of the South is unquestioned, and there has never been a time when strife between different sections seemed less probable than at present.

"The man who should assume to prophesy what the twentieth century will bring forth is likely to be as far astray as the hypothetical writer I mentioned, who failed to take account of the inventions of the nineteenth century. At the same time, speculations based upon an existing state of things are not wholly useless. If they fail to anticipate every contingency, they may at least provide for some. If they are an uncertain guide for our future conduct, they may serve to point out to us our immediate duty. There are certain rules of human conduct which are obligatory at all times and under all circumstances. Of these are integrity, morality and industry. Let us hope the

time may never come when they will fail to receive their reward.

"It is one of the ancient maxims of the law that a state of things once proven to exist is presumed to continue. So we may safely assume that the tendencies which the last half of the nineteenth century has developed will be prolonged into the twentieth; that the great powers of Europe, which have already parcelled out among themselves almost the entire continent of Africa, will look for new fields of conquest in the extreme east; that the process of absorption will go on with the usual indifference to the wishes of the native populations; and that another hundred years may see the entire eastern hemisphere under their control. It will be your duty to see that their rapacity does not extend to the western hemisphere. The lust of conquest, like that of acquisition, knows no bounds.

"Municipal corruption has come upon us with universal suffrage and the growth of large cities, and in general seems to flourish in a ratio proportioned to the size of the city. Why a system of government which, upon the whole, works well in small towns, and even in States of considerable size, should break down so completely when applied to large cities, may seem strange at first, but after all is not difficult of solution. The activities of urban life are so intense, the pursuit of wealth or of pleasure so absorbing, as upon the one hand to breed an indifference to public affairs; while upon the other, the expenditures are so large, the value of the franchises at the disposal of the cities so great, and the opportunities for illicit gains so manifold, that the municipal legislators, whose standard of honesty is rarely higher than the average of those who elect them, fall an easy prey to the designing and unscrupulous. Franchises which ought to net the treasury a large sum are bartered away for a song; privileges which ought to be freely granted in the interest of the public are withheld till those who are supposed to be most immediately benefited will consent to pay for them; gross favoritism is shown in the assessment of property for taxation; great corporations are permitted to encumber the streets and endanger the lives of citizens; while every form of vice which can be made to pay for the privilege is secretly toler-

ated. The consequence of all this is thus depicted by a recent English writer who has made a study of our municipal institutions:

"I have watched the rapid evolution of social democracy in England; I have studied autocracy in Russia, and theocracy in Rome, and I must say that nowhere, not even in Russia, in the first year of the reaction occasioned by the murder of the late Tzar, have I struck more abject submission to a more soulless despotism than that which prevails among the masses of the so-called free American citizens when they are face to face with the omnipotent power of the corporations."

"Granting this to be overdrawn,—for I am unwilling to believe that corporations are solely responsible for our municipal misgovernment,—the fact remains that bribery and corruption are so general as to threaten the very structure of society. Indeed, we are being slowly driven to the conclusion that the best-governed city in the country—I had almost said the only well-governed large city—is administered upon principles which amount to a complete negation of the whole democratic system. Universal suffrage, which it was confidently supposed would enure to the benefit of the poor man, is so skillfully manipulated as to rivet his chains, and to secure to the rich one a predominance in politics he had never enjoyed under a restricted system. Probably in no country in the world is the influence of wealth more potent than in this, and in no period of our history has it been more powerful than now. So far as such influence is based upon superior intelligence and is exerted for the public good, it is doubtless legitimate; so far as it is used to secure to wealth exceptional privileges, to trample upon the rights of the public, to stifle free discussion, or to purchase public opinion by a subsidy of the press, it invites measures of retaliation which can scarcely fail to be disastrous. Mobs are never logical, and are prone to seize upon pretexts rather than upon reasons to wreak their vengeance upon whole classes of society. There was probably never a flimsier excuse for a great riot than the sympathetic strike of last summer, but back of it were substantial grievances to which the conscience of the city seems to have finally awakened. If wealth will not respect the rules of common

honesty in the use of its power, it will have no reason to expect moderation or discretion on the part of those who resist its encroachments.

"The misgovernment of which I have spoken is so notorious and so nearly universal that it is useless to attempt to ignore it or to expect that it will cure itself. Whether the blame lies chiefly upon him who gives or upon him who receives a bribe, it is evident that the temptation must be removed, either by destroying the inducement or by elevating the character of those who are charged with the administration of the government. The fault is not that of one class alone. If the higher classes evade their just responsibilities, the lower will not fail to profit by their example. If the rich are seen to escape taxation by bribing assessors or by fraudulent removals from the city, the poor will not hesitate to avenge themselves in the coarser way of accepting bribes. Whether the remedy for all this lies in raising the character of the electorate by limiting municipal suffrage to property-holders, or in government by commissions, is a question which will not fail to demand our attentive consideration. The great, the unanswerable argument in favor of universal suffrage is, not that it ensures a better or purer government, but that all must be contented with a government in which all have an equal voice. If it be deficient in this particular, if it fail to protect the poor against the oppression of the rich, or the rich against a destruction of their property by the poor,—in short, if the representatives of the people betray their trusts, it is *pro tanto* a failure, and another method of representation should be adopted. If we cannot have government by the whole people, let us have government by the better classes and not by the worst."

The rule by which a court of appellate jurisdiction is to test the sufficiency of a complaint when challenged for the first time after verdict and judgment was recently discussed and determined by the Appellate Court of Indiana, in the case of *Harter et al. v. Parsons*, 40 N. E. Rep. 157. The court said: "Of course such assignments of error question the sufficiency of the facts alleged to constitute a cause of action, not as we find them in the complaint as originally filed, but after they have been strength-



ened by all the curative virtues of a verdict, and when they are aided by the presumptions which are rightfully to be inferred by this court in favor of the correctness of the rulings and decisions of the trial court. It has been held in a number of cases that, when the sufficiency of a complaint is challenged for the first time by an assignment of error in the appellate court, many omitted facts will be deemed to have been supplied by the evidence, and the complaint held to be sufficient.

"Expressly stating that it is unwilling to say that the doctrine of intendment after verdict should be carried to the extent of holding that any material fact omitted from a complaint will be assumed to have been supplied by the evidence, the court distinctly affirms that a complaint which is insufficient to withstand a demurrer, because of a defective or imperfect averment, only, of a fact, will be cured by a verdict upon the assumption that every fact alleged in a complaint, and such other facts, not alleged, but, which are naturally to be inferred from those alleged, being the basis for the introduction of evidence, have been proven. The particular thing which is presumed to have been proved must always be such as can be implied from the allegations on the record by a fair and reasonable intendment. But where a material fact is lacking the pleading is not cured by the verdict.

"A complaint is vulnerable to attack, because fatally defective, when a fact necessary to the statement of a cause of action is missing therefrom. There must be a sufficient complaint, or there is no foundation for a judgment; and where there is a necessary fact lacking, it is incurably bad, and a verdict will not cure it. Indefiniteness and uncertainty in a complaint, however, are not cause for demurrer, hence it follows that that question cannot well be urged in testing the sufficiency of a complaint when first challenged by an assignment of error in the appellate court. The usual remedy for indefiniteness and uncertainty is by a motion to make more specific."

The following clever comment on the case of *St. James Military Academy v. Gaiser*, appears in the August number of the *Green Bag*:

"It is but a step from poesy to dancing. It seems to this chair that the Supreme Court of

Missouri does not put a correct estimate on dancing, when it holds that it is libellous to accuse an institution of learning, in print, of teaching the art of dancing. This is what that learned court has done in the case of *St. James Military Academy v. Gaiser*, 28 S. W. Rep. 851. It seems that a number of clergymen of Macon, Missouri, assembled themselves together and resolved that the academy in question, because it 'fostered the practice of dancing, which is antagonistic to the teaching of our churches and homes,' and 'hurtful to the moral and spiritual well-being of all engaging in it,' and because the academy obstinately refused to discontinue it, although thereunto requested by said clergymen, was 'harmful to the moral and religious interests of our community,' and that they recommended 'the members of our churches and all friends of religion and good morals that they absent themselves from and discourage and discountenance in every way all receptions and other gatherings at the academy as long as dancing is allowed in the building.' The court holds that this publication constituted a cause of action for libel, but leave it to a jury to say whether it was justified on the ground that dancing was immoral. It seems to us that the charge is not libellous, because it does not accuse the academy of promoting anything immoral. Would it be libellous, for example, for the proprietors of the academy to publish that the churches presided over by these clergymen should be avoided, so long as the clergy thereof combed their hair behind their ears and sang through their noses? Or suppose the clergy had denounced the academicians for teaching the lascivious angles of geometry, or unfolding the unholy mysteries of algebra, or encouraging the contemplation of the deleterious principles of geology, would that have been libellous? Is not the one charge as ridiculous and manifestly baseless as the other? To justify the court's decision it must be conceded that to accuse an academy of teaching or permitting dancing has the natural tendency to bring it into odium, unpopularity or contempt. This can hardly be true. The world has moved considerably since 'The Waltz' was so vehemently denounced by the pious and saintly Lord Byron. It is now recalled that David danced before the Lord, that

Hatton danced himself into the Lord Chancellorship before Queen Elizabeth, and that dancing is taught at the government's expense, or at all events publicly favored, at West Point."

The *Daily Review*, in an article on Legal Education, says:

"At a period not very far distant the office system of instruction was practically the only method by which the candidate for admission to the bar could obtain the necessary preliminary education; but the introduction of modern business methods into the law office and the general employment of stenographers and typewriters have relegated the student to the background. In the busy office he no longer has the advantage of intimate intercourse with his preceptor and familiar knowledge of the routine of business whereby he was once able to acquire a thorough training in the practice and principles of the law. He is either a mere clerk with little leisure for study or else he is simply tolerated as an inmate of the office, browsing among the books and picking up the work in a desultory and unsystematic way.

The scope of modern practice has broadened so wonderfully that the narrow range of the old system is no longer adequate. Commercial enterprise, the multiplication of corporations, the varied investments of capital have developed a new school of lawyers who rarely appear in court, but by their skillful management of vast business interests command the largest retainers, and an enviable position in the community. Such practitioners have no use for the student in their offices and no time to train the novice. Again in New York State at least the continued elevation of requirements for admission to practice make more irksome the solitary work of the student."

Only four States, Delaware, Minnesota, New York and Pennsylvania require any standard of general education and in twenty-five of the States there are no preliminary requirements for admission except a good moral character.

It is said that Hon. Thomas B. Reed and another presented themselves for examination before a judge in San Francisco at the time when the legal tender acts of Congress were assailed as unconstitutional, but the Supreme Court had not yet passed upon them. Asked if such laws

were constitutional, Reed promptly said "yes," the other with equal readiness said "no." The judge admitted both to practice without further questioning, saying that two young men who could answer offhand a question of such importance, before the Supreme Court of the United States had decided it, were qualified to practice.

The path to admission is no longer so short and easy as that travelled by Reed and his friend. The boy who has no college diploma must pass a regent's examination in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or their substantial equivalents, then he must devote three years to the study of the law before he can present himself before the State Board of Law Examiners for examination.

The rapid growth of law schools, both in number and size of classes, only keeps pace with the demand for adequate legal education. Connected, as many of them are, with great universities they afford an opportunity for some general culture as well as the technical training of the professional school. Two years of undisturbed study under the guidance of a corps of professors having no other duty than the instruction of their students should be the equivalent of twice that time spent in a busy law office without direction and amid constant interruptions.

Office experience is of course indispensable to the practical knowledge of the law, but it can no longer be considered the adequate and complete method of legal education which it was under former conditions.

The Supreme Court of New Jersey say in the case of *Arnoult v. Arnoult*, 31 Atl. Rep. 606, that the existence of influence which arises from unlawful or immoral relations, operating on a testator when his will is made, does not raise a presumption against the instrument, but will be regarded as a significant fact, which calls for a close and suspicious scrutiny. The law permits a man to leave all his property, which he may by will dispose of, to his mistress, and to ignore his wife, if he does so with free, sound and disposing mind, pursuant to the formalities which the law describes.

## THE LAW RELATING TO BOYCOTTS.

DECISION OF QUEENS BENCH DIVISION IN WRIGHT &amp; CO. V. HENNESSEY.

*Judge Dillon's Letter.*KARLSBAD, AUSTRIA,  
August 1, 1895.*Editor of the Albany Law Journal:*

The London *Times* of July 27, 1895, contains an authentic report of the case of Wright & Co. v. Hennessey, which I enclose.

It relates to an important subject which is rapidly undergoing legislative and judicial development. The action was tried before Mr. Baron Pollock and a special jury on the Queen's Bench Division on July 26, 1895, resulting in a judgment for damages in favor of the plaintiffs and an injunction to guard and protect the rights which that judgment established. The case decides the following three propositions:

1. Under the common law of England, no person or association of persons has a right to boycott another; for example to say to another, if you do not employ members of such and such organizations we will injure you in your business by inducing employers to refuse to employ you or to break their contracts with you, or by inducing the men employed by you to strike.

2. Such conduct if done intentionally and for the purpose of injuring the person so boycotted is in law malicious, and is actionable in damages.

3. Under the existing Procedure Acts in England such an action for damages may be brought, and there may be united therewith an application for an injunction restraining the defendants from inducing or endeavoring to induce persons to break a contract made with the plaintiff, and from continuing to write or publish libels concerning the plaintiff in connection with his business.

I send you the report of this case, thinking you would like to lay it before the readers of the *JOURNAL*.

Concerning the case I beg only to observe that the substantive rights affirmed in the first and second of the above propositions must be the same in the United States as in England. It would be an outrage on the fundamental and primordial rights of persons if such a course as was pursued by the defendant towards the plaintiffs could be pursued with impunity. As to the third proposition, the granting of an injunction in the same action which established the right of the plaintiffs to damages, I may observe that it is a needful remedy and one broader perhaps than would be afforded in many of the States of the United States, even in those that have Codes of Procedure. It rests upon the provi-

sions contained in Acts of Parliament, relating to procedure.

Very truly yours,

JOHN F. DILLON.

PROCEEDINGS AND JUDGMENT IN QUEEN'S BENCH DIVISION.

*Queen's Bench Division (before Mr. Baron Pollock and a Special Jury.)*

WRIGHT AND CO. V. HENNESSEY.

This was an action brought by Messrs. Samuel Wright & Co., of the Crown Works, Amherst road, Hackney, fibrous plaster manufacturers, against Mr. Daniel Hennessey, of Club Union buildings, Clerkewell road, the organizing secretary of the National Association of Operative Plasterers, for (1) damages for maliciously inducing and endeavoring to induce persons to break contracts with the plaintiffs, and for libel; (2) an injunction restraining the defendant from inducing or endeavoring to induce Messrs. Colls & Sons to break a contract made by them with the plaintiffs in respect of work at the Pavilion Theatre, Whitechapel; (3) an injunction restraining the defendant from continuing to write or publish the libels complained of.

Mr. Lawson Walton, Q. C., Mr. T. W. Chitty and Mr. Frank Newbolt appeared for the plaintiffs; Mr. Robson, Q. C. and Mr. A. H. Ruegg, Q. C., for the defendant.

Mr. Lawson Walton, Q. C., in opening the case, said that the defendant had attempted to ruin the plaintiffs by malignant libels and interference with the plaintiffs' contracts. The action was brought by the plaintiffs, not as an attack on trade unionism, but in self-defence. Mr. Samuel Wright, a member of the plaintiff firm, formed a combination of master plasterers. Mr. Peek, a master plasterer, had a difference with the defendant, and the men who were working for him were withdrawn. Wright lent Peek some men, and thereupon persecution followed. The plaintiffs' names were inserted in a "black list" by the defendant's society. In January, 1893, the plaintiffs entered into a contract with Messrs. Patman & Fotheringham, and on January 4 the defendant wrote and sent to Messrs. Patman & Fotheringham the following letter:

*"National Association of Operative Plasterers, London District Committee's Department, 85 Weedington road, Kentish-town, N. W., Jan. 4, 1893:*

DEAR SIRs. — I am instructed by the above committee to ask whether it is with your knowledge and consent that the sub-contractor, S. Wright, who is executing work for your firm in St. Paul's churchyard, is employing men other than plasterers to do plasterer's work; and I am further instructed to inform you that the said S. Wright, owing to his previous action, has been declared by the

above committee, and endorsed by the whole of the members, to be an unfair employer. The plasterers' work referred to is the fixing of fibrous plaster. I enclose copy of working rules and by-laws for your perusal. No. 3 of the latter relates to this matter, in which you will see that it is impossible for any plasterer to finish the work now being fixed.

Committee instruct me to inform you that unless Mr. Wright is removed they will be reluctantly compelled to take steps to prevent the men from finishing the work. We shall esteem it a favor if you please reply at your earliest convenience.

Sir, on behalf of the committee, yours obediently,

D. HENNESSEY,  
*Organizing Secretary.*

Messrs. Patman & Fotheringham."

The object was to boycott Mr. Wright. Messrs. Patman & Fotheringham refused to give way and to dismiss the plaintiffs, but endeavored to bring about a reconciliation. In June, 1893, the plaintiffs entered into a contract with Messrs. Watkins & Company to supply and fix certain fibrous plaster work at South Kensington. Thereupon, a deputation headed by the defendant waited upon them, and the result was that Messrs. Watkins were compelled to discharge the plaintiffs. In 1894, the plaintiffs entered into a contract with the School Board for London to do certain plastering work, and on February 2, the defendant wrote the following letter to Mr. Perry, the assistant architect of the School Board:

*"National Association of Operative Plasterers, &c.,  
February 2, 1894. Gravel-lane :*

DEAR SIR — I am sorry to have to again trouble you in reference to the question of sub-contracting, but seeing upon the schools in Gravel-lane, Houndsditch, there are men employed by Mr. Wright, a sub-contractor, of Hackney, to do plasterers' work. I might further state that these men are not plasterers at all. I must remind you that this is not the first time I have been compelled to draw your attention to this said sub-contractor, and if this man is permitted to do this work, nothing but scamped work and inferior workmanship will be the result; also a great injustice will be done to the organized plasterers of London, whose rules will not permit them to work for sub-contractors upon the board's works. Trusting you will give this your early attention, and thanking you in anticipation for an early and favorable reply,

I remain yours faithfully,

D. HENNESSEY, Org. Sec. N. A. O. P.

P. S.—There is no specialty in this work, and Mr. Grover of Islington, is the builder.

To Mr. Perry, Architect to the London School Board."

In May the plaintiffs entered into a contract with Messrs. Sage & Co., and on May 16 the following was sent by the defendant to them :

*"National Association of Operative Plasterers, &c.  
From George Cole, District Secretary, David Hennessey, Organizer, May 16, 1894.*

DEAR SIRS — I write you in reference to the following upon the works of Messrs. Colls, situated at Rylane, Peckham, Messrs. Jones and Higgins' premises. Your firm are doing some fibrous ceilings, and as the man to whom you intrusted this work is known as an unfair employer, we have to inform you that the members of this association are not permitted to work upon the same works as them, and as we have several members engaged upon the above works the presence of these men is causing considerable friction. We therefore have to ask you for your intervention by getting these men removed, and thus prevent any trouble arising upon the above works. Thanking you for a reply by return of post.

I remain yours faithfully,

D. HENNESSEY.

To Messrs. Sage & Co., Gray's-inn-road."

In July, 1894, the plaintiffs contracted with Mr. Roome to supply and fix certain fibrous plaster cornices, when on the 19th of that month the defendant induced Roome to break his contract with the plaintiffs and to refuse to allow them to proceed with the work. In the months of September and October, 1894, the plaintiffs contracted with Messrs. Colls & Sons to do certain plastering work at the Pavilion Theatre, Whitechapel, under the supervision of the architect, Mr. Runtz. Thereupon the defendant on October 1 sent the following letter to Messrs. Colls & Sons:

*"National Association of Operative Plasterers. London  
District Committee. From George Cole, District  
Secretary, Daniel Hennessey, Organizing Secretary,  
Club Union-buildings, Clerkenwell, E. C. :*

October 1, 1894.

DEAR SIRS — It is with much regret that I have to approach your firm again, but upon your work at the Pavilion Theatre, Whitechapel, there has been introduced Mr. Wright and his men, and, as you, Sir, are aware, for some time past this man's opposition to the organized plasterers of London have caused a revulsion of feeling throughout London, and no man worthy of the name will work for or on any works where he is employed. It does appear somewhat strange that your firm should be so persistent in introducing this man. We have done all that lays in our power to prevent friction with your firm, and do hope that you will not allow the present good feeling to be strained. Should Mr. Wright,

and his men be allowed to remain on the works, we cannot be held responsible for what may occur. Trusting you will in the interest of all concerned give this matter your consideration. It cannot be that this man has good or efficient men, for such will not go near him. Again expressing regret for having to trouble you, and thanking you in anticipation for a favorable reply,

I remain, yours faithfully,

D. HENNESSEY.

To Messrs. Colls & Sons, Contractors."

In that letter the motive of the defendant was cynically avowed. Messrs. Colls, however, bravely refused to cancel the contract; the result was that a strike ensued and ultimately Messrs. Colls were compelled to throw Messrs. Wright over. If such a state of things were allowed to continue, Mr. Wright would be a ruined man, as it would be quite impossible for him to continue to carry on his business.

Mr. Charles Watkins, surveyor and estate manager, was then called and examined by Mr. Chitty, and said,—In June, 1893, I instructed the plaintiffs to do work at 1, Bottesmore-gardens, South-Kensington. The work was started, when I received an intimation from Doyley and Co. I wrote that the plasterers must leave. In September, defendant and others called at my office. He said unless I fell into line with other builders they would be obliged to call out the union men. The defendant called again on the following Saturday. I went to the works and found the men on strike. I saw the defendant and others. I wrote to Wright's men, saying, I could not allow Wright to finish the work.

Cross-examined by Mr. Ruegg.—There was no dispute about the men's wages being kept back. I am not a member of the Association of Master Builders. I cannot say I knew that the invariable rule is to pay the men up to Friday night. We paid up till Thursday night.

James Marcham, examined by Mr. J. W. Chitty, said,—I was fixing work for Wright & Co. in January, 1893. The defendant told me they were determined to smash Mr. Wright if it cost them £6,000, and that they had got that amount in hand.

Cross-examined by Mr. Ruegg.—Wright paid the same as other men. Mine was piece-work.

Re-examined.—I was content with my wages as lather and to work for Wright and put up plaster.

Mr. Peter, foreman to Patman and Fotheringham, said that the defendant told him the plaintiffs' men were scamping their work by not fixing the slabs with screws. His objection was unfounded. Mr. J. H. Colls, builder of Coleman-street, who was employed at the Pavilion Theatre, Whitechapel, and whose firm Messrs. Colls & Sons, entered into a contract with the plaintiff firm for the plastering there,

said that Mr. Wright's men did their work well and he did not find that good men would not go near Wright's men.

On cross-examination the witness said that the contract with Wright had to be broken, because all the union men were withdrawn, and Runtz, the architect, was anxious that the work should go on. He (the witness) refused to enter into a conspiracy to ruin Wright.

Mr. Collins, manager for Messrs. Colls & Sons, examined by Mr. Chitty, said,—I was manager on the job at the Pavilion Theatre. On October 17, the men were called out, and on October 18, Mr. Wright's men were also called out. I saw Mr. Hennessey on the 19th, and Hennessey asked whether Wright would come back again. I said "No." Wright's work had always given us satisfaction. We broke our contract with Wright.

Cross-examined by Mr. Ruegg.—We broke our contract with Wright on October 19. Mr. Verdon represented all the trades. The men themselves do not refuse to work with Wright's men. Our idea is that it is due to Mr. Hennessey's action. Directly the men were assured by us that Wright's men would not come back, they returned to work.

Mr. E. A. Runtz, an architect, carrying on business in Moorgate-street, examined by Mr. Chitty, said,—I was architect to the Pavilion Theatre, Mile-end. On October 18, I had to tell Wright's men to go off the job as the other men would not go on while they were there.

Cross-examined by Mr. Ruegg.—Wright's men were doing their work extremely well, and behaved very well.

Mr. Beazley, a process server, said that on October 19, about 9.20 a. m., he served Mr. Hennessey with an injunction restraining him from inducing Messrs. Colls & Sons to break their contract with the plaintiffs.

Mr. H. R. Perry, assistant architect for the school board for London, said: While Wright was doing the work at Gravel lane, Houndsditch, I received the letter of February 2, 1894. Wright's men were doing the work very well. At Greenwich I found that instead of nine screws to a slab, which I always insist on for school board work, Wright's men were putting in six. I have examined five schools done by Wright, and the ceilings are satisfactory, showing the work must have been well done.

Mr. Yates, a clerk to Messrs. Sage, of Gray's Inn lane, said he received letters from Hennessey.

Mr. Samuel Wright, managing partner of the plaintiff firm, said he estimated his loss at some thousands of pounds. His business had fallen off over fifty per cent. since January.

Cross-examined by Mr. Ruegg.—Over these particular cases I have lost £85 4s. 3d., which, together

with other small losses, comes to £94 11s. I pay the full rate of wages to every skilled and competent man. [The names of several men were put to the witness, and he said in each case that they were not competent plasterers.] He continued: I paid the men the rates they asked. Some men left the union to remain in my employ. I had nothing to do with the Fibrous Plasterers' Association.

This was the case for the plaintiffs.

Mr. Robson, Q. C., in opening the case for the defendant, said he quite admitted the right of the master to make any contract he liked. These men said: "We disapprove of certain employers." Any man had a right to say: "I won't work for that master, and I won't have anything to do with any other man who aids that master." If any section of men took up an unreasonable position society would inevitably protect itself against such conduct. A man had a right over his own labor, and a right over the labor of others where he was not guilty of malice. A single man could not possibly compete with capital. Where a man sought to injure another for the sake of injuring him it was malicious; but where a man sought to control his own labor and to persuade another to control his in the same way as the man himself did it was not malicious. Where a man pursued his own interests, and in doing so incidentally injured another there was no malice. Throughout this case there was absolutely no evidence of malice. Mr. Hennessey was never told: "I have a contract which you are seeking to make me break."

Mr. Hennessey, the defendant, was then examined by Mr. Robson, Q. C., and said: "I am organizing secretary of the National Association of Operative Plasterers. My duties are to increase the membership, and if I find a breach of the rules, to try and get it rectified. If a dispute arises between masters and men I go and see what it really is. I put it before the committee, and they advise me whether it is necessary to take action or whether they will let it go on as it is. I never had any communication with Messrs. Maxwell. On September 8, I went to Mr. Watkins, with Mr. Verdon, and told him that his notice that he would only pay up to Thursday night was causing friction. Wright's name was never mentioned. Watkins said he should do as he liked. After that there was a strike. Watkins then changed his mind. I did not know then that Wright was employed there. The objection we had to Mr. Wright was that he was continually employing men and not paying them what we considered the trade union rate of wages.

Cross-examined by Mr. Lawson Walton, Q. C.—I regarded Wright as an unfair employer. My business was to control the dispute. To get rid of Wright would be the speediest way of settling the

dispute. From my point of view it would be the happiest thing that Wright should go and our men should stop. I object to Wright employing laborers to do plasterers' work. Mr. Watkins voluntarily offered to employ our men instead of Wright's men.

Mr. Botright, examined by Mr. Robson, Q. C., said—I am a plasterer. I have worked for Wright. The usual rate is 9½d.; he paid 9d. I worked overtime and got nothing for it.

Cross-examined by Mr. Walton, Q. C.—I am a *bona fide* plasterer. Wright said I was not a plasterer.

This was the case for the defense.

Counsel on both sides having addressed the jury,

Mr. Baron Pollock, in summing up, said that the form of action was of modern origin and had not hitherto come very much into the courts. No man had a right to do that which injured another man unless by acts he had a legal right to do. In this country every one had a right to express his opinion clearly with reference to the questions of the day. But if an individual, in order to enforce his particular views, did an act knowingly and intending to inflict an injury upon another, the law did not allow that to be done. Nor could a man say "If you don't employ a certain class of people we shall do certain things which will injure you in your business." The question was, did the defendant say to himself, "I will go to these people and will write such letters as will prevent them from employing Mr. Wright, and then he will be obliged to come to our terms and not to exercise any free will of his own." His lordship left the following questions to the jury: (1) Do you think that the course of conduct pursued by the defendant with regard to the employment of the plaintiff Wright was improper in the sense of being malicious—*i. e.*, with the intention of injuring him? (2) Do you think that the letters which were written were written with an improper motive to injure plaintiff or were written *bona fide* and with the honest intention of discharging a duty?

The jury found that there was malice on the part of the defendant in the sense in which his lordship had used the word "malicious," and they returned a verdict of £500 damages for the libels and £300 for inducing the breaches of contract.

His lordship gave judgment accordingly, and granted an injunction restraining the defendant from inducing, or endeavoring to induce, Messrs. Colls & Sons from breaking their contract with the plaintiffs in respect of work at the Pavilion Theatre, Whitechapel, and from inducing or endeavoring to induce any person or persons to break contracts made, or hereafter to be made, with the plaintiffs.

His lordship also granted an injunction restraining the defendant from continuing to write or pub-

lish the libels complained of. A stay of execution was granted upon the terms of the defendant paying £500 into court within a week.

EDITORIAL OF THE TIMES (LONDON) ON WRIGHT & CO. V. HENNESSEY.

Questions as to labor have of late for some reason been more heard of in our courts than used to be the case, and the trial which we reported on Saturday in the action "Wright & Co. v. Hennessey" is an example of a class of disputes with which judges and juries have had frequently to deal. Many years ago parliament modified the labor laws. It removed the legal disabilities of which trade unions complained. The property of such associations was protected by law. They were no longer deemed unlawful associations merely because they contemplated the supporting of strikes. But both here and in America, and in the latter much more than with us, the recent action of trades unions has brought them into collision with the courts; and it has been necessary sharply to remind too energetic secretaries of unions that the removal of disabilities has not conferred upon these bodies privileges and immunity from all legal control. Sometimes it is the case of a body of workmen or their representative going to an employer and saying that, unless he discharges A, who has broken a trade union code, they will throw up their work. Sometimes it is an attempt to induce people not to sell goods or materials to a builder who has incurred the displeasure of the local branch of the union. The substance of such cases as "Templeton v. Russell," "Flood v. Jackson," and "Wright v. Hennessey" is a threat by some one "unless you conduct your business as we direct, employ those whom we approve, we shall make it unpleasant for you and do our best to ruin you." In the action tried before Mr. Barou Pollock the defendant was the organizing secretary of the National Association of Operative Plasterers. A master plasterer named Peek having had a difference with Hennessey, the secretary, Peek's workmen were ordered to withdraw from his service, which they did. Wright came to his rescue and lent him workmen. This, it was alleged, brought upon Wright the wrath of the National Association. His name was inserted in a "black list," and other means were taken to coerce him. The organizing secretary wrote to Messrs. Patman and Fotheringham, under whom Wright had taken a sub-contract, that "unless Mr. Wright is removed they will be reluctantly compelled to take steps to prevent the men from finishing the work." A deputation was sent to another firm which had given Wright a contract for fibrous plaster work at South Kensington, and the result

apparently was that he lost the contract. In another case the firm which had given the contract for fibrous ceiling to Wright was informed by the organizing secretary that the removal of Wright's men was necessary; "as we have several members engaged upon the above works the presence of these men is causing friction." Messrs. Colls, who had employed Wright as sub-contractor in connection with works carried on at the Pavilion Theatre, were told, in a formal communication addressed to them, that "this man's opposition to the organized plasterers of London have caused a revulsion of feeling throughout London, and no man worthy of the name will work for or on any works where he is employed." \* \* \* Should Mr. Wright and his men be allowed to remain on the works, we cannot be responsible for what may occur." Messrs. Colls not at first yielding to this threat, a strike took place, and in the end Wright seems to have been thrown over. There were insinuations—wholly baseless, as it turned out—that the work which he carried out was of an inferior quality, and that his rate of pay was lower than the trade allowed. But the only real defence was that stated by Hennessey in cross-examination: "I regarded Wright as an unfair employer. My business was to control the dispute. \* \* \* I object to Wright employing laborers to do plasterers' work."

The way in which English law deals with this class of dispute is open to criticism. It has not attempted to define with nicety the point at which the right of every one to insist upon a particular form of contract of service and to induce others to do likewise becomes intolerable tyranny. Our courts have got out of this difficulty, as out of so many others, by the use of the magical word "malicious"—that word which means so much or so little, and the learning about which is half the stock-in-trade of an English lawyer. They have said that it is permissible to do all or most of the things which Hennessey actually did, provided such conduct be not malicious in the sense of being done to injure. They have not made it very clear under what circumstances such conduct could have any other object. They have been content to lay it down that if the intention is to injure some one the courts will interfere. The jury is thus left master of the situation; it may absolve or condemn according as it thinks the boycotting is spiteful or not. In the action tried on Saturday the jury took a serious view of the matter, for it returned against the secretary a verdict of £500 damages in respect of the libels contained in the letters as to the style of Mr. Wright's work, and £300 for bringing about the breaches of contract from which he was a sufferer. It may be doubted whether the law as it stands is in all respects perfect; and whether it will

not be practicable to distinguish with more precision between the legitimate advocacy of a particular policy and attempts to enforce it by ruining men in their business. But there is no question that many of the things brought to light in "Wright v. Hennessey" could not safely be tolerated. Suppose that every group of persons with supposed interests in common wrote letters and generally behaved towards all who seemed to be in their way as the National Association of Operative Plasterers did through Mr. Hennessey; suppose that every tradesman sought to obtain custom by taking organized means to ruin his neighbors who dealt elsewhere; that merchants trusted less to supply and demand than to threats of retaliation, and every trade circular wound up with a notice that, unless the particular wine, coals, silk, cotton, were ordered of the sender within twenty-four hours he would do his best to ruin the man whose custom was solicited. Suppose that each of these groups acted in this spirit, and that in consequence contracts were freely broken and men in large numbers were dismissed. Could society subsist with this *bellum omnium contra omnes*? The evidence in Wright's case was that the plaintiff's business had fallen off 50 per cent. in consequence of the action of Hennessey. There would be such a loss all round if everybody acted in his spirit and sent out wholesale messages of war to the knife. Mr. Hennessey writes as if the operative plasterers were an ancient caste and he and his friends full-blown Brahmins who will not brook Mr. Wright's pariahs touching things meant for sacred hands.

It is astonishing how old abuses reappear under new names. For some centuries trade corporations all over Europe exercised various forms of monopoly. Strangers were not allowed to ply their trades within a city until they had become "free" of it. A long period of apprenticeship was an essential condition to the practising of most professions and industries. Each town, and indeed each industry, were ruled by by-laws framed with absolute disregard of the interests of the whole community, and with the exclusive object of benefiting the little combinations in possession of the field. It was this "sort of slavery," to use Adam Smith's phrase, which the great economist sought to destroy. Wherever these irksome restrictions have existed they have been hurtful to trade, and their removal in England proved the beginning of an era of prosperity. Let Mr. Hennessey and other energetic organizing secretaries have their way, and we should soon see a system of industrial castes and corporate tyranny as oppressive as that exposed in the *Wealth of Nations*. It is satisfactory to know that for the present, at all events, the mandate of

"the organized plasterers of London" is not above the law of the realm — and in the long run it will be better even for the "organized plasterers" that this is so.

### Abstracts of Recent Decisions.

**MUNICIPAL CORPORATIONS — RESTRAINING BOND ISSUE.** — Where a bill in equity to restrain a proposed issue and sale of municipal bonds shows no other valid reason why such issue and sale should be estopped, except that the proceeds of the sale of such bonds will go into, and be expended by, improper hands, it is error to enjoin the issue and sale of such bonds, or to go further with an injunction, in such a case, than to restrain the delivery of such bonds when issued, to unauthorized hands, and to prohibit the proceeds thereof from going into the hands of, and being expended by, unauthorized persons. (*City of Tampa v. Salomonson* [Fla.], 17 South. Rep. 581.)

**WILLS.—ESTATE DEVISED.**—Under a devise "to my adopted daughter, H, to have and to hold for and during the term of her natural life. And after the death of H I give and devise the reversion or remainder to her lawful issue, to have and to hold the same in common to them, their heirs and assigns, forever. And, in case the said H should die without leaving lawful issue, then the aforesaid real estate shall revert to my estate, and I give and devise the same to my heirs under the interstate laws."—H takes a fee; the words "lawful issue" meaning lineal descendants, and having *prima facie*, the force of words of limitation, and the words "in common" not being such superadded words of limitation or distributive modification as will make the words "lawful issue" words of purchase. (*Grimes v. Shirk*, Penns., 32 Alt. Rep. 113.)

**WILL.—VESTED REMAINDERS.**—Testator devised his estate to trustees, a portion of the income being payable to his wife, who was authorized, during the trust, to dispose of one-third of the personal property by will, and the remainder of the income to be paid in equal proportions to a daughter and three sons; and provided that if the daughter or either of two sons should die, leaving issue, the issue should take the parent's share; but power of disposition was not given to any child. The trust was to end on a fixed date, and the property was then to be paid to testator's legal representatives: Held, that the remainders did not vest on testator's death, so that, on the death of the daughter before the termination of the trust, her surviving husband became entitled to the income previously payable to her, or to any part of the principal of the estate. (*Eager v. Whitney*, Mass., 40 N. E. Rep. 1046.)



## Correspondence.

NEW YORK, 8 July, 1895.

*Editor of the Albany Law Journal:*

DEAR SIR.—The Executive Council of the Association for the Reform and Codification of the Law is glad to announce that it has arranged for the next conference to be held at Brussels, in the Palais des Académies, from the 1st to the 4th of October, when the president of the Association, Sir Richard E. Webster, K. L. M. G. Q. C. M. P. is expected to preside, and the Bourgmestre and Eschevins of the city of Brussels will kindly entertain the Association.

The council will welcome to membership in the Association any of the American judges and leading jurists of the United States.

FRED. JAS. TOMKINS, M. A., D. C. L.,  
*Member of the Council, Secretary of the Reception Committee, at the Guildhall, London.*

P. S.—Application for membership can be made to Mr. Alexander, 33 Chancery lane, London; or to Mr. Scott, at the time of the conference in Brussels.  
F. J. T.

## RIGHT OF LIFE TENANT TO OPEN MINES.

NEW YORK, August 12, 1895.

*Editor of the Albany Law Journal:*

In the *Students' Helper* for July there appeared an article by Darius H. Pingrey, an article in which there occurred a statement to the effect that unopened mines could be developed by a life tenant. This was so extraordinary a proposition that I wrote to the editor of the *Helper* for Mr. Pingrey's authorities, there being no references to authorities in the article. In reply I was referred to section 370 of Pingrey on Real Property. That section I find to be as follows (with citations as given):

"The widow is dowable in mines which had been opened at the death of the husband, and it is generally held that she cannot open new mines even upon the lands set apart to her as dower; that is to say, a widow is not dowable of mineral deposits where there is no opened mine.<sup>1</sup>

<sup>1</sup> *Lenfers v. Henke*, 73 Ill. 405; *Hendricks v. McBeth*, 61 Mich. 473; *Kreer v. Stotenhur*, 36 Barb. (N. Y.) 641; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Crouch v. Puryear*, 1 Rand. (Va.) 258; *Clift v. Clift*, 87 Tenn. 17; 9 S. W. 198; *Findlay v. Smith*, 6 Munf. (Va.) 134; *Sayers v. Harkinson*, 110 Penn. St. 473; 11 id. 308; *Irwin v. Covode*, 24 Penn. St. 162; *Neel v. Neel*, 19 Penn. St. 323; *Moore v. Rollins*, 45 Me. 493; *Reed v. Reed*, 16 N. J. Eq. 243; *Billings v. Taylor*, 10 Pick. (Mass.) 460; *Bishop on Married Women*, § 264; 1 *Scribner on Dower* (2d ed.), 200-6.

"But this rule must be modified in this country, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the estate, founded in policy, and the provision for the widow is a part of the law of distribution, and the aim of the statute is not subsistence alone, but provision commensurate with the estate. Thus, a husband died in the possession of land which was not improved and was wholly valueless for agricultural purposes or lumbering. Its principal value, and practically its sole value, was in deposits of iron ore contained in it. And it was held that the widow was entitled to dower rights in the royalties realized from the lease by the guardian of minor heirs of the mineral lands which were undeveloped at the time of her husband's death, and solely valuable for the minerals afterwards discovered therein. This is the correct doctrine in this country.<sup>2</sup>

"The English authorities should not be followed. They define dower as a provision which the law makes for a widow out of the lands or tenements of husband and for her support and the nurture of her children.<sup>3</sup>

"The rules applicable in England, where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is substance merely, and where there is a strong disposition to free estates from even that charge, should not obtain in the United States.

"So a widow should not be excluded from her dower interest in mineral lands which, at the death of her husband, are unimproved and unproductive, and are chiefly and solely valuable for the minerals contained in them. This doctrine is in accordance with the interpretation of the statutes of the States providing for dower, though it is opposed to the English rule. But the mere possessory right given by the United States Statutes to the location of a mining claim is not such an estate that dower can be predicated thereon by State legislation as against the United States and its grantees.<sup>4</sup>

"On examination of the late Michigan case cited (*In re Seager's Estate*, 92 Mich. 186) I find that the whole body of Mr. Pingrey's text is adopted almost without a change of language from the judge's opinion, and he even cites all the authorities that are cited by the judge in support of the general doctrine, except *Coates v. Cheever*, 1 Cow. 450; *Washb. on Real Prop.* 166; *Bishop on Married Women*, § 246; and *Scribner on Dower* (2d ed.), 200-6; and he even copies the mistake of the judge in citing *Clift v. Clift*, 87 Tenn. 17, twice.

<sup>2</sup> *In re St. Leger's Estate*, 92 Mich. 186.

<sup>3</sup> *Co. Litt.* 30 h., 2 Bl. Com. 130.

<sup>4</sup> *Black v. Elkhorn Mining Co.*, 53 Fed. Rep. 859.

The case of *Black v. Elkhorn Mining Co.*, 52 Fed. Rep. 859, is authority only on the point contained in the sentence last given.

A close examination of the Michigan case, it is thought, does not warrant the position taken that a life tenant may develop unopened mines. This was a case where the guardian of infant heirs had opened mines on lands valuable only for the minerals contained therein, and the court held that the widow was entitled to dower in the proceeds of the mines thus opened. The court says on page 197 of the report:

"In the present case the grant is by operation of the statute giving the use of all the lands of which the husband was seized. The grant must be held to include the use of the lands, irrespective of whether mines were opened upon them before or after the husband's death. The question here is not the impairment of one mode of enjoyment or source of profit to reach another. There is but one mode of enjoyment of the land in question, but one source of revenue or profit. The land is susceptible of but one use. The widow is therefore entitled to one-third of the amount in the hands of the petitioner."

This is thought to be unnecessary to the decision of the case in hand and for that reason purely *dictum*.

I find that the same point is discussed by another work on real property just out, and a contrary conclusion arrived at. I refer to Kerr on Real Property, recently announced by Banks & Bro. In section 588, Mr. Kerr says: "Where mines, quarries, clay-pits, gravel-pits, and the like, have been opened on the premises and worked by a former owner of the fee, the tenant for life may continue to work them without restriction<sup>5</sup> or limitation,<sup>7</sup> for the reason that such mines have been made part of the profits of the land." If a mine or quarry has been worked for commercial profit, that must order-

narily be decisive of the right of the life tenant to continue working, but, on the other hand, it has been said that if mines have been worked or used for some definite purpose, that alone would not give the life tenant a right to continue the working."<sup>9</sup>

In section 584, Mr. Kerr says: "The life tenant, where he has a right to mine, in order to more advantageously pursue such work, may open new pits and sink new shafts."<sup>10</sup> But the opening of mines and the opening of new pits and shafts must be conducted and done on the tract of land already worked, and not upon a different tract of land and in a place where the mine or vein has never been opened or worked,<sup>11</sup> because a tenant for life has no right to open new mines, the opening of new mines forfeiting the estate where such tenant is liable for waste.<sup>12</sup> The American cases, however, have greatly modified the law of waste, so as to adopt it to the conveniences and requirements of a new and growing country, in order to encourage tenants for life to make a reasonable use of wild and undeveloped lands.<sup>13</sup>

What I would like to know is whether the American cases have modified the doctrine of waste "to adapt it to the conveniences and requirements of a new and growing country" to such an extent as to justify the position taken by Mr. Pingrey in his work on Real Property? It does not seem to the writer that they have. After a diligent search I have not been able to find a case that supports the Michigan court in the *dictum* quoted, and upon which Mr. Pingrey is content to announce the novel doctrine. I trust that some one well-read in real estate case law will furnish the wanting authority, for I have a great deal depending upon being able to find an authority that can be safely relied upon to support Mr. Pingrey's position, which the Michigan case certainly does not do.

HARRY M. HANSON.

<sup>5</sup> *Billings v. Taylor*, 27 Mass. (10 Pick.) 460; s. c. 20 Am. Dec. 533; *Executors of Reed v. Reed*, 16 N. J. Eq. (1 C. E. Gr.) 248; *Rockwell v. Morgan*, 13 N. J. L. (2 Beas.) 384, 389; *Coates v. Cheever*, 1 Cow. (N. Y.) 460, 474; *Lynn's App.*, 31 Penn. St. 44; *Neel v. Neel*, 19 Penn. St. 323, 324.

<sup>6</sup> Under a statute providing that the tenant for life shall have "reasonable and necessary use and enjoyment" of the land, the right to work mines, quarries, etc., will not be limited or restrained. *Westmorland Coal Cos. Appeal*, 85 Penn. St. 344; *Kier v. Patterson*, 41 Penn. St. 357; *Irwin v. Covode*, 24 Penn. St. 162.

<sup>7</sup> *Crouch v. Puryear*, 1 Rand. (Va.) 258; s. c., 10 Am. Dec. 528.

<sup>8</sup> *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (5 Stew.) 86.

<sup>9</sup> *Elias v. Snowden Slate Quarries Co.*, L. R. 4 App. Cas. 454, 465.

<sup>10</sup> *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (5 Stew.) 86; *Crouch v. Puryear* 1 Rand. (Va.) 258; s. c. 10 Am. Dec. 528.

<sup>11</sup> *Westmorland Coal Cos. Appeal*, 85 Penn. St. 344.

<sup>12</sup> *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (6 Stew.) 603; *Coates v. Cheever*, 1 Cow. (N. Y.) 460, 474; *Viner v. Vaughan*, 2 Beav. 466; *Whitfield v. Bewit*, 2 Pr. Wms. 242.

<sup>13</sup> *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (6 Stew.) 603; *Ballantine v. Poyner*, 2 Hayw. (N. C.) 110; *Irwin v. Covode*, 24 Penn. St. 162; *Neel v. Neel*, 19 Penn. St. 323; *Hastings v. Crunkleton*, 3 Yeats (Pa.) 261; *Findley v. Smith*, 6 Munf. (Va.) 184; s. c., 8 Am. Dec. 733.

### New Books and New Editions.

**SMITH ON CHATTEL MORTGAGES AND CONDITIONAL SALES IN THE STATE OF NEW YORK, 2d EDITION, BY P. C. DUGAN, Esq., OF THE ALBANY BAR.**

The second edition of this work was made necessary by the decisions rendered since the last edition and by the many changes in the statute law. The frequency in these days of conditional sale of property to secure payment has largely increased the interest in this branch of the law. The edition begins with the chapter on the "Instrument." The subsequent chapters are on the filing and refiling of chattel mortgages, the validity of chattel mortgages, the disposition and sale of the mortgaged property, assignment of mortgages of ships and vessels, and the supplement contains chapters on the same subjects except that Chapter VI, which deals with contracts on conditional sale of personal property. The well-known ability and learning of the editor of the second edition makes the second appearance of this work, perhaps, more important than the first edition, and the general care which was used in the preparation of the second edition makes the work up to date in all respects. Published by Matthew Bender, 511 and 513 Broadway, Albany, N. Y.

**JEWETT'S MANUAL FOR ELECTION OFFICERS AND VOTERS OF THE STATE OF NEW YORK, BY F. G. JEWETT, OF THE SECRETARY OF STATE OFFICE THIRD EDITION.**

The changes in the election laws made by the last Legislature made the appearance of this work a necessity and practically a useful remedy and the method of handling the subject in the past has been repeated in the third edition. The scope of the work in this edition has been greatly enlarged and the work most clearly show the laws of the State in general with the special elections laws in relation to the cities of New York and Brooklyn. The changes in the Senate and Assembly districts in number and in territory also made the publication of this work a practical benefit to lawyers as well as to officers of elections and perhaps of political organizations, and the directions for voting contained in the work will be found of great aid to the instructors of voters at the coming election. The work is complete in every respect and contains a full practical index. The maps showing the senatorial and assembly districts will be of considerable value to those who use such a work. Published by Matthew Bender, 511 & 513 Broadway, Albany, N. Y.

**THE EXCISE AND HOTEL LAWS OF THE STATE OF NEW YORK, BY ROBERT C. CUMMING AND FRANK B. GILBERT, OF THE STATUTORY REVISION COMMISSION.**

This is a treatise of 253 pages on this important subject. The work begins with the statutory con-

struction law with the amendments of the Legislature of 1895. Chapter 2 deals with the Excise Law, which is excellently annotated with citations at the end of every section, and shows clearly the amendments made by the last Legislature and with the new sections. Chapter 3 deals with special acts relative to Excise Commissioners and Excise moneys, and gives a special law relating to powers and pledges for liquor sold, and the Civil Damage Act and is followed by a chapter on the Public Officer's Law. Chapter 6 deals with Code Provisions, while Chapter 7 is on local statutes relating to excise, with a special act relating to the State and counties. Chapter 8 deals with United States statutes relating to wholesale and retail liquor dealers, and Chapter 9 is in relation to rights and liabilities to innkeepers. After this comes the chapter with forms on this subject, and an excellent index completes the volume. Published by Matthew Bender, 511 & 513 Broadway, Albany, N. Y.

**COMMENTARIES OF THE LAW OF CORPORATIONS. BY SEYMOUR D. THOMPSON.**

Vol. 4. We have already carefully reviewed the first three volumes of this excellent and tremendous work, and have also published a most careful and learned review of the books already published by John F. Dillon, of New York city. It seems almost unnecessary to repeat the encomiums of praise which have already been accorded to this publication except, perhaps, to note that the same excellence of literary and scientific research and knowledge is evinced as in the former three volumes we have seen. Vol. 4 begins with chapter 86, on the rights of membership, and continues with the rights to inspect books and papers, other rights and remedies, remedies of shareholders in equity, injunctions in aid of such remedies, and when such remedies extend to winding up and when not, further as to the release of parties to such actions, pleadings in such actions, varies matters of practice in such actions. Title 8 treats of ministerial officers and changes, and power of the president and other officers of the corporation, the cashier of a bank, the teller and other officers. Title 9 deals with formal execution of corporate contracts, and deals with negotiable instruments, parol contracts and implied contracts. Title 10 is about notices, estoppel ratification, while title 11 contains chapters on franchises, privileges and exemptions. Title 12 deals with corporate powers and the doctrine of *ultra vires*, and has chapters on corporate powers in general, interpretation of charters, financial powers, while chapter 126 deals with powers relating to negotiable papers. The enormity of the work and the manner in which it deals with this large and increasing branch of law makes the work equal to any of the standard commentaries of this or any other era. The true value of the work will have its lasting effect on the law and lawyer of this and future generations.

Published by Bancroft Whitney Co., San Francisco, Cal.

# The Albany Law Journal.

ALBANY, AUGUST 24, 1895.

## Current Topics.

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"IT must be remembered that the majority of companies are honestly formed for carrying on a legitimate, though it may be a speculative enterprise or business, and the business is conducted with honesty and reasonable ability and judgment." Such is part of the report of the committee appointed to make recommendations and changes in the English Companies Acts, and if all corporations were formed honestly and conducted without any endeavor to take advantage of the public there would be little necessity to have any of the present relations, regulations and restrictions in the corporation laws of this State. There is little doubt, as Judge Dillon suggests in his letter published in these columns, that many of the present severe provisions of the corporation laws of this State should be modified to the end that a larger number of business interests may be induced to begin their legal life and existence under our State laws. How far we can loosen the restrictions which we now have is a difficult matter to determine, but the changes should at least attain the results which Judge Dillon suggests. After all, when we realize the practical results of the provisions of the New York Statutes in regard to corporate companies, we must appreciate that the seemingly severe prohibitions and restrictions which we have referred to, are partly only imaginative and that is only necessary to resort to subterfuges to evade laws which are shibboleths of regulations rather than actualities. Corporations are formed under the laws of other States and carry on business here with enormous capital stock much of which only represents the dreams of the incorporators. Are these restrictions in our statutes in many cases the result of the work of over-anxious patriots in the legislature who were not properly persuaded that their views and fears were wrong? Are these practical benefits pro-

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portionate to their injury to the State in preventing companies from doing business within our boundaries? Will it not require the use of a flood of gold to secure there repeal? Gentlemen of the legislature, in time you may kill the goose that lays the golden egg.

Commenting on the Draft Companies Act Amendment Bill which Judge Dillon writes of the *Law Times* says:

Everyone will hail with satisfaction the report of this committee and its draft of a bill for amending the companies acts, and most will think that a very prudent middle course has been taken between the opposing dangers of leaving too much to the prudence of investors, and of laying too heavy burdens on the backs of directors. A few matters appear to call for comment.

The first clause, which makes the certificate of incorporation conclusive for all purposes, is of more importance than is generally known. For many years it was thought that associations could be formed into companies at common law, and then registered under Part VII of the Companies Act 1862. As this course involved a considerable saving of stamp duty, it was largely adopted down to 1890 when the board of trade refused any longer to allow it, a ruling which was upheld in the Court of Appeal in *Ex parte Johnston* (1891), 2 Q. B. 598. This case shows that such an association is one which cannot be registered, and accordingly the certificate of incorporation, which only deals with the forms and details of registration (see *National Debenture Corporation* [1891], 2 Ch. at 517), is no protection to the great number of companies already registered in this manner, and if the question were raised it would probably be held that they are unincorporated bodies, and that the shareholders' liability is unlimited.

The clauses of the bill which, however, arrest most attention are those which deal with the prospectus and the first allotment. No one will dispute the advantage of compelling fuller disclosure of preliminary contracts, of the profits of vendors, of the amount of promoters' remuneration, and preliminary expenses; but the result of a failure to make proper disclosure is dealt with in an unsatisfactory manner. The matters to be disclosed are in some cases of

great importance, in others they are or may be trivial, *e. g.*, the actual number of shares taken by directors, or the address of auditors; but the remedy is the same in every case: "In the event of non-compliance with any of the requirements of this section with respect to a prospectus, any person aggrieved shall be entitled to compensation from any director, etc." Here is a splendid opening for litigation. Who is a person aggrieved? *Prima facie* no doubt a person who has applied for shares on the faith of the prospectus; but will the clause also extend to purchasers of shares or others indirectly aggrieved? Again, will it give relief against loss where the non-compliance was really immaterial? And for what is the compensation? Shall the smallest omission of any matter required to be stated give a right to every subscriber to have all his loss made good to him, although arising from something wholly unconnected with the omission?

So far the Bill seems to lay too great a responsibility on directors, but, on the other hand, the exceptions in clause 15, sub-sect. (a) and (b) of sect. 4 will open a means of evading the salutary provisions of the Act. Several of the most important particulars will not require to be disclosed more than one year after the formation of the company, nor need contracts made more than one year before the issue of the prospectus be set forth. If a dishonest trader wishes to put his business before the public without giving proper particulars, he can easily form it into a private company first, and, after waiting for a little over a year (during which time he will, no doubt, have paid a good dividend), he can offer the whole to the public, concealing the particulars of the transactions relating to the formation of the company.

In like manner the excellent provisions restraining the directors from going to allotment or commencing business until a certain minimum of capital has been subscribed and in part paid-up, and giving the members at the statutory meeting a right to information on some important point, can be easily evaded. If a company be first registered with a small capital (say £100), and all this be subscribed, and perhaps fully paid, it will be free, after holding the statutory meeting, to increase the capital to any extent, and to offer this to the public, who

will lose the protection intended for them. It seems imperative that some provision should be made for dealing with issues of capital other than the first where they amount to as much as, or more, than the amount for the time being issued.

The repeal of sect. 25 of the Companies Act 1867 will be received with great satisfaction by most people. But it would be well to declare expressly what the position will be of persons who now hold shares on which they are liable, in the event of a liquidation, to pay the whole amount in cash because no contract has been filed. If they are freed from this liability the creditors of the company may be injured; if not freed, their case will be a hard one.

The provisions as to disclosure of the amount of shares issued as fully or in part paid which are to take the place of this section would be sufficient, were it not that an easy method of evasion presents itself. A company may contract to purchase property or pay for services with cash, upon the understanding that the vendor or *employee* subscribes for an equal nominal value of shares; and this may be used to defeat the clauses relating to a minimum subscription. If the owner of a gold mine wishes to sell it for £100,000, and the prospectus of a company with a capital of £150,000 states that the minimum subscription will be £50,000, and that the property will be purchased for £100,000 in cash or shares at the option of the directors, and upon opening the letters of application it is found that only £10,000 is subscribed for, there is nothing to prevent complacent directors from agreeing the purchase price at £55,000 in shares and £45,000 in cash, out of which latter the vendor will subscribe and pay for £40,000 of shares, making up the required minimum subscription, but leaving only £5,000 working capital.

No apology seems necessary for pointing out these means of "slipping out of" the bill, for there is still time to stop up the gaps, and it is to be hoped that pains will be taken to do so.

One other point requires notice. It is proposed that unregistered mortgages shall not be valid as against creditors or the liquidator. There is much in favor of this, but it may work

great hardship on a purchaser of a mortgage or debenture not duly registered, and will make it necessary for purchasers to make inquiry before completing the purchase, thus checking the negotiability of such securities.

On the whole, however, the bill, if it becomes law, should do much to dissipate the evil odor into which the practice of company formation has come.

The *London Law Magazine* says: "It will be remembered that an Irishman, named Cleary, and his family, most cruelly burnt the wife of the former to death, under the belief that she was a witch, and that so soon as the victim was consumed the real wife would appear at the door of the cabin riding on a white horse. The man has just been sentenced at the Tipperary Assizes in Clonmell to penal servitude for twenty years, the jury having mercifully found him guilty of manslaughter only. The learned judge, Mr. Justice O'Brien, expressed surprise at the degree of darkness of mind, moral ruin, and superstition existing in the nineteenth century. Yet these are the people whom we are told are capable of exercising the parliamentary franchise."

On Monday, August 19, 1895, ex-Justice William Strong, of the Supreme Court of the United States, died at Lake Minnewaska, N. Y.

William Strong was the son of the Rev. William Lighthouse Strong, and was born in Somers, Tolland county, Conn., May 6, 1808. He was educated at the Plainfield Academy and Yale College, graduating at the age of 20 years. After a brief career as school teacher, he returned to New Haven and graduated from the Law School of Yale. Removing thence to Philadelphia, he was admitted to the bar in 1832. The young lawyer chose Reading, Pa., for his home, and entered upon the practice of his profession. In 1847, having taken an active interest in politics, he was elected to represent the district in Congress, and served two terms. He then returned to the practice of his profession, and in 1857 was elected a judge of the Supreme Court of the State of Pennsylvania for a term of fifteen years. On October 1, 1868, he resigned that office and resumed his practice at the bar. One of his decisions on the supreme bench of the State attracted great

attention. This was in the famous "Sunday Car" case, decided in 1865 in Philadelphia.

While a member of the Supreme Court of the State, Justice Strong won a reputation for judicial learning that extended far beyond its limits, and when, in 1870, President Grant transmitted his name and that of the late Justice Bradley to the Senate for confirmation as associate justices of the Supreme Court of the United States, there was a very general feeling of satisfaction among the members of his profession. On January 15, 1872, Mr. Justice Strong announced the decision of the court affirming the constitutionality of the legal tender act, and Justice Bradley concurred in a lengthy opinion.

But the legal tender question was not the only one of importance growing out of the war in the settlement of which Mr. Justice Strong took a prominent part. The constitutional amendments, intended to crystallize and preserve the results of the war, and the congressional legislation necessary to give these constitutional provisions force and effect, were before the court. In *Bigelow v. Forest*, Mr. Justice Strong prepared the decision announcing that under the Confiscation Act of July 17, 1862, a decree and sale only established a confiscation during the life of the one for whose offence the land was condemned and sold. In *Tennessee v. Davis*, he delivered the opinion of the court establishing the principle that the judicial power of the United States embraced alike civil and criminal cases arising under the Constitution and the laws of the United States, and that their removal from a State to a federal court was no invasion of State domain and power. In *Virginia v. Rives*, he also prepared the opinion of the court, holding that the object of the Constitution, which authorized the enactment of statutes for the removal into the federal court of civil suits or prosecutions against any person who was denied, or could not enforce, in State courts any rights secured to him by any law providing for the equal rights of citizens of the United States, was to place the colored race, in respect of civil rights, upon a level with the whites.

In *ex parte Virginia*, Judge Strong announced the decision of the court that whoever, by virtue of public position under a State government, deprived another of life, liberty,

or property, without due process of law, or denied or took away the equal protection of the laws, violated the constitutional inhibition; that his act, as such officer, was the act of the State; that power was given to Congress to enforce its provisions by appropriate legislation, and that such legislation must act not upon the abstract thing called the State, but upon the persons who are agents of the State.

Justice Strong was designated by the Electoral Commission Act of 1877, as one of the judicial members of the famous tripartite tribunal which passed upon the contested presidential election of 1876. In 1880 Mr. Justice Strong, having reached the age at which retirement from the bench after ten years' service thereon is permitted, retired, and had since made his home in Washington.

It is always of importance in determining the value of oneself or of a condition of affairs to secure the opinion of others and to regard their view in passing and forming judgment.

The *Law Magazine*, of London, in its review on works called the "Sources of the Constitution of the United States," by Ellis Stevens, and "Adoption and Amendment of Constitutions in Europe and America," by Charles Borgeau, shows how our English cousins regard the Constitution of the United States and its history. The *Magazine* says:

Mr. Gladstone has observed that "as the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." There is some truth in this, for the American Constitution, established as a written document by the convention and in circumstances quite unique, has many elements peculiar and characteristic; but it is beginning to be realized that the American Constitution, though possessing elements of novelty, is not after all the new creation that Mr. Gladstone would imply. It is not the original composition of one body of men nor the outcome of one definite epoch. It rests upon very old principles, laboriously worked out by long ages of constitutional struggles; it looks back to the annals of the colonies and of the motherland for its sources and its explanation. The constitution has been made what it

is by the political development of many generations of men, and it is not the mere sole creation of the Philadelphia convention.

Mr. Ellis Stevens, in the work before us, treats of that document which goes by the name of The American Constitution, and avoids all side issues. He deals with the making of the constitution, its legislative organism, its legislative powers, points out in what manner its executive is related to the ancient executive of England, discloses the popular feeling of Americans against kingship—an opposition largely due to the fact that the struggle for emancipation had been forced upon them by their sovereign in person—and describes the derivation of the American courts from the English colonial courts and judges, and explains, in a very lucid manner, the continuity of our bill of rights in acts of American legislation. An excellent treatise on an interesting subject, well digested and clearly evolved.

"Mr. Borgeau devotes his work to the process of Constitution-making in those States which admit of an isolated treatment, and render possible the attainment of a general theory. He points out that a constitution is the fundamental law according to which the government of a State is organized and the relations of individuals with society regulated; it may either be a code or a collection of texts promulgated at a certain time by a sovereign authority, or in the second place it may be the result of a series of legislative acts, judicial decisions, precedents and traditions of dissimilar origin and unequal value.

"The English Constitution—the oldest of all constitutions—belongs to the second division. The private law of the United Kingdom is uncoded, and her fundamental law is unwritten. An unwritten constitution does not, as a whole, furnish innovators with a definite concrete point of attack; but as it lies within the ordinary competence of Parliament to increase or diminish it by mere statutes, indirect blows may be aimed at it all the more dangerous, because not immediately and generally apparent. Mr. Borgeau directs his study to those countries which may be said to fall within the first division; they are becoming more and more numerous, their public law may be considered apart from the power which creates it, and

their political institutions are based upon a fundamental statute emanating from this power. The author has treated the subject objectively in a rigorously scientific and impartial manner; the method he employs is largely historical.

"Modern constitutions are not the systematic work of jurists. They have sometimes been the result of theoretical speculations. We can only judge constitutional system correctly by studying the origin of the fundamental law upon which that system is based, or by tracing the evolution of the customary law to which it conforms. The aim of the book before us is to show the possibilities of such an investigation, beginning with the origin, growth and character of written constitutions, then with royal charters and constitutional compacts divided into the German group and the Latin-Scandinavian group, lastly, with Democratic Constitutions, viz., the United States of America, France and Switzerland. The two books before us should be found in the hands of every jurist and student of constitutional history."

The unfortunate lack of uniformity in the divorce laws of the different States is a subject on which we have written considerably. The effect of this condition of the States' statutes is two-fold. First, divorce is made easy for the rich, and hard to secure for the poor; and, second, the judgment of the court of the State granting the divorce, loses all force and effect outside of the boundaries of the State.

The historical, philosophical and analytical schools differ greatly in their conception as to how far moral law may influence the judicature of any locality, but, it is certain that public opinion will, in the end, frame legislative enactments in accordance with its ideas.

If similar divorce laws were enacted in every State, and if these statutes contain, first, a requirement that the person seeking a divorce must have a residence of five years, and, second, that the divorced party should not marry within five years, it would seem that proper restrictions were placed upon parties, and that individuals would not in the present light and fickle fashion, seek marriage and again divorce.

The divorce laws of several States have been used as a sort of boom to populate growing

sections, and the general cussedness of the thing is, that it not only temporarily increases the number of persons in those States, but afterwards depopulates them to the same extent.

If marriage is to be a relation which may be voluntarily ended at the volition of the parties, let us enact in the laws of the State of New York such provisions as exist in some of the statutes of the western States — the more lenient the better.

If, however, some of the old-fashioned, good ideas of the sacredness of the relation and the indissolubility of the tie yet remains in the public mind, let us endeavor to stop this booming of population in some States by enacting uniform statutes which will not allow the rich man greater privileges than his poorer brother.

The recent case of *Le Mesurier v. Le Mesurier* decided by the Privy Council in England does away with the theory which has existed in England since the decision of *Jack v. Jack*, of Matrimonial Domicile in Jurisdiction for Divorce. In *Jack v. Jack*, 24 D. 483 it was well recognized that the domicile of the party was mainly to be looked after in considering the competency of the court to decree divorce.

In that case the husband, a domiciled Scotchman had married a Scotswoman in Scotland, and had been wronged by her committing adultery there. He had gone to America without any idea of returning to Scotland, and the Scotch courts were much inclined to grant the decree, although his wife claimed that her residence was his, which was in America.

The new doctrine of matrimonial domicile was then most fully expounded by the late Lord President Inglis who argued that the true foundation of jurisdiction and divorce must have some actual relation to (1) the wrong to be redressed, (2) the remedy to be applied and (3) the character of the union which it is the effect of the decree to dissolve, and that it was not therefore necessary that the husband should at the date of the action have such a domicile within the territory as would regulate his succession at death. In short, the court held that a man could have a matrimonial domicile separate and apart from any other. The decision of *Jack v. Jack*, however, was followed in many



later cases and it has only been the decision of *Le Mesurier v. Le Mesurier* which has expounded the new doctrine.

The last named decision has been followed in *Dombrowizky v. Dombrowizky*. These decisions and the evolution of the theory of domicile in England are perhaps mostly instructive because they show that the trend of English decisions is to give more force to the permanent, actual, absolute domicile of the party seeking a divorce.

There should be no statutes allowing a six months' residence to entitle a person to have such a domicile as is necessary to sue for a divorce, and the power of the courts of many States should be greatly lessened and limited.

It is also worthy of comment to write as to the status of persons who have been divorced in England, that all prohibitions which could be placed in the statutes, should be enacted to prevent the divorced from again marrying.

It is a matter of history that in 1857, Mr. Gladstone was the leader of the party who endeavored to defeat the bill which gave to one tribunal the power to grant divorces instead of the cumbersome method which had before been necessary, namely, the common law action enjoined to an ecclesiastical decree and a bill in Parliament. The effect of this legislation was really to gain simplicity in procedure rather than any loosening of the rules of law to enable persons to be divorced. Several sections were placed in the bill to appease Mr. Gladstone's party. The two which were thought most highly of were sections fifty-seven and fifty-eight which provided (1) that no clergyman shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any set penalty or censure for solemnizing or refusing to solemnize the marriage of any such person and (2) that if the minister of any church shall refuse to perform the service for persons who, but for such refusal, would be entitled to have it performed in such church, he shall permit any other minister entitled to officiate within the diocese to perform the service in his church.

Lord Halifax's bill now pending in Parliament repeals section fifty-eight of the act of

1857 and provides that no minister of any church or chapel of the Church of England wherever marriages may be lawfully solemnized, shall be liable to any set penalty or censure for refusing the marriage of any person whose former marriage shall have been dissolved on the ground of his or her adultery or crime, to be solemnized in such church or chapel, or for refusing to proclaim or permit the publication of the bans of marriage of any such person in any such chapel or church.

The later amendment to this bill by Lord Grimthorpe's proposition provides that no marriage of a person found guilty of adultery, shall be solemnized in any church or chapel in the Church of England within five years after such finding.

Can we not learn from our English brethren that a restriction on marriage when one of the parties has been divorced will prevent many of the scandals which now grace the columns of the daily newspapers, some of which openly announce the intention of divorced parties to marry even before any proceeding has been begun for a dissolution of the marriage ties.

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A married man living at Port Hadlock with his wife and four children enticed a girl barely sixteen years old to run away to Victoria, B. C., where he joined her. The runaways were discovered and the man arrested. He relied upon the want of jurisdiction of the British court, but after some consideration the judge sentenced him to the extreme punishment allowed by law.

Commenting upon the law and the facts in the case, the court said:

"You brought the girl here, but the abduction never took place until she landed here and you gave her the chance to return. You might have receded from your wrong intention, but you chose to take her away, and the abduction took place here and the court here has jurisdiction. I fail to observe any redeeming feature. You were living at Port Hadlock with your wife and children, and in one of your letters you said you had to leave there at once, as you were accused of a most horrible crime, and as a fugitive from justice you came to Canada. You also said you were about to get

a divorce, which was not true. After you left you wrote letter after letter breathing, not love, but criminal sensuality, and you induced the girl to come here to her ruin. You knew her age and begged her to put on long dresses to make her look older. Yours is a crime aimed at by the laws of all nations. The family circle must be protected from such as you, who are nothing more than fiends dressed in human shape. There is no reason that your sentence should be any less than the full term the law allows, and you are sentenced to five years in the penitentiary."

It is true that the crime is one aimed at by the law of all nations, and the sentence will be hailed with satisfaction by everybody who recognizes the need of protection for his family against such villains.

In line with the piano case decided in New York city is the "merry-go-round" case of West Virginia, in *Town v. Davis*, decided in the Supreme Court of Appeals of West Virginia, 21 S. E. R., 906, it was held that a "merry-go-round," run by a steam engine, the whistle of which blew every few minutes, accompanied by a band and attended by a large, noisy and boisterous crowd till after ten at night, disturbing some of the people living near it, is such a nuisance as a town council has power to abate.

The court said, in part: "Many of the questions raised by the plaintiff in error have already been discussed and considered. Was the riding gallery a nuisance at that particular place and time? is the only one that remains. That depends on the place, the time, the circumstances, the manner in which it was operated and the effect it produced. Did the noise and crowd, and other effects of this riding gallery, invade any public or private right? Did it materially interfere with and impair the ordinary physical comfort of any one of normal sensibility and ordinary mode of living, in his home or place of business? The place has much to do with it. It seems to have been on a vacant lot in a populous part of the town, with at least four dwellings near by. The time is important. It was operated up to ten, and half after ten in the night, tending to prevent and disturb sleep, and had been kept up continuously for six days.

The attending circumstances are important. It drew to the place a large and noisy and boisterous crowd. The nature of the thing itself is important. It was run by a steam engine. The whistle blew every few minutes. The music played, the gallery ran around, the crowd hallooed, etc., until ten o'clock at night. That it was a mere idle amusement, perfectly legitimate in a proper place or at a proper time, is not wholly unimportant. That which calls together a disorderly crowd in a public place was held to be a public nuisance in *King v. Moore*, 3 Barn. & Ald. 184. The making of loud music, with instruments or otherwise, in the night time, to the disturbance of a neighborhood, was held to be a public nuisance in *Rex v. Higginson*, 2 Burrows, 1233; *Com. v. Oaks*, 113 Mass. 8; *Com. v. Smith*, 6 Cush. 80. Those who participated did not regard it as a nuisance. Some of the witnesses attended. Some permitted their children to attend. They thought it a harmless amusement for the children. It did them good, rather than harm, and the proprietor was careful, polite, and kept good order. This, I take for granted, is true, at a proper time and in a proper place. Other witnesses lived at a distance. They, of course, were not annoyed, and they thought it was not a nuisance to those who lived near by. Four witnesses who lived close by say that it was a nuisance, disturbed and annoyed them at their homes, and prevented or interrupted their sleep. One witness, who lives on the same street, five lots below, says it was a considerable annoyance, and, to some extent, kept him awake. Quite a number of witnesses who live or do business near by were not annoyed by it, and do not regard it as a nuisance. From all this, and from the general character of such machines in operation, with their usual accompaniments, it is not hard for one to form a pretty accurate opinion on the question involved; that is, that when kept up day and night, for days together, in such a place, it was a decided nuisance to some people, of ordinary sensibility, who lived or had their place of sleeping adjoining or close to the vacant lot, while to those who lived at a distance, those who participated, and some of those who lived close to the place, it was not a nuisance — did not annoy them to any material extent."

### "STATUTORY CONSTRUCTION."

A paper read by the Hon. F. S. Monnett, of Bucyrus, before the Ohio State Association.

IN as much as whole treatises have been written on this subject by learned professors and critical expositors of the law, it is difficult to furnish you anything new; in fact, on this subject, I anticipate you would rather have something not new. But as long as Legislatures meet annually, and personal and proprietary rights are affected by their acts, just so long will this branch of the law be one of great and vast importance to the profession. The fundamental division of our government, under its various constitutions, both national and State, into three distinct heads: legislative, judicial and executive, while apparently simple, has grown to be a subject of constant litigation to determine the boundaries of each governmental function and to prevent the one from usurping or intruding upon the other. No more startling illustration of the difficulties and the intricacies involved, in observing these distinctions, is there than that of the effort of the highest tribunal of the land to construe the income tax. Here we observe a court of last resort, and of the choicest scholars, dividing at one time equally upon great and vital questions of construction of the fundamental law of the land, and subdividing many times on minor questions in the same decision, and finally reversing themselves and revising their former opinion within a few weeks after their original decision. If thus the doctors of the law do disagree, we disciples of the law may go free. So that it may not always be the mark of an inefficient prosecuting attorney if he cannot off-hand, on the street corner, give an infallible construction to some county officer of a new law involving the rights of person or property, for the rules now laid down by adjudication and precedent have grown so numerous that to apply any considerable number to a given case before finally deciding it, is an arduous task in itself.

To analyze this subject and bring it within the limit assigned the speaker, we will analyze the subject itself.

Statute law has been defined as the will of the Legislature of a State, or the will of the nation expressed by the Legislature, expounded by the courts of justice. The Legislature, as the representative of the nation, expresses the national will by means of statutes, which with the exposition by the court, form the body of the statute law. (Willberforce Statute Law, p. 8.)

Bouvier defines it as the written will of the Legislature, solemnly expressed according to the forms necessary to constitute it the law of the State. Before undertaking to interpret a statute, and apply the ordinary rule of interpretation, you

must inquire whether it is a Federal statute, or whether it is purely a State statute, for the rule of interpretation, as seen hereafter, varies according to the class referred to. Another division of statutes that is necessary to be understood before applying the rules of interpretation is, first, whether a statute is simply declaratory, which does not profess to make any alteration in the existing law, but merely to declare or explain what it is; or, second, remedial, meaning those statutes which are made to supply such defects, and to abridge such superfluities in the common law as arise either from the general imperfection of all human laws, whether from the change of time and circumstances, or from the mistakes and unadvised determination of unlearned judges, or from other cause. This modification being effected either by enlarging the common laws where it is too narrow or restraining it where it is too lax. The English Parliament occasioned a division of remedial statutes into two sub-heads, commonly called enlarging and restraining statutes. Such is Wharton's definition, and substantially Blackstone's, of remedial statutes.

The other branch of my subject perhaps needs a brief definition. What is "interpretation," and what "construction" of statutes? Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to do the same. While construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text.

Interpretation only takes place if a text conveys some meaning or other. But construction is resorted to when in comparing two different writings of the same individual, or two different enactments of the same legislative body, there is a contradiction found where there was evidently no intention of such contradiction, or where it happens part of the statute contradicts the rest. When this is the case, and the nature of the document or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction. I have used Judge Cooley's distinctions as cited in his Constitutional Limitations, 49-50. In common use, however, the word "construction" is generally employed in the law in a sense embracing all that is probably covered by the terms "construction" and "interpretation," and in the broader sense the words "construction" and "interpretation" are used as synonymous and interchangeable.

A lawyer in construing a statute, or in looking for precedents and judicial construction of statutes, must bear in mind the difference between the

Federal statutes and the State statutes, and the judicial determinations under each class, for there is a marked difference — a fundamental difference, in respect to implied powers between the Federal and State constitution.

The Constitution of the United States consists in a grant of enumerated powers; hence, in interpreting it and the statutes under it, the courts presume the existence of no power not expressly or impliedly conferred. On the other hand, a State constitution proceeds on the idea that all legislative functions are in the Legislature, and hence the general assembly of the State may exercise all the powers which are properly legislative, and which are not taken away by its own or the Federal Constitution. Congress can pass no laws but those which the constitution authorizes, either expressly or by clear implication, while the State assembly has jurisdiction of all subjects on which its legislation is not prohibited. The powers not granted to the Union to legislate are withheld, but the State retains every attribute of sovereignty which is not taken away. (21 Penn. St. 147, 16; 17 Id. 118-119; 52 Id. 474; Cooley C. L. 10-11.)

The rules of construction of statutes are the same in courts of law and equity. There is always a legal presumption that the Legislature intends nothing unconstitutional, and if an act is susceptible of two constructions, that one must be adopted which is constitutional. But an unconstitutional consequence cannot and must not be avoided by forcing upon the language of the act a meaning which upon a fair test is repugnant to its terms. (24 Cal. 518; 12 Iowa, 1; 21 Id. 221.)

It is an elementary rule of construction that words and phrases of an act are used in their popular and common conception, unless the subject matter or context indicate that they are used in a technical sense. If an act is passed with reference to a particular trade or business, then the words have the meaning as defined by that trade or business, even though the meaning may differ from the common or ordinary meaning. If the language is clear and admits of but one meaning, there is no room for construction. It is not allowable to interpret that which has no need of interpretation. In such a case any departure from the language used would be an unjustifiable assumption of legislative powers. (48 Fed. Rep. 298; 6 Wall. [U. S.] 395; 5 Wheat. 95; 79 Am. Dig. 350.)

And where the language is susceptible of but one meaning, it must receive that meaning, although such construction lead to results that are absurd and mischievous. Courts are not to tamper with the clear and unequivocal meaning of words used, although the consequences may not be such as were contemplated by the Legislature. There can be no

departure from the plain meaning of a statute on the ground of its un wisdom or public policies. (Sedg. on State on Constitutional Law, 231; Cooley, 197.)

Lord Blackburn said no court is entitled to depart from the intention of the Legislature as appearing from the words of the act because it is thought unreasonable. Chief Justice Payton, of Mississippi, laid down the rule that courts have no other duty to perform than to execute the legislative will without any regard to their own views as to the wisdom or justice of the particular enactment. It is also a universal principle of construction that courts must find the intent of the Legislature in the statute itself. Unless some ground can be found in a statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the court cannot arbitrarily subtract therefrom, nor add thereto. There are some apparent exceptions to this broad rule. No limitation must be inferred which will defeat the object of the law. Thus, where two hundred thousand dollars were appropriated for buildings, which must cost three times that amount, it was no limitation as to the expenditures.

Conjunctive sentences describing different branches of the same offense will be construed as conjunctive or disjunctive, as the object and sense of the law must distinctly require. It is, therefore, only in cases where the words of the statute are capable of two meanings, or where, by giving them their literal interpretation the statute will be inconsistent or ambiguous, that courts have a right to resort to the secondary rules of construction to aid in determining the real intentions of the Legislature. (7 N. Y. 97; 11 Id. 593; 10 Pett. [U. S.] 524.)

Language is rarely so free from ambiguity as to be incapable of being used in more than one sense, and to adhere rigidly to its literal and primary meaning would be to miss its real meaning in many instances. It is observed in Blackstone that if a literal meaning had been given to the laws forbidding a layman to lay hands on a priest, and punish all who drew blood on the streets, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who had bled a person on the street to save his life would have been liable to punishment.

So likewise, the German who was greatly annoyed by having his out lot run over by trespassers and the village cow and horse, placed the following sign thereon; "Any man, woman, child, horse, cow or dog caught trespassing upon these premises will have his or her tail cut off, as the case may be." He never, literally, carried out his threat. So in construction of statutes, the rules of grammar are less

important than the intentions of the legislature. The sense and spirit of the statute will always prevail over the strict and grammatical construction of its words. If the terms of a statute are ambiguous, it becomes the duty of the court to give such construction to it as may fairly be said to be in accordance with the intentions of the legislature.

On a literal construction of his promise, Mohammed II's sawing the governor's body in two was no breach of his engagement to save his head; nor did Tammerlane's burying alive the garrison violate his pledge to shed no blood. So the Earl of Argyll fulfilled in the same spirit his promise to the Laird of Glenstane, that if he would surrender he would see him safe to England, for he hanged him after safely taking him across the Tweed to English banks.

Lord St. Leonard is on record as saying, "Nothing is so difficult as to construct properly an act of Parliament, and nothing so easy as to pull it to pieces."

Chief Justice Pollock said: "There is no important word in the English language which does not admit of various interpretations."

Lord Coke classifies the rules interpreting an ambiguous statute under four heads:

First.—What was the law before the act was passed?

Second.—What was the mischief or defect for which the law had not provided?

Third.—What remedy the legislature had appointed.

Fourth.—The reason of the remedy.

Surrounding facts and circumstances, with certain restrictions, are allowed to place the interpreters in the position of those whose words are interpreted. Hence, evidence of such intrinsic circumstances may become admissible to show the intent of the legislature. (7 Barb. N. Y. 416.)

To carry out the second rule of Coke, and in order to understand the scope and object of the enactment, the interpreter must ascertain what was the mischief or defect for which the law had not provided. That is, he must call to his aid all those external or historical facts which led to the enactment. He must refer to the history of the time to ascertain the reasons for and the meanings of the provisions of the statute. He may even look to the state of public opinion, or judicial and legislative opinions on the particular subjects at, and prior to, the time of the enactment. But this rule has never gone so far as to allow a court to take the testimony of the views of the individual members of the legislature in debate to ascertain the meaning of the statute by them. Neither can the motives of legislators in supporting an act be inquired into by the court in

order to make the validity of the act depend upon the intention resulting from such inquiries. (113 U. S. 27; Id. 703; 36 N. Y. 285.)

On the other hand, the legislative journals are permitted to be used, not, however, as evidence of the meaning of a statute, for this must be determined from the language of the act itself, and the facts connected with the subject on which it is to operate. Yet, in a case where a statute, the construction of which was requested, was so worded as to be apparently contradictory in some of its provisions, the Supreme Court of the United States interpreted the same by reference to the journals of Congress from which it appeared that the particular phraseology was the result of an amendment without due reference to the wording of the original bill. (23 Wall. 307-321.)

Under the head of "External Circumstances," usage has been taken into consideration in construing a statute. Long usage may determine the meaning of the language where one of two ambiguous constructions has been adopted.

It is another elementary rule of construction that all parts of a statute which relate to the same subject matter must be construed together; that the plain or palpable parts must interpret the ambiguous ones. If one section of an act, for instance, required that notice should be given, standing alone, a verbal notice would probably be sufficient, but in a subsequent section it provided that such notice should be served on a person or left at his usual place of residence, which would obviously show that a written notice was intended in the first section. It is a legitimate rule of construction, from the context in surveying the whole act, to allow one portion to restrict the generality of certain of its provisions. So it may expand the narrowness of others if the real intention of the legislature may be gathered from broader expressions in other parts of the statute.

The examination of the context is allowable to correct omissions and errors if the omission or error is explained in a subsequent section, thereby supplying the omission. The context is to be consulted to avoid inconsistencies; and under this rule it is the duty of the interpreter to give effect to every word, clause and provision of the enactment. Hence, the most important purpose of examining all the parts of a statute together, and with reference to one another, is that of giving, by the means of such comparison, a sensible and intelligent effect to each, without permitting any one to nullify any other, and to harmonize every detailed provision of the statute, with the general purpose or design which the whole is intended to subserve.

With this end in view, the rule extends to all amendments which, for this purpose, are regarded

as constituting but one enactment. (Here refer to the legislation on water works.)

This same rule applies as to acts, and their supplements, and still more, to codes and revisions. Various sections referring to the same subjects, if practicable, should be construed together as one, or as one act or chapter, or as continuous sections of the same act. And one chapter is to be read with another relating to the same subject, as one body of law, though collected from independent laws on previous enactments, where all have been re-enacted by revisory acts.

On this same principle, and under this head, are constructions by context; earlier acts relating to the same subject-matter have been examined by the court in reference to the limiting power of certain words, enlarging, restraining or qualifying terms, so as to effectuate the previous intentions of the law. A by-law which authorized any person to be Chamberlain of the City of London would be construed so as to harmonize and not to conflict with an earlier act or general statute which limited the appointment to a person possessed of certain qualifications. And the court held that "any person" would be understood to mean only an eligible person. So the various statutes of New York and Ohio relating to, and enlarging the powers of married women, though passed in different years, were held to be construed as one act. (62 Barb. N. Y. 581.)

Where an act conferring jurisdiction of a certain offense upon a police court, provided that the fine to be imposed should not exceed one thousand dollars, nor the imprisonment be more than one year, it was held that, on comparison with other statutes *in pari materia*, this provision was a limit upon the punishment by either fine or imprisonment, but did not intend to authorize the imposition of both for the same offense. (15 Barb. N. Y. 627.)

So an act enlarging the jurisdiction of justices of the peace, and prescribing no forms of procedure, must be construed together with earlier acts upon the same subject and as adopting the forms of practice prescribed by them. (105 Pa. St. 610.)

Where a part of an act has been repealed it must, although of no operative force, still be taken into consideration in construing the rest, provided it tends to elucidate an ambiguous word or passage.

Some courts have laid down the rule that punctuations by the legislature may be practically ignored, and that punctuation is no part of a statute. And further, that there is no punctuation in it which ought to control the interpretation. (105 U. S. 77; 65 Pa. S. 311; 17 Wall. 496-502.)

The Supreme Court of Ohio in the case of Albright v. Payne, 43 Ohio St. 8, lays down the broad rule in construing a statute, that punctuation may

aid, but does not control, unless other means fail; and in rendering the meaning of a statute punctuation may be changed or disregarded. Judge Follett adds in his opinion, that ancient inscriptions and writings show that words were grouped together without break or punctuation mark, the location and form of the word being the only indication of the meaning. The use of spaces and marks was adopted very slowly, but mostly since the beginning of the 16th century. In the English case of Barrow v. Wadkin, it was said that "It seems that in the rolls of Parliament the words are never punctuated, and that punctuation was not allowed to throw light on printed statutes in England."

In Cushing v. Workin, 9 Gray, 382, it was held that "Punctuation is not to be regarded in construing a statute."

Punctuation has not arrived at perfection anywhere. In the Ewing case, 11 Pet. 41, the court held, "Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will first take the instrument by its four corners in order to ascertain its true meaning. If that is apparent on judicially inspecting it, punctuation will not be subject to changes. In the Pancoast case, 1 Ohio, 385, the court in speaking of a construction claimed by a party, say: "This construction is founded upon a mere grammatical criticism which is never received to change or control the intention of the legislature, where that intention is otherwise freely expressed. Something may depend upon punctuation in the statute books, which may be incorrect, and ought never to vary the true sense."

And in that case they disregarded and left out a comma.

Judge Day, in the Hamilton case, 15 Ohio St. 428, says: "Courts will, however, in the construction of statutes for the purpose of arriving at the real meaning and intention of the law makers, disregard the punctuation, or re-punctuate if need be, to render the true meaning of the statute."

Judge Okey made the same observation in the 31 Ohio St. 337; 223 Ohio St. 140.

Much learning has been expended in English courts, as well as in the State courts, as to what effect a title to a statute may have in construing an ambiguous statute. Lord Coke insisted that the title to a statute was not only no part of the statute, but should be excluded from consideration in construing the statute. Lord Cottonham said the title should not be resorted to in construing an enactment. This rule has been very much changed and modified by our judges in this country, both State and federal. While the title is not regarded as part of the act, it is, nevertheless, regarded as a legitimate aid in ascertaining the intentions of the legis-

lature, when the language and provisions in the body of the act are ambiguous, and of doubtful meaning and application. (3 Wheaton, 610; 19 Fed. Rep. 304.)

In the *Briggs* case, 9 Howard, 351, the court say: "Where the words of the enacting clause of the statute, even a penal statute, are more general than the title, the enacting clause governs." A large number of State cases hold that the title of a statute, or preamble, cannot control the enacting part of the law when the meaning of the act is clear, but when the language is ambiguous and may admit a larger or more restricted interpretation, the preamble may be referred to to determine which sense was intended by the Legislature. But the title and preamble of a statute are not to be referred to as explanatory of it unless the statute itself cannot be clearly interpreted from its own language; or, in other words, unless it is ambiguous. It may then be considered that the converse proposition is true, and it may become an important guide in certain ambiguities, and aid, if need be, in its construction. It was held in a California case, "A very important guide to its right construction." (15 Cal. 624.)

There are numerous other rules and presumptions in construing statutes, but the limited space and time offered me will not permit further adverting to them; such as the presumption against the unreasonableness of an act; presumption against injustice; presumption against absurdities; presumption against the statute impairing contracts. Then there is a presumption against retrospective operations; presumption against their affecting vested rights prejudicially. To these I might add usage, and contemporaneous construction, as being a presumption.

In closing this paper, I think the resume given by Endlic is so comprehensive that it cannot be improved upon.

"In a word, then, it is to be taken as the fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter, or of its wisdom and justice. If the language, read in the order of its clauses, presents no ambiguity, and admits of no doubt or secondary meaning, it is simply to be obeyed without more; for the intention, controlling though it be, can be resorted to only to ascertain what the Legislature intended to do, not what it has done. If it admits of more than one construction, the true meaning is to be sought, first of all, in the statute as applied to the subject matter to which it relates, not to the wide sea of surmise and speculation; but from such conjectures as

are drawn from the words alone, or something contained in them, that is, from the context viewed by such lights as its history may throw upon it, and construed by the help of certain general principles, and under the influence of certain presumptions as to what the Legislature does, or does not, generally intend."

## CODE REVISION.

### LETTER OF THE COMMISSION TO THE BAR.

Pursuant to the provisions of chapter 1036 of the Laws of 1895, the undersigned have been appointed by the governor to "examine the Code of Procedure of this State, and the Codes of Procedure and practice acts in force in other States and countries; and the rules of court adopted in connection therewith, and report thereon to the next Legislature in what respects the civil procedure in the courts of this State can be revised, condensed and simplified."

This appointment involves a possible revision of the Code of Civil Procedure of this State, and also a revision of the practice in all the courts, whether the rules governing such practice are included in the Code of Civil Procedure, or in general and independent statutes. But, before engaging in a general revision of the Code, we deem it important to obtain an expression of opinion from the bar of the State upon the general question of revision; whether such a general revision is desirable at this time, and if so, upon what lines it should be made; and if such a revision is not deemed desirable, then what particular changes should be made in the detail or scheme of the Code, in order to make it more practical and less complex in its provisions.

An examination of this subject involves an inquiry whether everything relating even remotely to practice should be included in the Code of Civil Procedure, or whether the Code should include only those matters which deal directly with procedure in actions, leaving to other and independent statutes subjects like the organization of courts, the functions and fees of various officers of the court, and matters of substantive law. If the Code is to include all matters relating to practice either in actions or special proceedings, then, even with its thirty-four hundred sections, it is incomplete, and several subjects now included in other statutes should be added to the Code. If, on the other hand, the Code of Civil Procedure should be limited strictly to questions relating to practice in actions from their commencement until their final determination, without regard to various subordinate and subsidiary matters that arise in the progress of an action, then some subjects that are now in the Code should be eliminated therefrom, in the interest of simplicity, and embraced in other statutes.

It has been suggested that the practice in Justices' Courts and in Surrogates' Courts does not properly belong in the Code of Civil Procedure; also, that the detailed rules of evidence in our present Code more properly belong elsewhere; that the various provisions of a local character should be taken from the Code and included in the charters of the municipal corporations to which they relate; that the subject of the organization and jurisdiction of the various courts, and the election and appointment of various officers of the courts, is no part of a proper system of procedure. It has also been suggested that the code of practice should be confined to the rules regulating proceedings in actions generally in Courts of Record, and that actions of a special character, and special proceedings, should be treated in an independent code.

If these suggestions should be adopted, it would involve the separation of several subjects and sections from the present Code, and their incorporation in other statutes, but it need not necessarily involve a revision or change in the phraseology of various sections; it would require a re-arrangement of the law, without changing its language. We are not unmindful of the uncertainty, if not positive mischief, produced by frequent changes in the phraseology of a statute, especially where it has received judicial construction; and the language of a statute which has become familiar to the practitioner should be retained, unless a change will tend to make the law more clear.

In connection with our work as Commissioners of Statutory Revision, we have found numerous instances of omission either in the general statutes, or in the Code of Civil Procedure, and several subjects of general or minor importance are included in other statutes which, possibly, ought to be incorporated in the Code; and in formulating plans for the general revision of the statutes, in connection with possible code revision, it seems to us that the subject should be considered as a whole, and that Code revision should be considered in connection with its bearing upon general statutory revision, and *vice versa*. Our statute law is now too fragmentary, and we think an attempt should be made to produce a harmonious system upon lines which may be considered feasible and practicable, but we are unwilling to engage in a general revision of the Code, without first attempting to ascertain the opinion of the bar upon the subject. The determination of this question of a revision of the Code will have an important bearing upon our work of general statutory revision.

Please kindly inform us, upon the enclosed blank, whether or not you are in favor of a general revision of the Code, and if you are not in favor of a general revision, whether you are in favor of some re-

vision, and if so, upon what particular lines. Any suggestion that you may make upon this subject will be appreciated by the commission.

CHARLES Z. LINCOLN,  
*Little Valley.*

WILLIAM H. JOHNSON,  
*Onsenta.*

A. JUDD NORTHRUP,  
*Syracuse.*  
*Commissioners of Code Revision.*

### Abstracts of Recent Decisions.

**ACCOUNTING ON OFFICIAL BOND.**—Where a court of equity has jurisdiction of a bill for account against the principal on a bond or his representatives the sureties on the bond can properly be made parties for the purpose of the accounting but no decree for payment can be made against them. (Mayor, etc., of Borough of Rutherford v. Alyed [N. J.], 32 Atl. Rep. 70.)

**ADVERSE POSSESSION — PRESCRIPTION.**—One in possession of lands under a pre-emption entry and patent from the United States is not charged with notice that the lands were swamp lands twenty years prior to the patent, and, as such, had passed under a prior act of Congress granting swamp lands to the State, nor with notice that the land was within the territorial limits of a town, where neither of these facts nor the date of entry appears on the face of the receiver's receipt or patent; and, therefore, such patent is a "just title," and sufficient to sustain a plea of prescription, under Code La. arts. 3481-3484. (Texas & P. Ry. Co. v. Smith [U. S. S. C.], 15 S. C. Rep. 904.)

**CARRIERS OF PASSENGERS—EXPULSION OF PASSENGER—DAMAGES.**—The extent of the injury of a passenger who has been wrongfully expelled from a railroad train, and the amount of damages recoverable, do not depend at all upon the intentions or good faith of the conductor in executing a rule of the company, but only upon what was done and the consequent injury. (Pittsburgh, C. & St. L. Ry. Co. v. Russ [U. S. C. C. of App.], 67 Fed. Rep. 662.)

**CONTRACTS—CERTIFICATE OF ENGINEER.**—A provision in a construction contract that the engineer or architect of the owner shall finally determine, as between the contractor and owner, what work has been done, and the amount to be paid for it, is valid, and should be enforced, in the absence of fraud or palpable mistake. (Mundy v. Louisville & N. R. Co. [U. S. C. C. of App.], 67 Fed. Rep. 633.)

**CORPORATION — CORPORATE STOCK — ASSESSMENT.**—A subscription for capital stock of a corporation cannot be cancelled except for fraud or



mistake, without the consent of all the stockholders. (*Pacific Fruit Co. v. Coon* [Cal.], 40 Pac. Rep. 542.)

**DEED ABSOLUTE — MORTGAGE.**— Defendant held a second mortgage on plaintiff's land. On default on the first mortgage, both mortgagees threatened to foreclose, whereupon plaintiffs conveyed the land absolutely to defendant, who took possession, and leased part of the premises for a small rental to plaintiffs, and assumed the payment of the first mortgage, and each of the parties executed to the other a release of all claims. *Held*, that the evidence was not sufficient to show the deed a mortgage. (*Ahern v. McCarthy* [Cal.], 40 Pac. Rep. 482.)

**DEED — GENERAL "WARRANTY."**— The general "warranty" clause in a conveyance is equivalent to the several special covenants in use under the common law, and is sufficient to compel the grantor, before receiving the full amount of the purchase money, to discharge all liens on the property. (*Smith v. Jones* [Ky.], 31 S. W. Rep. 475.)

**DEED — RIGHT OF WAY.**— A condition in a deed of a right of way for erection of a station, the character of which is not specified, is complied with by erection of a board shed, without the placing of an agent there, it being in structure and management like most of the stations on the road. (*Caldwell v. East Broad Top Railroad & Coal Co.* [Penn.], 32 Atl. Rep. 85.)

**EQUITY — REFORMATION OF INSTRUMENT.**— Plaintiff made a certain payment to defendant bank, and received in exchange a note signed by a firm composed of the officers of the bank, and the business of which was transacted in the bank's office. He subsequently gave a check to his wife, which was also exchanged at the bank office for a similar note. Plaintiff and his wife could both read and write, and had transacted considerable business with banks. Plaintiff retained the notes for two years, and, upon failure of the firm, began suit to reform the notes and change them into certificates of deposits of the bank, on the ground that he intended to deposit his money with the bank: *Held*, that plaintiff was not entitled to a decree. (*Murphy v. First Nat. Bank of Cedar Falls* [Iowa], 63 N. W. Rep. 702.)

**EXECUTION — INCOME OF TRUST FUND.**— Where a fund is given to executors, to keep invested and pay over the interest to a legatee during his life, a trust is created, and the income of such fund cannot be reached by a judgment creditor of the legatee in satisfaction of his judgment, by supplementary proceedings under the act respecting executions. (*Linn v. Davis* [N. J.], 32 Atl. Rep. 129.)

**FEDERAL COURTS — CIRCUIT COURT — JURISDICTION.**— The Circuit Court has jurisdiction in a general creditors' suit properly pending therein, for the

collection and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claims the right to recover from any one debtor a sum not exceeding \$2,000. (*White v. Ewing*, U. S. S. C., 15 S. C. Rep. 1018.)

**FEDERAL COURTS — FOLLOWING STATE DECISIONS.**— Where State statutes, affecting the title to large tracts of land, have been construed by the State Supreme Court, and the title so established has been reaffirmed by the United States Supreme Court, which decisions have remained unchallenged for many years, comity does not compel a federal court, when the title is again called in question, to follow a later decision of the State courts adverse to the title established by the earlier decisions. (*Wilson v. Ward Lumber Co.* [U. S. C. C. Mo.], 67 Fed. Rep. 675.)

**FEDERAL COURTS — JURISDICTION — CITIZENSHIP.**— An allegation that the citizenship of a party or parties is unknown is insufficient to sustain the jurisdiction of the federal courts, as the requisite citizenship must distinctly appear. (*Tug River Coal & Salt Co. v. Brigel* [U. S. C. C. of App.], 67 Fed. Rep. 625.)

**FRAUDS, STATUTE OF — AGREEMENT RELATING TO LAND.**— Where the owner of the lot and the street number appears on the agreement, the omission of the name of the city or town in which the lot is located does not render the description indefinite. (*Price v. McKay*, N. J., 32 Atl. Rep. 130.)

**HUSBAND AND WIFE — CONVEYANCE — VALIDITY.**— In an action to set aside a conveyance made by a husband as in fraud of his deceased wife's interest in community property, evidence showing what property the husband and wife respectively had at the time of their marriage, and what property they afterwards acquired, is admissible. Declarations by the husband after his wife's death as to what was community property, and his statements claiming as his other property belonging to his wife or the community, are also admissible to show fraud in connection with the community property in controversy. (*Smith v. Smith*, Tex., 31 S. W. Rep. 422.)

**INSURANCE — PROOF OF LOSS — WAIVER.**— Where an insurance company demands, as part of the proofs of loss, an inventory destroyed in the fire, and which it was not entitled to under the policy, the alternative given the assured being that, if it was not furnished, only a compromise would be entertained, it waives formal proof of loss. (*Phoenix Ins. Co. v. Center*, Tex., 31 S. W. Rep. 446.)

**MALICIOUS PROSECUTION — PROBABLE CAUSE.**— In an action for malicious prosecution, it is for the

court to determine whether certain admitted or clearly proven facts constituted probable cause. (*Smith v. Liverpool & London & Globe Ins. Co.*, [Cal.], 40 Pac. Rep. 540.)

**MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.**—A night watchman was found dead under an un-railed bridge connecting two buildings, which he customarily crossed in the performance of his duties. *Held*, in an action to recover damages for his death, evidence was admissible which tended to show what kind of a man he was in respect to health, vigor, activity and sobriety, and his bodily mental peculiarities. (*Overman Wheel Co. v. Griffin* [U. S. C. C. of Ap.], 67 Fed. Rep. 659.)

**MORTGAGE—TRUST DEED—INJUNCTION.**—The existence of a lien for a small paying tax is not such a cloud on the title as to warrant the enjoining of a sale under a deed of trust given for the price thereof, as the trustee can be compelled to pay the tax out of the purchase money. (*Patch v. Morrisett* [Va.], 22 S. E. Rep. 173.)

**MUNICIPAL CORPORATION — CONTRACT.**—A contract between a city and a water company provided that the latter should put in such further number of fire hydrants upon street mains as may be ordered by said city council, "provided that the cost and expense of all such further number of hydrants and of the putting in of the same shall be paid by said city." *Held*, that the city was liable only for the actual sum expended by the company in putting in such hydrants, and not for what such work was reasonably worth. (*Bull v. City of Quincy* [Ill.], 40 N. E. Rep. 1035.)

**PARTNERSHIP — CONTRACT BY ONE PARTNER.**—The general rule is, that one partner has no implied authority to bind the firm by an instrument under seal, but where such an instrument has been executed by one partner in the firm name, in the scope of the partnership business, it may be ratified by the other partners by prior or subsequent oral assent, or by implication from acts or declarations of such partners. (*Tischler v. Kurtz* [Fla.], 17 South. Rep. 661.)

**PARTNERSHIP — INSOLVENCY — ACTION BY RECEIVER.**—A receiver of the insolvent estate of one member of a copartnership cannot maintain an action to set aside as preferential a conveyance of real and personal property belonging to a copartnership and of its assets, given to secure a firm debt. (*Masterman v. Lumberman's Nat. Bank of Stillwater* [Minn.], 68 N. W. Rep. 723.)

**PUBLIC LANDS — GRANTS — RIPARIAN RIGHTS.**—Where the government grants lands on the banks of a fresh-water stream, without reservation, in States where the common law prevails, all unsurveyed islands between the middle line of the stream

and the bank pass by the grant, and the riparian owner cannot be divested by a subsequent survey of the islands. (*Grand Rapids & I. R. Co. v. Butler* [U. S. C. C.], 15 S. C. Rep. 991.)

**TRUST DEED—POWER OF SALE.**—A trust deed of land provided for a sale on default, "as in cases of foreclosing mortgages, by bill in chancery, by some suitable person, to be appointed in writing by any person interested in such trust fund." *Held*, that a conveyance to a purchaser at a sale conducted as a sale under judicial process, by a person appointed in writing by one interested in the debt, conveyed to him the legal title. (*Lang v. Stansel* [Ala.], 17 South. Rep. 516.)

## Correspondence.

KARLSBAD, AUSTRIA, August 5, 1895.

*Editor of the Albany Law Journal:*

It is well known that in England Commercial and Business Companies, in fact, nearly all Corporations for Profit, are organized under what are known as the Companies Acts. The general principles on what the legislation embodied in those acts is founded, and the beneficial effect thereof to England are well set forth in the following article in the *London Times* of August 8d instant.

### THE COMPANIES ACTS.

The report of the departmental committee appointed by the Board of Trade "to inquire what amendments are necessary in the acts relating to joint-stock companies incorporated with limited liability," has been published. The report is of considerable length and an addendum follows it, in which Mr. Justice Vaughan Williams gives reasons for dissenting from some of the conclusions of his colleagues. The appendix to the report consists of two parts. Part I. contains evidence supplied by various persons and public bodies as to matters on which the committee desired information; suggestions from various persons or bodies as to changes in the existing law; and also the judgments in a certain important case. Part II. consists of the draft bill prepared by the committee.

Experts in company law will, doubtless, have much to say on the draft bill recommended by the committee. Many suggestions that have been eagerly pressed by reformers, have been put aside as impracticable. In particular, the committee have not seen their way to approving of the establishment of the principle of compulsory reserve liability, which, however, is strongly supported by Mr. Justice Vaughan Williams. Neither do they

recommend a revival of the old practice of double registration, though they endeavor to secure some of the advantages of that system by enlarging the powers of the "statutory" meeting and providing that it shall be held earlier than at present. On the other hand they recommend that every prospectus shall mention a definite sum to be subscribed before the company shall proceed to allotment. They have also inserted clauses declaring the law as to the duties and liabilities of promoters and directors, and a clause requiring disclosure to be made in every prospectus inviting subscription to shares or debentures of certain defined matters, among others, of the name of the real vendor and the amount of purchase-money payable to him. They repeal the well-known "section 38" of the act of 1867, providing for the disclosure of contracts, the effect of which is now almost invariably evaded by the insertion of a "waiver clause" in prospectuses. The committee hope to get the results contemplated when clause 38 was devised by other means, including a general sub-section to clause 14, relating to information required to be stated in prospectuses. The committee recommend that the payment of commissions for underwriting capital and for some other purposes be legalized under certain conditions.

Having given a brief outline of some of the leading features of the new draft bill devised by the committee, we conclude by quoting a paragraph in the report which lays down the general principles of the legislation which the committee have adopted. They say:

Before inquiring into the typical forms of fraud against which further protection is sought or the nature of the remedies to be applied, it is convenient to consider shortly the general lines upon which, and the limits within which, the Legislature can safely or usefully interpose. It is a trite observation that legislation cannot protect people from the consequences of their own imprudence, recklessness, or want of experience. The Legislature cannot supply people with prudence, judgment, or business habits. It must be remembered that the majority of companies are honestly formed for carrying on a legitimate, though it may be a speculative, enterprise or business, and the business is conducted with honesty and reasonable ability and judgment. In consequence partly of the facilities which exist for the formation of companies in this country, a vast amount of foreign enterprise and foreign business comes to England. Banking, railway, and other business is now carried on in every quarter of the globe by British capital and managed by British officials. According to the recent report of the board of trade, there were in the United Kingdom in April, 1894, 18,361 companies, with a paid-up capital of £1,035,029,835, whereas the capital of all

companies in France, *anonymes* and *en commandite*, was, in December, 1894, calculated approximately at £420,000,000. The capital of German companies was estimated by Mr. Gerb, of her Majesty's Consulate-General in Berlin, at £200,000,000, but Mr. Schuster puts it at £300,000,000. The capital embarked in English companies, therefore, exceeds that represented by French and German companies together by at least £315,000,000. The number of persons who are interested, either as shareholders or bond or debenture holders, in these companies is, of course, enormous. It is obvious that legislation affecting interests of this magnitude and widespread character demands great caution and care. Restrictive provisions, which may have the effect of either curtailing the facilities for the formation of companies which bring so much business to England, or of embarrassing the administration of companies, or deterring the best class of men from becoming directors, are not to be lightly entertained.

On the other hand, it must be generally acknowledged that a person who is invited to subscribe to a new undertaking has practically no opportunity of making any independent inquiry before coming to a decision. Indeed, the time usually allowed between the issue of the prospectus and the making of an application does not permit of any real investigation. The maxim of *caveat emptor* has, in the opinion of your committee, but a limited application in such cases.—*London Times*, August 3, 1895.

Carefully considered there is here a valuable lesson for the State and especially the city of New York, which is the commercial center of the United States as London is of Great Britain. Many of the restrictive provisions in the existing corporation laws of New York are unwise, and have, as I know and as everybody knows who is familiar with their effect, driven large amounts of capital out of the State. The laws ought to be so modified and liberalized as that New York capital might under New York organizations carry on business of all kinds, not only in other States, but in every part of the world.

The direct inheritance tax imposed in New York, but not in the neighboring States, combined with unequal and therefore unjust taxation of the personal property of deceased persons, operating in connection with its short sighted corporation laws are inflicting upon the State incalculable injuries, and in the interest of the State itself, urgently call for revision. Instead of encouraging the concentration of wealth in the State, the effect constantly operating to an extent none the less, great because the operation is silent and invisible, is to drive capital out of the State.

Very truly yours,

JOHN F. DILLON.

# The Albany Law Journal.

ALBANY, AUGUST 31, 1896.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE value of any periodical extends only so far as it remedies existing evils and adds to the knowledge of the readers; and we have endeavored for a long time to impress on the public that not only is a great deal of vicious and bad legislation enacted yearly, but also that the passage of many laws are procured in ways which would never for a moment bear investigation. It is with pleasure that we publish part of the address of James C. Carter, Esq., President of the American Bar Association on this subject. Mr. Carter said:

"Are the laws executed? Do they represent resolutions of a wise and self-controlled man which are actually carried out, or those abortive resolves that serve only to indicate a man conscious of error, but incapable of reformation? It is not likely that the selection of legislators can ever be made with uniform wisdom; but a great advance will be made when those that aspire to be legislators begin to seek the knowledge the office requires.

"It seems incomprehensible that a people should deliberately adopt a policy that fosters the increase of crime, contempt for the laws and the debasement of character. In some communities, notably in the city of New York, the impossibility of a general and equal enforcement of the laws and the revolting injustice of a partial effort, have had the effect of leading the executive officers to wholly abandon any serious attempt at a rigid enforcement. And yet, these worse than useless results of legislative action seem nowhere to lead to any serious inquiry into the real nature of the difficulty.

"The condition of what are called summary laws is equally discreditable to our knowledge, both of the science of legislation and the teachings of experience. The task of

enforcing them against the passions, the beliefs and the interests of multitudes can be accomplished only by a despot armed with unlimited power. The result is that our statute books are bristling with penal enactments that have little effect in repressing the practices against which they are aimed. A society that has not the moral energy to enforce its will in any particular case should never embody that will in the form of a statute.

"There are large numbers also in all free societies with whom law-making amounts to a passion. In our easy-going Legislatures, too much engrossed with party and personal schemes, it is easy to induce acquiescence in proposals for new laws upon subjects not fit for legislation. I attribute these errors in legislation to the two causes already mentioned, which are closely allied with each other—first, the common passion—the cacoethes—which afflicts so many, of framing new laws, and second, the disposition or the willingness common to all Legislatures of acting upon matters that are not proper subjects of legislation at all.

"I know of nothing more needed among us than a deepened conviction that the sphere of legislation, like that of other forms of human activity, has its proper limits, which can never be exceeded without mischief, and a sufficient knowledge of what these limits are."

While the newly-appointed commissioners are considering the revision of the Code of Civil Procedure, it is highly desirable to call attention to the most recent decision in reference to examinations of parties before trial. Practitioners are tolerably familiar with the judicial gyrations on this subject, and we shall confine our attention to a single phase of the law of discovery. We refer to the primary right to examine the conscience of a fiduciary—the earliest occasion of the exercise of this power by a court of equity. Before the Code, we enjoyed the advantage of a well-developed system for extracting from trustees that fullest information in reference to the trust affairs, to which the *cestuis* are fundamentally entitled. Since the Code substituted a motion for the bill of discovery, the broad difference between examining a mere adversary or contractual party

and one subject to a dominant right, like a trustee, has been practically forgotten.

It is true that the General Term of the First Department clarified the situation in the case of *Career v. Good*, 57 Hun, 116. The opinion of Mr. Justice Brady affirmed, in apt language, the equity doctrine of discovery in all its plentitude. Referring to the relation of *cestui* and trustee — between the plaintiff and the defendant — the court said: "*It is enough that such relation is shown to call into being the inquisitorial power of the court.*" Recalling to the profession the above and other opinions *Valentine v. Harbeck*, 12 Abb. N. C., and *Dyett v. Seymour*, 19 N. Y. St. 766, the following is a measured statement of the rule therein affirmed. When a trustee of an express trust is sued by his beneficiary, the latter — as the real and equitable owner — has the absolute right to compel the trustee to divulge under oath, before trial, every fact in relation to the trust within the trustee's knowledge. This right to a full discovery is as much the *cestui's* property as the *corpus* of the estate itself. He has a right to prove his case from the trustee's mouth, and to put him on an equality with his trustee, he is entitled to the exercise of this right before he embarks on a trial — as he was so entitled by bill of discovery. It is his own proprietary information which he seeks from the fiduciary, and he may use it to determine whether he will go to trial (or even to bring suit) or whether in default of disclosure by the fiduciary he will call other witnesses. The decisions cited, incorporating the above statement of law, supposedly landed us again upon the solid ground of the English and American chanceries — in applying this invaluable remedy for beneficiaries of trusts.

But the general principle affirming this immemorial right of *cestuis* to the possession of the knowledge acquired by their trustees during their administration of their trust, has again been shattered in its first formidable application. At Chambers, in the First Department, Trustee Russell Sage has succeeded in having this forensic weapon deflected from his fiduciary *corpus*. In the suit of the Soldiers' Orphans' Home of St. Louis, against Sage and the Goulds, the opinion at Special Term again unsettles the whole sea of controversy, in refer-

ence to this most equitable right of parties interested in the performance of trusts. The complaint charges the taking by Sage of the trust assets as his own personal property. The trust deed to Sage and Gould was executed to secure the holders of an issue of thirty millions of dollars of railroad bonds scattered in various parts of the world. The protection of such an express trust is, therefore, peculiarly the province of a court of equity, intensified by the quasi-public nature of the security, and the large number of innocent holders of the obligations, depending for safety upon the honest administration of the trust. Such being the relation between the parties to this action, let us see how the Supreme Court applied the plain right of examination before trial. Any rectilinear mind would suppose, from the authorities above cited, that the establishment of the relation of trusteeship between the parties to the action would be sufficient to entitle the *cestui* plaintiff to search the conscience of the trustee defendant, in relation to the charges of misappropriation made by the complaint. Sage admits that he is trustee, but denies the alleged malversation. The bondholders being bound to prove the malversation propose to do so by Trustee Sage's own testimony. He knows what he has done with the trust property. If he has not converted it, he will so swear, on his examination, and the bondholders would have made him their own witness. If he has converted the trust property, the bondholders are entitled to his testimony to prove their case. In any event, the trustee is the one person, of all the world, most competent to prove his own transactions. The *cestui's* property and its administration being confided to the trustee, the *cestui's* is less able to tell what has been the course of management by the trustee. These considerations illustrate the common sense of the rule, unqualifiedly entitling *cestui's* to discovery — without which they would be practically helpless.

Let us now turn to this latest deliverance in the law of discovery. The learned justice says: "In the next place, the affidavit does not show facts and circumstances to indicate that Mr. Sage is a material and necessary witness for the plaintiff." Shades of the chancellors! Trustees not necessary and material witnesses in actions

by their *cestuis* against them, in regard to their administration of their trusts. Why, the relation itself establishes the necessity and materiality of their testimony—"calls into being the inquisitorial power of the court." Starting with obliviousness of this fundamental principle, the learned justice falls into an unbroken sequence of errors in the law of discovery. He says: "Nor does it appear that the facts and circumstances in respect of which Mr. Sage's testimony is sought, are within his knowledge alone." What has this to do with the right of discovery from the trustee? The facts of a trustee's malversation might (though not likely) be known to a hundred people, but their knowledge would not detract, in the slightest degree from the *cestui's* equity, to prove his case by the best evidence—the complete cognizance of the man who did the deeds. It is enough to make Lord Hardwicke shudder in his grave, to learn that it is only when nobody else knows about the administration of a trust that discovery can be had from the trustee. But this learned Court proceeds: "Nor does it appear \* \* \* that it is necessary that the testimony should be procured before the trial." Mark ye! a *cestui*, whose affairs have been entrusted to another man, must take the risk of preparation for trial under deprivation of the best source of information regarding his affairs, while the trustee necessarily knows it all. Discovery in equity always precedes the trial on the merits. Are trusts created for the benefit of trustees?—to enable them to keep the trust property? If not, certainly the law must enable the *cestuis* to get on an equality of preparation for trial with their trustees. Otherwise such trials would be purely on the aleatory method for the *cestuis*; but on the "loaded dice" method for the trustees. But all of these obstructions to the *cestui's* right to discovery flow from the original error as to the nature of that right. The justice should have borne in mind that in examining his trustee the *cestui* is getting at information which belongs to him, not to the trustee. So it happens that the climax of bad law is capped when this Chancellor tells the Bar of New York that "There is nothing to show \* \* \* that there is any reason whatever or necessity for compelling him to submit to an examination and thus be

called upon to disclose his whole case before he is called upon in the regular course of judicial proceedings to appear on the stand as a witness." Is there a law of discovery, and what was the object of its institution? Discovery from trustees is to make them disclose the *cestui's* case, not the trustee's case. But from the tenor of this opinion, one would suppose that the information which the trustee has got by being entrusted with the *cestui's* business—belongs to the trustee, for his own benefit. Moreover, the Justice objects to the affidavit being made by an attorney in fact for a foreign corporation. An agent was a good enough affiant to a bill of discovery, for a Court of Chancery (Rule 17). The Code requires only "an affidavit" to obtain orders of examination, and in the case of foreign corporations, specially authorizes the verification of complaints, by agents.

Perhaps great stress should not be laid upon this Special Term opinion, if it stood alone, inasmuch as the learned author was charged in a recent opinion in a higher court, with want of comprehension of one of its late decisions. But in the case of 'The Soldiers' Orphans' Home of St. Louis, against Sage and Gould, the General Term affirmed the order below, without opinion, giving the plaintiff leave to renew on "proper affidavits." We have stated above the grounds on which the Judge at Chambers found the affidavit insufficient. Are those the grounds, satisfactory to the First Department Judges, for refusing this precious right to these bondholders? Or does that Court—soon to merge into the dignity of an Appellate Division—deem it safer to follow Lord Thurlow's advice to the Colonial Judges: "Decide your cases, but don't write any opinions."

The commissioners to revise the Code, have now to consider this contemporary state of the law. Let them cast their eyes back towards the long vista that we have traversed in the law of trusts—to reach this slough of despond. At first, consider trusts as mere onerous *honoraria*, subject to the duty of showing accounts. Then, the rule of compensation for services became the counter-balance, for the duties and risks of the fiduciary. Now, in 1895, in the county of New York, the trustee has not only commissions, but he need render no account of the

corpus of the estate, under the law of discovery. Is it possible that our courts will not at this late day distinguish, as their predecessors have done, between the limited rights in common law actions—on contract or tort—to an examination before trial, and the essential right in cases of trusts? The limited scope of legal instruction since the Code is the plain cause of this degeneration of a great equitable remedy. By its attempted inclusion of all the rights of discovery in general language, it has reduced those discoveries that were absolute to the proportions of those that are limited in their nature. In fact, we have practically compelled beneficiaries of trusts to take every risk on the trial of their trustees; while the Chancery practice avoided every such risk by the beneficiary. We certainly need legislative relief to avoid this new legal obstacle, placed in the way of every man who confides in executors or trustees.

We publish in this number of the JOURNAL an article written by Lieut. J. S. Parke, U. S. army, on civil jurisdiction over military reservations, which we consider of particular importance and value, especially in view of several important decisions which have recently been made by the courts. The conflict of jurisdiction of military and civil tribunals is a subject which requires considerable care to properly distinguish and we feel that the military side of the question has been very ably handled by Lieut. Parke.

Of the many laws which have been widely discussed and which was passed at the last session of the Legislature, few have acquired the notoriety of the so-called Malby law. Wm. J. Fanning, Esq., of New York city, counsel for the Hotel Keeper's Association, in an address to the members at the recent meeting, said:

"It may be safely asserted that every statute enacted by the Legislature of this State modifying the harsh and unreasonable doctrines of the common law as applied to inn keepers, is the direct result of organization among the hotel keepers of the State. But it is not alone to secure remedial legislation that organization is necessary. It is equally important for the

purpose of successfully repelling the attacks which from time to time are being made upon the hotel interests by a class of citizens who may be justly styled fanatics or cranks. During the session of 1895 there were upward of thirty such bills introduced, the majority of which related to excise, and a large number to fire escapes, elevators, stairways and other features of hotel construction. In every instance these measures were either defeated or so modified in the committee room as to render them comparatively harmless.

"But, notwithstanding the vigilance of the legislative committee of this Association and that of New York city, there was one measure of extreme importance to hotel men which passed both houses and reached the Governor before they had any knowledge of its existence. I refer to the now famous Malby law, popularly called 'Equal Rights Bill,' but which should have been entitled 'A Bill to Establish Unequal Rights.' That the object sought to be attained by this bill was party advantage is beyond doubt. That it will prove a boomerang to its promoters is, I think, equally clear.

"Previous legislation had conferred upon colored citizens every right and privilege enjoyed by the whites. The law made it a misdemeanor for a hotel proprietor to refuse accommodations to a colored man, and in addition gave the latter his right of action for damages. In other words, the law prohibited any discrimination against a colored man on account, or because of, his color. He had precisely the same rights as a white man—no more, no less.

"Under the Malby law, however, the colored man is accorded a right which is denied to the white citizen. For, while the latter, if wrongfully denied accommodation, is relegated to his action for damages, in which his actual damages must be established by legal proof to the satisfaction of a jury, the former is only called upon to prove that he was rejected on account of his color, whereupon the jury must award him \$100, although he may not, in point of fact, have suffered any damage whatever.

"There is, to say the least, grave doubt as to the legislative power to enact a law so partial in its object and destructive in its effects to private interests. The business of hotel keep-

ing is in every sense of the word a private enterprise, in which the proprietor invests his capital and carries on his business without any special grant or license from the State. To say that the State can pass a law imposing upon him an obligation such as must, if carried out to its logical results, destroy his business and ruin him financially is to acknowledge a situation never intended to exist under our Constitution.

"Under the amendments to our Federal Constitution, the colored man is accorded equal rights with the white man. There shall be no discrimination on account of color or previous condition of servitude. The United States Court has held, however, that each State has the right to make legal provisions whereby the colored man, while enjoying the same kind of accommodation, must conform to such reasonable rules as may be adopted by the State for the separation of the white from the colored people in hotels, railways, and other places of public accommodation.

"I believe, therefore, that, even assuming the Malby law to be constitutional, it is within the province of the proprietor of a hotel to establish rules for the conduct of his business whereby colored people shall be obliged to occupy such special rooms as may be assigned them, provided the accommodation furnished in such room is equal to that afforded to white people in a similar room of the hotel. And should a colored person refuse to accept such accommodation and insist upon entering that part of the hotel reserved for white people, I believe the landlord would be justified in forcibly ejecting him from the hotel.

"It should be borne in mind that, in order to entitle a colored man to the damages arbitrarily fixed by statute, he must prove to the satisfaction of a jury that his exclusion was on account of his color. Should the colored man, therefore, unduly force himself where he is not wanted and succeed in having himself ejected from a hotel, I believe that in an action for damages brought under the Malby law, juries would be likely to treat that statute in the same manner they have recently treated the act prohibiting the opening of barber shops on Sunday.

"The real solution of the question, however, lies in the repeal of the law itself. And

to this end every member of this association should bend his energies. The combined power and influence of the 7,000 hotels in this State will be found to be great enough to secure the repeal of an act which has already been shown to be repugnant to the minds of a large majority of our people."

This law we believe is unnecessary and attempts to instill a spirit into our statutes which is unwise and improper. The relations of different races of men to each other in the end regulate themselves and the only end which is gained, is that hostility and enmity are encouraged among those whose relations prior to the passage of the act were friendly and pleasant.

Much has appeared in these columns in regard to uniformity of State laws and the subject is receiving increased notice from periodicals in America, while kindred attempts are being made in England to attain the same end.

One of the most important conventions of the year and one that was called together by imperative necessity, is that which the Interstate Commissioners are now holding at Detroit. The object is to consider the ways and means of obtaining uniform State legislation. Thirty States are represented and the delegates include some of the best constitutional and legal authorities in the country, and although their work is of an advisory nature, the result should have weight with State Legislatures.

The various laws relating to marriage and divorce are the principal subjects to be considered. No one will deny that the lack of uniformity among the States on these matters has caused a national scandal. All the States have their own marital and divorce laws, and in many cases they are conflicting. Certain States, for example, permit marital relations that are not recognized by others, and other States grant divorces which would not be given across their borders. The Dakota divorce, which is obtained by what is practically a fraudulent residence, has become a crying national disgrace, and it is high time to extirpate this evil.

Among the other subjects outlined for consideration, we find no allusion to the necessity of a uniform bankruptcy law. It is possible that the commissioners may have felt that ac-



tion on this subject would not fall within their province; and, on the other hand, it is possible that the news reports unintentionally omitted mention of this important subject. Many States have bankruptcy laws and they are neither uniform, nor are they all just to the non-resident creditors. To obtain a uniform national bankruptcy law, national legislation is necessary, and attempts have been repeatedly made to secure one since the repeal of the Jencke's law in 1879; but the lack of uniformity in the States that have laws ought to be considered by the commissioners.

The system in vogue in New York of preferring creditors often operates to the disadvantage of the non-resident creditor, though his claims are just and should have equal consideration with the assignee. It was this and other unsatisfactory workings of the State bankruptcy laws that brought southern and western Democrats to their senses and gave the Torrey bill more chance for success than any other measure. But an objection to the present vicious and indiscriminate State system, and one that ought to have some weight with the commissioners, is the fact that no one of them is familiar with all the bankruptcy laws of the various States that have them.

Other subjects will be taken up, and among them are notes, checks, legal documents, the systems of weights and measures. Legislation is needed on all these matters, looking to a uniformity in State regulation, and it is to be hoped that the commissioners will accomplish results that will bear fruit when the State Legislatures again convene.

Congress should pass a statute providing for the appointment of a commission, few in numbers, who will receive proper remuneration, and whose report can be acted on by the Legislatures with some degree of intelligent precision and with the same result in view.

The Albany Law school begins the scholastic year on September 24 after a complete reorganization of the trustees and faculty. New members have also been added to the faculty as special lecturers. Hon. Amasa J. Parker succeeds Hon. W. L. Learned as President of the Board and Newton J. Fiero becomes Dean in

place of Lewis B. Hall. The faculty now consists of A. V. V. Raymond, President of the University; J. Newton Fiero, Dean on Procedure, Equity and Torts; James W. Eaton, on Evidence and Contracts; Eugene Burlingame, on Criminal Law; James F. Tracey on Corporations, and Joseph A. Lawson, on Real and Personal Property.

During the year a course of special lectures will be delivered as follows: By Hon. Charles Andrews, Chief Judge of the Court of Appeals; Hon. Judson S. Landon, on Constitutional Laws; Hon. William L. Learned, on Trial Causes; Hon. Alton B. Parker, of the Supreme Court; Hon. Matthew Hale, on Professional Ethics; Hon. D. Cady Herrick, on Municipal Corporations; Charles A. Collin, on the Statistics of New York, and Andrew McFarlane, M. D., on Medical Jurisprudence of Insanity.

The change in the faculty and trustees will bring the school in closer touch with Union university, of which it became a part in 1873. The change from three terms to semesters is considered an advantage to the school. The first semester will begin on September 24 and close on January 31, with a two weeks' vacation at the holidays. The second semester begins on February 3 and ends on June 3. The close of the scholastic year, June 4, will be commencement day. Already the application for admission to the school give promise of a much larger attendance than last year.

Under the act of 1894, providing for the appointment of examiners to conduct a uniform system of examination throughout the State, the examination this year must be much more carefully conducted than when under the direction of the court. The consideration of this matter has suggested to the present management the desirability of a course especially designed as a preparation for bar examinations, the instructions to be of the most practical character, covering those topics of law and practice upon which the student will be examined for admission, at the same time giving him a knowledge of legal principles which will be of actual and immediate benefit in the first years of his professional career. Moreover, this course is designed to meet the needs of those who desire to devote but a single year of the time required by statutes in study in a law

school. Mock courts will be held the same as in preceding years.

A good many years ago prizes were awarded, but this had stopped until the present year, when the following have been founded and will be awarded at the next commencement.

The Edward Thomson Co., law publishers, of Northport, Long Island, N. Y., offer the American and English encyclopedia of law, to the graduate who shall reach the highest standing in the performance of his general duties and deportment.

A prize of fifty dollars will be awarded to the graduate who shall pass the best examinations during the course; to be known as the "Amasa J. Parker" prize, Judge Parker having been one of the organizers of and for many years a lecturer at the school.

Frederick W. Cameron, Esq., offers a prize of twenty-five dollars, to be given to the graduate who shall make the best presentation of his cases at Moot Court during his entire course.

During the summer a number of changes and improvements have been made to the school. A record room and needed cloakroom have been provided, as well as new and improved cases. Individual seats have been placed in the lecture room, giving it a capacity of sixty-five.

It is but natural for us to take great pride in the old school whose earliest successes were due to the efforts of Dean, Parker and other learned jurists, and whose history is replete with the brilliant achievements of a large number of the ablest members of the profession.

#### CIVIL JURISDICTION OVER MILITARY RESERVATIONS.

What is the extent of the civil authority over the persons and property at a military post and on a military reservation?

What are the limitations of the civil power, when it has any, and where is the line distinctly drawn between the jurisdiction of the military and that of the civil tribunals?

When can the military officer say to the civilian "hands off," and when must he bow before his superior authority?

These are a few of the practical questions connected with this subject which every officer is interested in being able to answer knowingly, definitely and positively.

As Gen. John Gibbon said when he assumed the command of the Department of the Columbia in 1835, "The law is supreme," and it is to this supreme authority that we must go to find an answer to these questions.

They are not new. They have arisen, have been argued and passed upon time and again, but the trouble is at widely different times and places and it involves much labor to search out the answers. Hence, I cannot tell you anything new or original, but can only give you, in as concise a form as possible, the results of my search.

Starting with the maxim, "The law is supreme," the next questions are, what is the law, how is it invoked and by what means applied?

The law is intended to enforce the right and prevent the wrong, to uphold the good and punish the bad. It is dormant so long as there is no infraction of it; it cannot act when there is no offense committed, because there is no offender for it to act upon.

But when a crime is committed, then the law begins to act, and acts through its constituted agencies. For the purposes of our discussion, these agencies are either the civil or military tribunals.

The powers of these tribunals are either distinctly prescribed by statute or by long and accepted usage. They all owe their powers primarily to that great source and foundation of all our rights and liberties—the constitution and the laws passed in accordance with it. The only court actually created by the Constitution was the Supreme Court. All the others were created by the acts of Congress made in pursuance of the Constitution. While the court-martial may claim the honor of being older than the Constitution by reason of having been in existence before its adoption, yet it is held not to be one of the inferior courts authorized by that instrument, and in fact is said not to be a part of the judicial system of the government, but to belong to the executive branch. (20 How. 65; 114 U. S. 564; Kurtz v. Moffit, 115 U. S. 500.) But it of necessity, by reason of its functions, in its forms and procedure is assimilated to all other courts. Like all other courts, its "jurisdiction and judicial authority must be derived from the Constitution and laws of the United States, and it can only exercise such power as has been conferred on it by acts of Congress."

The military courts, few in number, have their powers clearly defined by the laws of Congress to be found mostly in the articles of war, so that there is ordinarily no difficulty in determining which one of these should undertake and pass upon a case, but the question of the jurisdiction of a civil court arises when the *res*, the subject matter, or the person is amenable to either or both of these tribunals.

The court martial being essentially and exclusively a criminal court, has no jurisdiction over any

matter of a purely civil nature, such as the enforcement of a contract or the collection of a debt, so that all matters of that nature are referred to the proper civil courts where the soldier stands on the same footing as the citizen.

The determination of the question of jurisdiction involves the person or persons concerned, the crime committed and the *locus* or place where the event happened or the cause originated.

Suppose two citizens, not in any way connected with the military service, or a soldier and a citizen, or two soldiers, should engage in a fight on this reservation.

In the first case the military authorities would have no jurisdiction because they would have none over the persons concerned. They could only interfere beforehand to prevent it.

In the second case they would have jurisdiction over the soldier but not over the citizen.

In the third case they would have jurisdiction over both because they were both soldiers.

In the second and third cases the civil jurisdiction would extend to all parties in both cases because it exists by law concurrently with the military jurisdiction, and if the military authority should decline to act the civil federal courts could properly take cognizance of the offense, but not any State court.

This brings us to those cases where the conflict arises between the civil and the military jurisdiction.

Without attempting to argue against the propriety of subjecting the soldier to two jurisdictions but accepting it as a well established fact that he is so amenable the question for us to consider is, what is the proper course for each to pursue?

Leaving out the case of the civil liability alone, where the civil courts have exclusive jurisdiction let us consider a case where the jurisdiction is *concurrent*.

It is well to explain here the legal authority for this concurrent jurisdiction.

The Constitution says (Art. X, Amendments). "The powers not delegated to the U. S. nor prohibited by it to the States are reserved to the States respectively or to the people." It also says (Art. I, Sec. 8, c. 17):

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever (over the District of Columbia) and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same may be, for the erections of forts, magazines, arsenals, dock yards, and other needful buildings." And (Art. IV, Sec. 3, c. 2):

"To dispose of and make all needful rules and

regulations respecting the territory or other property belonging to the United States."

Now in accordance with these provisions, the States, in giving their consent to the purchase of land and in ceding jurisdiction to the U. S., generally reserved *concurrent* jurisdiction over the same. As an example I will give the law applicable to the Post of Plattsburgh, N. Y.

#### LAWS OF NEW YORK.

##### CHAP. 18, p. 27.

AN ACT granting the consent of the State of New York to the acquisition by the United States of certain lands for military purposes in the town of Plattsburgh, Clinton county, N. Y., and ceding jurisdiction over the same.

Approved by the Governor, March 6th, 1890. Passed by a two-thirds vote.

*The People of the State of New York represented in Senate and Assembly do enact as follows:*

SECTION 1. The consent of the State of New York is hereby given to the United States to acquire, by condemnation, purchase or gift, in conformity with the laws of this State, one or more pieces of land in the town of Plattsburgh, county of Clinton, and State of New York, not to exceed in all 1,000 acres, for military purposes for use as a parade ground, or for any military purposes connected with the United States military post at Plattsburgh, and the said United States shall have, hold, occupy and own said lands when thus acquired, and exercise jurisdiction and control over the same and every part thereof, subject to the restrictions hereafter mentioned.

§ 2. The jurisdiction of the State of New York, in and over the said land or lands mentioned in the foregoing section, when acquired by the United States shall be, and the same hereby is, ceded to the United States, but the jurisdiction hereby ceded shall continue no longer than the United States shall own the said lands.

§ 3. The said consent is given and the said jurisdiction ceded upon the express condition that the State of New York shall retain concurrent jurisdiction with the United States in and over the said land or lands, so far as that all civil process in all cases, and such criminal or other process as may issue under the laws or authority of the State of New York against any person or persons charged with crimes or misdemeanors committed within said State, may be executed therein the same way and manner as if such consent had not been given or jurisdiction ceded, except so far as such process may affect the real or personal property of the United States.

§ 4. The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title

to the said land or lands by gift, purchase or condemnation, in conformity with the laws of the State of New York; and so long as the said land or lands shall remain the property of the United States, when acquired as aforesaid, and no longer, the same shall be and continue exonerated from all taxes, assessments and other charges which may be levied or imposed under the authority of the State.

§ 5. Any malicious, wilful, reckless or voluntary injury to, or mutilation of, the grounds, buildings or appurtenances shall subject the offender or offenders to a fine of not less than \$20, to which may be added for an aggravated offense, imprisonment not exceeding six months in the county jail or work-house, to be prosecuted before any court of competent jurisdiction.

§ 6. This act shall take effect immediately.

The act of Congress making an appropriation for the construction of new buildings and the enlargement of the military post at Plattsburgh, N. Y., is as follows: Approved, February 7, 1891.

Be it enacted, etc.

SECTION 1. That to enable the Secretary of War to enlarge the military post at Plattsburgh, N. Y. to the capacity of twelve companies, and for beginning the construction of the necessary buildings, barracks, quarters, kitchens, mess halls, stables, store houses and magazines, there is appropriated from any money in the treasury not otherwise appropriated the sum of \$200,000.

§ 2. That the Secretary of War is hereby authorized to accept, free of cost to the United States a donation of a tract of not less than 500 acres of land for a target range and other military purposes at or near the post at Plattsburgh barracks, N. Y.

*Provided*, That in his judgment the said tract of land is found in all respects adequate and suitable to meet the wants of the post, and that the title shall have been declared valid by the Attorney-General of the United States; and provided further, that no part of said sum hereby appropriated shall be expended until the aforesaid tract of land shall have been conveyed to, and accepted by, the United States.

Another act of Congress on this subject, is as follows:

Mississippi River Commission. For salaries of the Mississippi River Commission from July 1, 1890 to September 18, 1890 inclusive, \$1,950. Provided, that in acquiring land for the enlargement of the military post at Plattsburgh, N. Y., as provided for by the act of Congress, approved February 7, 1891, the Secretary of War is authorized to proceed in accordance with sections 4, 5 and 6 of the act approved February 22, 1867, entitled, "An act to establish and protect national cemete-

ries," but all costs and expenses incurred in procuring said site shall be paid by the citizens of New York furnishing such site as provided in said act of February 7, 1891.

The sections referred to in the act of February 22, 1867, provide for the acquisition by purchase or condemnation of lands for national cemeteries and the act of July 1, 1870 declares that from the time any State legislature gives its consent to the purchase by the United States \* \* \* the jurisdiction of the United States over the same is the same as that granted in section 8, Article 1, of the Constitution; that is, exclusive.

Now suppose a crime has been committed on this military reservation: the first thing to do is to arrest the offender. It does not matter who is the first to make the arrest. Suppose the United States first gets hold of him. Then there is no power that can take him away out of its hands unless the commanding officer acting in behalf of the United States, is willing voluntarily to surrender him. But if he chooses to hold him, the law is perfectly plain and well settled that he may do so.

On this point I quote from Beach's *Modern Equity Practice* (Vol. 1, p. 85, § 27). He says: "It has long been a settled rule of law in all cases of conflict of jurisdiction between the federal and State courts that the court that first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation and incidentally to take possession or control of the subject matter of the dispute to the exclusion of all interference from other courts of co-ordinate jurisdiction." And in a note he cites authorities, and says, "It has been held by an almost unbroken current of authorities that \* \* \* no State court can interfere with the custody and administration of the *res* which a federal court has lawfully in custody."

I also find this case among the decisions of the Supreme Court of the United States.

(Supreme Court 1878, *Coleman v. Tenn.* 97 U. S. 509.)

A. charged with committing murder in Tennessee whilst there in the military service of the United States during the rebellion, was by a court martial then and there convicted and sentenced to suffer death. The sentence for some cause unknown was not carried into effect. After the constitutional relations of that State to the Union were restored, he was, in one of her courts, indicted for the same murder.

To the indictment he pleaded the conviction before the court martial; the plea being overruled, he was tried, convicted and sentenced to death.

Held, 1. That the State court had no jurisdiction to try him for the offense, as he, at the time of committing it, being a member of the United

States forces in military occupation of the country, was not amendable to the laws of Tennessee.

2. His plea, although not proper, inasmuch as it admitted the jurisdiction of that court to try and punish him for the offense, if it were not for such former conviction, need not prevent the Supreme Court from giving effect to the objection founded on defendant's military character.

3. The judgment must be reversed and defendant discharged from custody of the sheriff on the conviction in the State court; but he should be delivered up to the military authorities to be dealt with according to law, under the conviction of court martial.

And a State court in Texas even went further and held in 1892: "In a cession to the United States by a State of land for a military post, a reservation of 'concurrent jurisdiction' to serve State civil and criminal process in the ceded place does not defeat the exclusive jurisdiction of the United States over the ceded place (Constitution, U. S. Art. 1, Sec. 8 sub. 18) and the State courts have no jurisdiction of crimes committed thereon." (*Lasher v. State, Tex. App. 17 S. W. 1064.*)

The United States having thus acquired and asserted its jurisdiction, proceeds to deal with any case that may arise and cannot be interfered with by any civil courts whatsoever. Its method of dealing with those cases is generally by court martial, and on this subject, the Supreme Court of the United States has said :

"Within the sphere of this jurisdiction the judgment and sentences of court martial are as final and conclusive as those of civil tribunals of last resort." (2 Sawyer, 402; 20 How. 82) and further: "The only authority of the civil courts is 'to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, the civil courts can not interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction.'" (9 Sawyer, 52 Re. McVey, 23 Fed. Rep. 878).

Further on this subject: "Where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject matter or jurisdiction of the particular cause, must adjudicate and neither party can be forced into another's jurisdiction." (Supreme Court, 1824, *Smith v. McIver*, 9 Wheat., 532, etc.)

When, however, either court has proceeded to a finality, the other may come in and proceed against the prisoner. In one case (that of Captain Howe, referred to by Winthrop, p. 112, note) "the action of the court martial was suspended for more than two years, while the civil proceedings against the accused were pending."

In those cases where the jurisdiction is concur-

rent, the way the civil courts may get possession of the party is either by a mere oral request, by presenting an indictment and demanding the prisoner or by a writ of *habeas corpus*.

The military authorities might surrender him as a matter of courtesy on a mere verbal request and they might properly refuse to surrender him even on a writ of *habeas corpus*, if issued by a State court. It would be different with a federal, i. e., a United States court.

It is to the latter that reference is had in the decision of the Supreme Court of the United States, rendered in 1891, on the subject of *habeas corpus*, as follows:

"The civil courts may, in any case, by means of the writ of *habeas corpus*, inquire into the jurisdiction of a court martial, and if the person condemned was not amenable to its jurisdiction, may discharge him from sentence, but the civil courts by *habeas corpus* can exercise no supervisory or correcting power over the proceedings of a court martial and no mere errors in their proceedings are open to consideration." (Reversing 38 F. 84, 137 U. S. 147; Winthrop, Military Law, p. 779, note 2).

The proper method to be pursued by military officers is indicated in article of war No. 59. Under that article they are obliged to deliver up an accused upon application duly made, but at the same time they can insist on the application being duly made and in proper form, provided of course, the government does not intend to try the accused. If it does and its jurisdiction has attached, the civil court must wait until the end of the proceedings in the court martial. In *Tarble's case* (13 Wallace, 397), the Supreme Court of the United States considered very fully the question of State and federal jurisdiction and, *inter alia*, held that a State judge has no power to issue *habeas corpus* for the discharge of a person held by authority, or under color of authority, of the United States.

In *Ableman v. Booth* (21 How. 506) the Supreme Court held that *habeas corpus* issued by a State court had no authority within the limits of United States sovereignty.

Both of these cases were discussed fully and confirmed in the case of *Robb v. Connelly* (111 U. S. 632-4), and the decisions made and principles enunciated are embodied in articles 1060-61-62 of our existing army regulations as follows:

1060. "A State court or judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under a writ when issued for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government.

"If, upon the application for the writ, it appears that the party alleged to be illegally restrained of

his liberty is held under the authority, or claim and color of the authority, of the United States by an officer of that government, the writ should be refused. If this fact does not appear, the State judge has a right to inquire into the cause of imprisonment and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. But after he is fully apprised by the return that the party is held by an officer of the United States under the authority, or claim and color of the authority, of the United States, he can proceed no farther."

1061. "Should a writ of *habeas corpus*, issued by a State court or judge, be served upon an army officer commanding him to produce an enlisted man, or show cause for his detention, the officer will decline to produce in court the body of the person named in the writ, but will make respectful return in writing that the man is a duly enlisted soldier of the United States, and that the Supreme Court of the United States has decided in such case that a magistrate or court of a State has not jurisdiction."

1062. "A writ of *habeas corpus*, issuing from a United States court or judge will be promptly complied with. The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued, and a return made setting forth the reasons for his restraint or confinement. The officer upon whom such a writ is served will at once report the fact to the adjutant-general."

It is thus seen that the lines are so drawn limiting and defining the respective powers of the two jurisdictions that it is not difficult to locate them. It may be stated that it is a general principle on which military officers may safely rely that the United States will not allow the civil power of any State or of the United States to be so used as to impair the efficiency of its military service, and, aside from numerous judicial decisions to that effect, the following law is found in the Revised Statutes of the United States, section 1237: "No enlisted man shall, during his term of service, be arrested on *mesne* process, or taken or discharged in execution of any debt, unless it was contracted before his enlistment and amounted to \$20.00 when first contracted."

Another leading case on this subject is that of Sergeant Mason. In this case the Supreme Court of the United States was petitioned for a writ of *habeas corpus* and *certiorari*.

Sergeant Mason, a soldier of the army while on duty in 1882, at the jail in Washington, maliciously attempted to kill a prisoner (Guiteau) who was by the authority of the United States there confined.

No application was made for the delivery of Mason to the civil authorities, but he was tried by a general court-martial, for violation of article of war 62, and sentenced to be imprisoned in the penitentiary for eight years, and to be discharged dishonorably from the service, with forfeiture of pay and allowances.

The petition was refused and the court held: "If this court may issue a writ of *habeas corpus* to review the judgments of courts-martial (upon which question this court withholds its decision), there can be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the court-martial could, under the law, pronounce."

Held, also, "the act being a breach of military discipline as well as a crime against society, the court-martial had jurisdiction to try the offender and to pronounce the sentence, inasmuch as he was, by the statute in force in the District of Columbia, subject, upon conviction, to imprisonment for that period in the penitentiary; and that the court could, in its discretion, inflict the other penalties." (Exp. Mason, 105 U. S. 696.)

In the course of the opinion, Chief Justice Waite who delivered it, said: "Whether, after trial by the court-martial, he can be again tried in the civil courts, is a question we need not now consider."

Another case on this subject is that of Crook, Horner & Co. v. Old Point Comfort Hotel Co., where a circuit court held in 1893, that "The Constitution, art. 1. sec. 8, chap. 17, giving the United States exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, arsenals, etc., applies only to land acquired by actual purchase, accompanied by cession of jurisdiction by the State; and where land is acquired directly from a State as owner by an act of cession (as in the case of Fort Monroe) the constitutional provision does not apply, and the United States holds the land only as prescribed in the act of cession.

The general laws of Virginia other than criminal, which conflict with those of the United States relating to forts, and which do not interfere with the military control, discipline and use of Fort Monroe as a military post, are in force at Old Point Comfort. (54 F. 604 [C. C.] )

It may be said in passing, that in construing art. 4, sec. 3, chap. 2 of the Constitution, it was held by the Supreme Court in U. S. v. Gratiot, 14 Peters, 537, that the word "territory" meant "lands."

And in art. 1, sec. 8, chap. 17, that "the term 'purchase' includes any mode by which the United States may acquire title, whether by original owner-

ship, subsequent donation or purchase in the ordinary acceptance of the term." (Ex parte Hebard, 4 Dillon, 384.) And that "the term 'purchase' was to be understood in its legal sense, as embracing any mode of acquiring property other than by descent." (7, Opinions Attorney-General, 114, 121; Winthrop's Digest, opinions of the Judge Advocate General, ed. 1880, p. 405, note.)

Among the more recent cases where this subject is very fully discussed both historically with much learning and judicially with forceful reasoning, I will make the following very full extracts from the case of the Fort Leavenworth R. R. Co., plaintiff in error, against Percival G. Lowe, sheriff of the county of Leavenworth (114 U. S. 542), where it was held:

1. The legislative power of Congress is exclusive over lands within a State purchased with its consent by the United States for a constitutional purpose.

2. Where the United States acquires lands within a State in any other way than by purchase with its consent, forts, arsenals or other public buildings erected thereon for the use of the general government, as instrumentalities for the execution of its powers will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within its limits.

3. The cession of lands by a State to the United States may be upon such conditions as the State may see fit to annex not inconsistent with the free and effective use of such lands for the purposes intended.

4. After the admission of the State of Kansas, the United States retained only the rights of an ordinary proprietor in the Fort Leavenworth Military Reservation; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used as a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. The clause of the act of the Legislature of Kansas of February 23d, 1875, to cede jurisdiction over said reservation to the United States, saving to the State the right to tax railroad, bridge and other corporations, their franchises and property on said reservation is valid and a tax upon a railroad paid to the State cannot be recovered back.

Decided May 4, 1885.

Mr. Justice Field, in delivering the opinion, used the following language:

"This brief statement as to the different modes in which the United States have acquired title to

lands upon which public buildings have been erected will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by federal and State tribunals, and of opinions of the attorney-general.

"When the title is acquired by purchase by consent of the legislature of the States the federal jurisdiction is *exclusive* of all State authority. This follows from the declaration of the Constitution that congress shall have like authority over such places as it has over the district which is the seat of government, that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress, and that no other authority can be exercised over them has been the uniform opinion of federal and State tribunals and of the attorneys-general.

"The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice. And congress, by statute passed in 1795, declared that cessions from the States of the jurisdiction of places where light-houses, beacons, buoys or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process issued under the authority of the State or of the United States might be served and executed within them. (1 Stat. at L., chap. 40).

"Thus in U. S. v. Cornell, 2 Mass. 60, it was held by Mr. Justice Story that the purchase of land by the United States for public purposes, within the limits of a State, did not of itself oust the jurisdiction or sovereignty of the State over the lands purchased, but that the purchase must be by consent of the legislature of the State, and then the jurisdiction of the United States under the Constitution became exclusive. In that case the defendant was indicted for murder committed in Fort Adams, in Newport Harbor, Rhode Island. The place had been purchased by the United States with the consent of the State, to which was added the reservation mentioned, as to the service of civil and criminal process within it. The main questions presented for decision were, whether the sole and exclusive jurisdiction over the place vested in the United States without a formal act of cession, and whether the reservation as to service of process made the jurisdiction concurrent with that of the

State. The first question was answered, as above, that the purchase by consent gave the exclusive jurisdiction, and as to the second question, the court said: "In its terms it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal process issued under authority of the State, which must, of course, be for acts done within, and cognizable by the State, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of the State that it should permit another State in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process. This is in the light in which clauses of this nature (which are very frequent in grants made by the States to the United States) have been received by this court on various occasions on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned State court. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise, perhaps, be construed entirely nugatory. For it may well be doubted whether congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock yards, etc., with the consent of the State Legislature, where such consent is so qualified that it will not justify the exclusive legislation of congress there. It may well be doubted if such consent be not utterly void. *Ut res majis valeat quam pereat*, we are bound to give the present act a different construction if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States.

"The case referred to in which the subject was considered by a learned State Court is that of *Commonwealth v. Clary*, 8 Mass 72. There the Supreme Court of Massachusetts held that the courts of the commonwealth could not take cognizance of offenses committed upon lands in the town of Springfield purchased with the consent of the commonwealth by the United States for the purpose of

erecting arsenals upon them. That was a case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the State. But the Court held that the law had no operation within the lands mentioned. "The territory" it said "on which the offense charged is agreed to have been committed is the territory of the United States over which the Congress have exclusive power of legislation." It added that, "The assent of the commonwealth to the purchase of this territory by the United States has this condition annexed to it, that the civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the commonwealth in executing such process, act under the authority of the United States. No offenses committed within that territory are committed against the laws of the commonwealth, nor can such offenses be punished by the courts of the commonwealth, unless the Congress of the United States should give to the said courts jurisdiction thereof.

In *Mitchell v. Tibbets* before the same court, years afterward (17 Pick, 298), it was held that a vessel employed in transporting stone from Maine to the navy yards in Charlestown, Mass., a place purchased by the United States, with the consent of the State was not employed in transporting stone within the commonwealth, and therefore committed no offense in disregarding a statute making certain requirements of vessels thus employed. The court said, that to bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded, adopting the principle of its previous decision in 8 Massachusetts. In March 1841, the House of Representatives of Massachusetts requested of the Justices of the Supreme Judicial Court of that State, their opinion whether persons residing on lands in that State, purchased by or ceded to the United States for navy yards, arsenals, dock yards, forts, light-houses, hospitals and armories were entitled to the benefits of the State common schools for their children in the towns where such lands were located, and the justices replied: "where the general consent of the commonwealth is given to the purchase of territory by the United States for forts and dock yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for



the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence, with the single exceptions expressed; and consequently that no persons are amenable to the laws of the commonwealth for crimes and offenses committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated."

And accordingly they were of the opinion that persons residing on such lands were not entitled to the benefits of the common schools for their children in the towns in which said lands were situated. (1 Met. 580.)

In *Sinks v. Reese* (19 Ohio St., 306) the question came before the Supreme Court of Ohio, as to the effect of a proviso in the act of that State, ceding to the United States its jurisdiction over lands within her limits for the purposes of a national asylum for disabled volunteer soldiers, which was, that nothing in the act should be construed to prevent the officers, employes and inmates of the asylum, who were qualified voters of the State from exercising the right of suffrage at all township, county and State elections in the township in which the national asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the Legislature of the State, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote, within the meaning of the Constitution which conferred the elective franchise upon its residents alone.

To the same effect have been the opinions of the Attorney-General, when called for by the head of one of the departments. Thus, in the case of the armory at Harper's Ferry, in Virginia, the question arose whether officers of the army, or other persons residing in the limits of the armory, the lands comprising which had been purchased by consent of the State, were liable to taxation by her. The consent had been accompanied by a cession of jurisdiction with a declaration that the State retained concurrent jurisdiction with the United States over the place so far as it could be consistently with the acts giving consent to the purchase and ceding jurisdiction and that its courts, magistrates and officers might take such cognizance, execute such

processes and discharge such other legal functions within it as might not be incompatible with the true intent and meaning of these acts. The question having been submitted to the Attorney-General, he replied that the sole object and effect of the reservation was to prevent the place from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State, and that in all other respects the extritoriality of the armory at Harper's Ferry was complete, in so far as regards the State; that the persons in the employment of the United States, actually residing in the limits of the armory, did not possess the civil and political rights of citizens of the State, nor were they subject to the tax and other obligations of such citizens. (6 Ops. Attys-Gen., 577. See also the case of New York Post-office site, 10 Id. 35.)

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative powers than that of congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated, and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his commentaries on the Constitution, says, "If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase or otherwise by the United States for a fort or arsenal or other constitutional purpose, the State jurisdiction still remains complete and perfect," and in support of this statement he refers to *People v. Godfrey*, 17 Johns. 225. In that case the land on which Fort Niagara was erected in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or of offenses against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender to Great Britain, pursuant to the treaties of 1793 and 1794. In deciding the case the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right to exclusive legislation over the fortress of Niagara, they would have also exclusive jurisdiction, but we are of the opinion that the right of exclusive legislation

within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings. The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously by dissesin of the State; much less can it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection."

"Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals or other public buildings are erected for the use of the general government, such buildings, with their appurtenances as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

"As already stated the land constituting the Fort Leavenworth Military Reservation was not purchased but was owned by the United States by session from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post."

"In the recent case of Fort Porter Military Reservation, the opinion of the Attorney-General was in conformity with this view of the law. On the 28th of February, 1842, the Legislature of the State of New York authorized the commissioners of its land office to cede to the United States the title to certain land belonging to the State within her limits 'for military purposes, reserving a free and uninterrupted use and control in the canal com-

missioners of all that may be necessary for canal and harbor purposes.' Under this act the title was conveyed to the United States. The act also ceded to them jurisdiction over the land. In 1880, the Superintendent of Public Works of New York, upon whom the duties of canal commissioner were devolved, informed the Secretary of War that the interests of the State required that the land, or a portion of it, should be occupied by her for canal purposes, claiming the right to thus occupy it under the reservation in the act of cession. The opinion of the Attorney-General was therefore requested as to the authority of the Secretary of War to permit the State, under these considerations, to use so much of the land as would not interfere with its use for military purposes. The Attorney-General replied that the United States, under the grant, held the land for military purposes and that the reservation in favor of the State could be deemed valid only so far as it was not repugnant to the grant; that, hence, the right of the State to occupy and use the premises for canal or harbor purposes must be regarded as limited or restricted by the purposes of the grant; that when such use and occupation would defeat or interfere with those purposes, the right of the State did not exist; but when they would not interfere with those purposes, the State was entitled to use so much of the land as might be necessary for her canal and harbor purposes." (16 Ops. Attys.-Gen. 592.)

"We are here met with the objection that the legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned.

But aside from this consideration, it is undoubtedly true that the State, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained as well as that of the State within which the territory is situated before any cession of sovereignty or political jurisdiction can be made to a foreign country."

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"In their relation to the general government the States of the Union stand in a very different position from that which they hold to foreign governments. Although the jurisdiction and authority of the general government are essentially different from those of the State, they are not of a different

country; and the two, the State and the general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the State. (114 U. S. 542.)

To summarize the conclusions arrived at in these various adjudications we might say in regard to this part and reservation, as well as all others where the conditions are similar:

1. The State courts have no jurisdiction of any kind of crimes committed thereon, and can only serve process for crimes committed outside of it.
2. Only Federal courts have concurrent jurisdiction with courts-martial.
3. Between these last two, the one that first takes cognizance of the offense is the one that has a right to retain it and cannot be interfered with by the other, but may proceed to a finality regardless of the other.

PLATTSBURGH, N. Y.

J. S. PARKE.

### Abstracts of Recent Decisions.

**ATTACHMENT—FRAUDULENT CONVEYANCE.**—The statute allowing attachments where a debtor has fraudulently conveyed or assigned his effects so as to hinder and delay his creditors, does not authorize attachments where the debtor has, without fraudulent intent, made a conveyance which is only constructively fraudulent. (*Weare Commission Co. v. Druley* [Ill.], 41 N. E. Rep. 48.)

**CARRIERS OF GOODS—BAILMENT.**—The rightful owner of personal property in the possession of a common carrier, or other bailee, may enforce his right thereto, although a stranger to the contract of bailment. (*Shellenberg v. Fremont, E. & M. V. R. Co.* [Neb.], 63 N. W. Rep. 859.)

**CONTRACT—DAMAGES.**—Where plaintiff, on the promise of defendant, to make papers giving her property to the plaintiff's wife, after defendant's death, if plaintiff would move "from his residence" to defendant's home, and take care of her, moved his buildings onto defendant's property, he cannot recover therefor, on defendant's repudiation of the agreement and refusal to allow plaintiff to remove them; moving the buildings having been either a gratuitous act, or at most a means by which plaintiff enabled himself to do his stipulated part. (*Kenerson v. Colgan* [Mass.], 41 N. E. Rep. 122.)

**EQUITY — BILL TO CANCEL TAX DEEDS.**—A bill by a landowner to cancel numerous tax deeds, held by different persons under a sale made by the commissioner of school lands, in West Virginia, in one proceeding to forfeit the lands for taxes, may be maintained as a bill to remove cloud from title, and on the ground of avoiding a multiplicity of suits, where all the parties claim under a common source of title. (*Ulman v. Jaeger* [U. S. C. C., W. Va.], 67 Fed. Rep. 980.)

**ESTOPPEL AGAINST THE UNITED STATES.**—A suit in which the United States has no interest, and in which it is under no obligation either to the public or to the party for whose benefit the suit is brought, can be sustained no better in the name of the United States than in the name of the real party in interest; and an estoppel which would operate against the rights of such party will bar recovery, notwithstanding that the United States is the formal complainant. (*Union Pac. Ry. Co. v. United States* [U. S. C. C. of App.], 67 Fed. Rep. 975.)

**MALICIOUS PROSECUTION.**—An action for malicious prosecution will lie for maliciously and without probable cause procuring a criminal warrant to be issued on a complaint under Laws U. S. 1885, ch. 164, providing for the recovery of a penalty for assisting the immigration of aliens under contract to perform labor, even though the statute is not criminal. (*Buehner v. Ellinger* [Wis.], 63 N. W. Rep. 756.)

**NEGOTIABLE INSTRUMENTS — NOTICE OF PROTEST.** The probative force of the official certificate of a notary that he deposited in the post-office notice to an indorser of the non-payment of a bill or note is not overcome by evidence of its non-receipt, standing alone, and unaccompanied by evidence that the notice was not in fact deposited in the post-office. (*Roberts v. Wold*, [Minn.], 63 N. W. Rep. 739.)

**REMOVAL OF CAUSES.**—The mere fact that the defendant is a United States marshal justifying under a writ of attachment issued from the Federal court for this district, does not confer upon him any right of removal of the cause to that court. (*Walker v. Coleman* [Kan.], 40 Pac. Rep. 640.)

# The Albany Law Journal.

ALBANY, SEPTEMBER 7, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE eighteenth annual meeting of the American Bar Association, recently held at Detroit, was from every point of view one of the most interesting in the history of the Association. The meeting extended over a period of four days, instead of three as heretofore, this having been arranged at the suggestion of the Detroit bar, with a view of enabling it to extend courtesies to the Association which would have been impossible within more limited time. The address of President Carter, as was to have been expected was very much more than the resumé of legislation throughout the United States which is required by the Constitution of the Association. It contained many able and pertinent suggestions, and we hope at a very early day to be able to publish at least that portion of it other than the mere formal part relating to the last year's legislation. President Carter presided with great acceptability. His reply to the exceedingly humorous address of welcome, by John M. Dickinson, on behalf of the Detroit bar and the citizens of Detroit, was inimitable as an impromptu effort and showed Mr. Carter in a light entirely new to those who know him only as a lawyer, as it developed a vein of humor of which heretofore he has not been suspected, and the same remark might well be made with reference to his address at the close of the meeting at the annual dinner of the Association, at which he presided as toastmaster. He was certainly at his best during the entire meeting.

The annual address by Judge Taft was a notable effort in its discussion of the legal phases of the Chicago riots of last year. The position of Judge Taft upon the bench, his relation to a portion of this litigation and his ability as a lawyer all conspired to render it a most interesting production. Although of great length, it was received by the association with

the utmost attention throughout and created an exceedingly favorable impression, not only as to the ability of Judge Taft but as to the correctness of the position and views taken by him on the subject discussed.

Justice Brewer of the United States Supreme Court, in his address upon the necessity for a higher legal education, took high ground in favor of a thorough and complete education of the bar, urging the necessity for careful and systematic teaching and study and calling attention to the high position which is and should be maintained by the bar in its relations to the public, not only as lawyers but as men influential in guiding and governing public affairs. It was a plea for the education of lawyers not only as lawyers, but as fitting them for public life and to exert the influence which they have been and necessarily must be called upon to exert in connection with public affairs. It is worthy to be ranked with Judge Brewer's notable address before the New York State Bar Association two years ago which attracted widespread and deserved attention.

A paper by Judge William Wirt Howe, of New Orleans, treating upon the relations of the civil law and the common law, brought to the attention of the bar very many of the features common to the Roman jurisprudence and that of England. Judge Howe traced the rise and progress of the English law in its relation to the civil law in force in continental Europe, and cited very many English authorities in favor of the view that very much that is embraced in the common law has been derived from Roman sources. It was an exceedingly polished as well as instructive paper, and must tend to create an interest in the civil law, which was urged by the Committee on Legal Education as a proper topic for study in the law schools throughout the country.

We publish in this issue the report of the Committee on Law Reporting, presented to the Association through J. Newton Fiero, its chairman, and concurred in by the entire committee, with the exception of Judge Dillon, who is abroad, and was, as is stated in the report, unable to take part in its preparation. The movement for this committee began last year through the thorough acquaintance of

Judge Dillon with the subject and his knowledge of what had been accomplished in the State of New York through the Committee on Law Reform of that Association. Upon the completion of the reading of the report, on motion of Judge Baldwin, of Connecticut, the committee was made a permanent committee of the Association, and the constitution and by-laws were, by a unanimous vote, amended for that purpose. This was followed by a motion requesting the chair to reappoint the same committee; as to this, however, President Carter took time by the forelock and reappointed the committee without putting the matter to the vote of the Association.

The matter of preparing suitable indices to the law reports and a uniform system of titles for digests, was also referred to the same committee, and on motion of Mr. Fiero, on behalf of the committee, Austin Abbott was requested to co-operate with the committee in this matter, and aid in the preparation of a set of titles which may be adopted throughout the country in the indices to the reports and the digests.

The hospitality of the city of Detroit and of the bar of Detroit was not stinted. On the first evening of the meeting, ex-Governor Alger invited the members of the Association to a reception given Justices Brown and Brewer of the United States Supreme Court, Judge Taft of the Circuit Court of Appeals and President Carter, at which were present very many members of the bar of Detroit as well as several of its leading citizens, in addition to the members of the association. This was followed on Wednesday by a sail upon the Detroit river and Lake St. Clair on a steamer chartered for that purpose, on which occasion the members of the association were the guests of the Detroit bar. On Thursday several of the citizens of Detroit placed at the disposal of the bar their steam yachts for the purpose of entertaining the association on a trip upon the river and Lake St. Clair, a member of the local bar accompanying each yacht and acting as host. The hospitality was extended in a most unostentatious manner and reflects very much credit upon the members of the bar and citizens of Detroit.

The annual dinner was a very decided success. An exceedingly apt address was made by

Ex-Governor Alger, in which he said he had in his early days been admitted as a member of the bar, the committee having reported favorably upon his answers to three questions, one of which he answered wrong and two right. He followed this by saying that he undertook to answer the first question and was informed that he was wrong; that in reply to the next two questions he said he didn't know and was promptly informed by the committee that he was right.

Justice Brown, in his address, referred to the measure of success which has attended the organization of circuit courts of appeal of the United States, showing that there is every reason to believe that so soon as the Supreme Court is relieved of the work accumulated before the organization of these courts, it will be fully abreast of its work. In this lies a suggestion of the possibility, and perhaps the probability that the Court of Appeals of New York may also be so fortunate by reason of the organization of the new appellate division of the Supreme Court which is organized upon substantially the basis of the circuit courts of appeal and for somewhat the same purpose.

One of the more important matters brought to the attention of the association is the matter of a uniform system of procedure throughout the English speaking countries in connection with the study of comparative law upon that subject. This matter has attracted the attention of the English bar to a very considerable extent during the past few months and as a result, as stated by him, of communications from leading English barristers, Mr. J. Newton Fiero moved the adoption of the following preamble and resolution :

"Whereas it is desirable that this association inquire into and collate the facts relative to the movement in progress to further a uniform system of legal procedure, and the study of comparative law on that subject throughout the English speaking world, Resolved, that a committee of five be appointed for that purpose."

This committee will be appointed by the newly elected President Moorfield Storey, of Boston, and will enable the association, by correspondence and otherwise, to compare the workings of the various systems of procedure under the common law and the code in this

country and England, so as to aid in arriving at a system which shall combine the utmost simplicity with the greatest excellence. It is in many respects the most important work in the way of law reform which has been suggested or undertaken for many years. It is quite probable that the commission appointed in this State to report as to the revision of the Code of Procedure will find it very desirable to postpone any definite action in the matter until the data suggested has been gathered and a study made by competent persons from its results as to the very best method of procedure, based upon the experience of all English speaking countries.

The newly elected President of the American Bar Association, Mr. Moorfield Story, of Boston, is a man of wide culture as well as of extensive practice. He has been much interested in the work of the association, and last year delivered the annual address at Saratoga upon "American Legislation," which attracted much attention. He is a man of middle age, active and energetic, and will doubtless do much toward forwarding the interests of the association.

J. Newton Fiero, of Albany, was elected as Vice-President for the State of New York, and William H. Robertson, of Westchester, elected a member of the General Council, having charge of the affairs of the association. Several prominent members of the bar of the State were selected as members of the local council which controls the matter of admission to the association of members of the bar from this State.

The Medico-Legal Society commenced its congress at the United States court rooms in the city of New York, on the 4th, 5th and 6th of September, under a committee of arrangements of which Hon. Rastus S. Ransom was chairman, and Clark Bell, Esq., secretary. Many eminent doctors and lawyers have consented to read papers, and, among others, Dr. Forbes Winslow of London will discuss "Suicide, considered as a Mental Epidemic." In a recent interview Dr. Winslow gave many interesting and valuable facts from his experience, which has been greatly devoted to insanity in criminal cases, on which he said:

For years past I have testified in a great number of cases, and I don't believe that I

have lost more than one case; in fact, I know that it was only in one instance that I failed to establish the lunacy of the prisoner under trial. My last case before I left London was the Saunderson murders. Four months before Saunderson came to trial I said that he was a lunatic and could not plead. You must understand that in England the question is asked if a man is sane now, and if he was insane at the time the murder was committed. If he is insane when the trial comes on, he cannot be tried; and in either case he cannot plead. Saunderson was a young man under twenty-five. As soon as I saw him and talked with him for a while I became certain that he was a homicidal lunatic. Five other doctors examined him and said he was a perfectly sane man, and that he could plead. In face of this opposition the prosecution decided against me, and he was to be brought to trial, but the day before the day fixed for the trial the chief attendant of the prosecution went to the prison to see Saunders, and after talking with him realized that he was crazy, and came to me to say so. Saunderson's was an auricular mania. He heard voices compelling him to commit the murders, but rather than be tried as a lunatic, he suppressed the fact so skillfully that he impressed everybody as being a man of sound sense. It is just this shrewdness in criminals and this apparent saneness which lead people to believe that they are responsible, when, as a matter of fact, they are homicidal lunatics. In my opinion a very small proportion of men accused of crime are sane.

"An instance of this, and the way the law treats it, occurred in a murder known in England as the Old Kent road murder. A wretched old man killed his wife and almost succeeded in cutting his throat. If the point of the knife had reached an inch further it would have cut his jugular vein and the verdict of a coroner's jury would have been that he had killed his wife and committed suicide when temporarily insane. But it happened that the knife did not penetrate far enough to kill him. So as soon as he was well enough to come out of the hospital he was dragged to the Old Bailey and tried for murder. He was wretchedly wounded, with a great hole in the side of his throat, but the jury decided that he was not insane, and

he was hanged. I talked to him in his cell at recess on the day of his trial, and was convinced that he was a lunatic. It turned out to be true, for after his death a lot of letters written by him were found, and they were perfectly irresponsible, indicating undoubtedly that their writer was insane.

"Not only are most murderers homicidal lunatics, but homicidal lunacy in London is increasing very rapidly, particularly among young men between sixteen and twenty-five years old. I think the increase comes chiefly from the force of imitation. These boys read about men who have committed murders; their minds become filled with the stories of them; the pulpit does all that it can to make the situation worse by preaching about these men, and this combination has its effect on their youthful minds. They want to do something of the same kind themselves to attract the same attention to them, and I am certain it is this motive which is the strongest now in the increase of the number of young men in London who are tried for murder. But they are homicidal lunatics just the same, even if it be only this force of imitation which inspires them. They are not responsible; their brains are affected. Homicidal lunacy, unlike suicidal lunacy, is curable. A homicidal lunatic may recover entirely from the attack which led him to commit a certain crime, but at the same time he will never be safe at large. Of all the men that are saved from the gallows in England by establishing their lunacy not one has ever been set free. They are all sent to Broadmoor prison, the prison for the criminal insane. From suicidal lunacy a patient rarely recovers, even for a brief period. It takes the form of melancholy, and for that reason it is rarely ever shaken off. When I go into a room and find a man raving, with three men holding him down, I feel very much more encouraged than if he walks into my presence quietly and soberly, with a look of melancholy.

"One case that I had, and the most striking instance of the force of imitation in leading young men to crime, particularly murder, is that of a boy who had been arrested for killing his brother. When I went to see him he was raving and three keepers were necessary to hold him, but I stayed in the room alone quieting him by talking with him, and in a moment

or two he was lying quietly on his cot. He told me that for several years he had attended murder trials habitually, and read the reports of those that he couldn't get to. He became so possessed with the thought of them that his mind was affected ultimately, and he turned and killed his own brother one day with no provocation.

"My theory of the Jack the Ripper murders was that they were the work of a religious maniac who fancied that he had some grudge to pay against these women. When I proposed this theory first in London I got letters from every quarter. After the third murder I got one signed 'Jack the Ripper,' saying: 'This week you shall hear from me.' The police at Scotland Yard got the same letter in the same handwriting, which proved also to be the same writing that was found on the arches in Whitechapel after the murders were committed. One of the people who wrote to me at that time was a lodging-house keeper. He said that a young medical student lived with him, and he described this man's actions on the nights when the first three murders occurred. At each time he had gone from the house differently dressed, and had come back with his shoes and clothes covered with blood. He was a religious monomaniac and went to St. Paul's Cathedral every morning. He came home after the murders, changed his clothes, and got out of the house in time to go to early service. The men that kept the lodging-house told me these facts. I investigated them and found them to be true. I got a pair of the man's shoes that were covered with human blood. After the third murder the medical student disappeared and no trace could be found of him. I went to Scotland Yard and asked them to assist me in the matter and put an officer at my disposal, so that we could look for the man, but they refused to do that, and I was unwilling to undertake the whole thing myself. Later, I wrote to one of the newspapers an account of this young man and my theory of the way in which the murders were committed. From that time there was not another murder, and that strengthened me more than ever in the belief that I could hit upon the right man. Somewhat later the body of this medical student was found in the Thames. He had drowned himself.

"I was very much interested in the case of Mrs. Maybrick. I believe now that she will be out of prison in six months. I handed up the petition to the Home Office for her release, and it was Mr. Matthews' refusal to pardon her which cost him his place under the present government. I found that Maybrick had taken arsenic two days before he died, which had been prescribed by his physician. Mrs. Maybrick was arrested simply on the ground that arsenic was found in her husband's body. The arsenic which he took was ample to explain the presence of what was found in his body after death.

"I have been witness in most of the principal cases the last twenty years. Once I testified in two murder cases on the same day at places 200 miles apart. A man named Richardson had shot two people at Ramsgate. I went down there and proved that he was unable to plead. When I got back to town that afternoon I found a telegram begging me to come down to a place where a man named Taylor, who had killed a child in his wife's arms and afterward a policeman who attempted to arrest him, was to be tried for murder the next day. I got down there and found the entire sentiment of the town against the man. I gave my testimony proving that he was a lunatic irresponsible for his acts, and he was acquitted. I was almost lynched when I left the town, the indignation against me being so great, but I had the satisfaction of learning later that I was right. The man was sent to prison as a religious maniac, and three months later, in a mania of religious excitement, he tore both his eyes out.

"I have had a great deal of experience in kleptomania, particularly of late, and it seems to me the cases are growing very much more frequent. I attribute that also to the force of imitation, just as in the cases of murder. It is very difficult to get a rich man off on a plea of kleptomania. It is very much easier to get a poor man off on that ground, but whenever the prisoner is a man of means the cry always is 'there is one law for the rich and another for the poor.' Even in cases when women are arrested with false pockets in their dresses and men with false pockets in their coats it may be just as much a case of kleptomania as when such elements were not present. I had a case

recently of a man who stole small sums of money in a club." The members had been losing money, from time to time, with no idea where it went. It was generally missed out of the pockets of their coats which hung in the cloak room. One day some marked coins were put there—a couple of shillings and a sixpence or two. They were afterward found in the possession of this gentleman, who was a member of this club. His rooms were searched, and in them were found a great number of pipes, cigarette boxes, cigars, etc., which he had taken at the club. He told me that he would walk to the door of the cloak room, and a voice would say to him, 'Go over there and take the money out of that coat pocket.' He said that it was repeated until he was compelled to obey it, and it was only when he found himself up stairs with a few silver coins or a cigarette case in his hand that he realized what he had done. He could not take the articles back, for he could never remember from what pockets he had taken them. When he was arrested there were six pounds in gold pieces of his own money in his pocket along with a small silver coin which he had stolen.

"A woman came into my hospital once in London, and after examining her I wrote the entry 'kleptomaniac' after her name. Four months later she was arrested in Brighton for theft. I went down there to see her, found that she was the same person, and succeeded in having her discharged, as I had diagnosed her case four months before when I had no other means than examination of learning what the feature of the mania was.

"Moral lunacy, which is the general description under which cases of this kind would come, takes many forms, and it is impossible to tell in what way it will manifest itself. Kleptomania is one of them. Oscar Wilde has had a remarkable career, and I have no doubt of his insanity. I could not be persuaded that he was responsible for what he did. I never have seen him except on the street, but I believe him to be insane.

"I am radically opposed to capital punishment. In Belgium, where it has been abolished, murder has decreased. I believe the same result would follow in any country. We have now in England 94,081 lunatics out of a population of 30,000,000. I was reading the



other day in a paper which my father edited fifty-one years ago, a description of the American lunatic asylums. At that time we were only passing a lunacy law, trying to do something to help these unfortunates, but as early as that, according to this letter from America, your institutions were built on a splendid scale and splendidly equipped. I expect to see them all before I return to England."

The Institute of International Law held at Cambridge, England one of its most successful sessions, and has materially increased the chances of securing some increased recognition of the laws of one country by another, as well as uniformity of laws. The *Daily News* furnishes a very complete history of the Institute and on this subject says: The institute was constituted some twenty years ago by Mr. Roln-Jacquemyns, who, after a varied experience, theoretical and practical, in Belgium, the Congo State and elsewhere, is now prime minister to the King of Siam. It consists of specialists in international law, most of whom have established their claims to an European reputation. Dr. von Bas (Gottingen), Professors De Martens (St. Petersburg), international adviser to the Russian government, Matzen (Copenhagen), Beirrao (Lisbon), Catellani (Padua), and Professors Westlake and Holland, of Cambridge and Oxford respectively, were among the most distinguished delegates.

The discussion commenced with the Geneva Convention of 1864 for the protection of the wounded in the time of the war, which all the European powers have signed. The experience of the Franco-Prussian war goes to prove that either side in the throes of a death struggle will be quick to accuse the other of breaches of the Convention, and to threaten to retaliate by acts of similar brutality. What is specially wanted is machinery for inquiry, so that the truth may be at once ascertained. The conduct of the Japanese in connection with the massacre of Port Arthur shows that even a nation outside the European family feels it dare not face the charge of proved cruelty to the wounded. Various schemes for preventing infractions of the Convention were suggested. M. van der Beer-Portugael, a Belgian general, favored the idea of a permanent military com-

mission to hold inquiries in such cases. Another proposal was that each belligerent should depute military authorities of its own to act as a check on their brother officers; but *quis custodiet ipsos custodes?* Finally the proposition of M. Lammasch, of Austria, was adopted, that either belligerent complaining of violations should be able to appeal to a neutral State, who should exercise the sort of voluntary supervision of a bystander in a street fight; the State appealed against must hold the inquiry, punish the offender and report what has been done to this neutral government. This scheme has, perhaps, the merit of being a trifle less unworkable than the others, but the position of the neutral State as a registration office can be no guarantee of the *bona fides* of the inquiry.

Proposed modifications of the Berne Convention for the international protection of copyright also occupied considerable time; the agreement was signed in 1886, and a meeting of delegates of all the signatory Powers, including England, will take place in Paris in the autumn to consider the question of revision. The proposals adopted by the late conference will doubtless have great weight with the revision committee. Roughly speaking, at present copyright is protected in two cases: (a) If the author be a subject of a signatory Power, wherever the place of publication; (b) If the work be published in the country of a signatory, whatever the nationality of the author. A proposal to extend the privilege in the first case to strangers domiciled in the territory was rejected, and does indeed appear to throw open the door too widely, and to cut down the privileges secured by signing the treaty. It was decided also to recommend: 1. The extension of the period during which translations should be protected from ten to twenty years. 2. That newspaper articles, so far as they contain literary matter, *e. g.*, short stories or scientific and literary critiques, should be secured; full freedom to reproduce political articles and news should be allowed, provided the source from which they were taken be acknowledged. Two other interesting points were the necessity of printed notice on musical publications reserving expressly the right of performance, as to which the Institute decided against the necessity of express reservation: and the damage done to

the rights of musical authors by the growing popularity of the common musical box.

These, however, are really questions of detail on which the resolutions of a body of savants are somewhat wasted. Questions of principle, such as are involved in contraband of war, nationality, and the privileges of an ambassador, all of which were discussed at the late meeting, afford much more room for useful work in harmonizing and codifying fundamental principles. The law of contraband is a field peculiarly suited for such work. In the great wars of the last two centuries the interest of the great maritime powers has been directly opposed to that of the smaller States, who were usually neutral. The maritime powers naturally wished to make the list of forbidden articles much wider than mere powder and shot, and especially to reserve the right of declaring, as the circumstances of each case arose, what should be considered contraband and what not. In many cases of blockade it may be more important to forbid neutrals carrying provisions to the enemy than powder and shot. The neutral powers, on the other hand, tried to restrict the list to munitions of war, and especially rejected the theory of occasional contraband altogether. The two armed neutralities of 1780 and 1800 attempted to secure the adhesion of all Europe to this idea, so as to compel "perfidious Albion" to give up her iniquities in this respect. England, however, is not the only country which has maintained the right of varying the list according to circumstances. America has done the same. And it is interesting to find that, with the growth of her navy, Germany recognizes the necessity of the English custom. On the motion of M. Perels, of the German admiralty, the Institute rejected the principle of a fixed catalogue, and adopted that of the belligerent's right to vary the list provided that neutral powers had full notice by proclamation before confiscation was attempted.

The questions involved in the word nationality again are many, and crying aloud for some system of settlement. Has a man a right to resign his allegiance to his mother country at will and adopt that of another State? To our continental neighbors with their lengthy periods of service, this is a vital question. England

answered the question in the negative till 1870, but now allows free right of expatriation to British subjects. The institute decided in favor of freedom to break the tie, but suggest that the mother country may still require such preliminary conditions to be satisfied as will practically destroy the right altogether. If it be recognized that Germany may still require three years' service of every subject, one of the chief inducements for Germans to be naturalized in America will have disappeared. Again, if an American woman marry an Englishman, she is at present an English woman in England, an American in America. The institute refused to admit the principle that any one can have two nationalities, and if this were generally adopted it would clear the ground of many difficulties.

English lawyers are tempted to ask what practical use these abstract rules and resolutions can have. It is quite clear that immediately they bind no one, not even their authors. But, undoubtedly, though the direct results may not be very obvious, indirectly the institute does much to promote international harmony. The discussion, in cold blood, of disputed points tends to remove prejudice and disarm suspicion, as the results of the recent debates on contraband law proved. While the presence of so many professors from all parts of Europe at these conferences must mean that the views of the rising generation of law students will be brought into line in a way hitherto impossible.

In the present day, when so much is said about women's rights, it will delight many to know that, although the judicial bench is now monopolized by the sterner sex, we believe at least once in the history of England a woman has acted as judge. This was in the reign of Henry VIII., and the woman to whom the unique honor fell was the Lady Ann Berkeley, of Yate, in Gloucestershire. She had appealed to the king to punish a party of rioters who had broken into her park, killed the deer, and fired the hayricks and His Majesty granted to her and others a special commission to try the offenders, armed with which she opened a commission, empaneled the jury, heard the charge, and, on a verdict of "Guilty" being returned, pronounced sentence.

## LAW REPORTING IN THE UNITED STATES.

### REPORT OF COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

#### *To the American Bar Association:*

The special committee appointed at the last annual session of this body, to ascertain the condition of law reporting in this country and report thereon, entered upon its duties by the selection of Frank C. Smith, one of its members, as secretary, with a view to gathering and collating facts and statistics upon the subject assigned.

The secretary upon ascertaining the names and residences of the reporters of the Federal and State courts, put himself in communication with them by circular letter, to which a large number of responses were received. These communications and suggestions have been tabulated by him for the use of the committee, and are most interesting and valuable. The schedule is therefore annexed hereto, and made a part of this report.

The Secretary has also prepared a table showing the number of cases reported from the courts of appellate jurisdiction in this country, from June 1, 1894, to May 31, 1895, and the number of times each court has cited its own decisions and the decisions of other States and of England.

This table is also attached as bearing upon the question of accumulation of the Reports in connection with the citation of the earlier authorities.

It is to be regretted that the continued absence of Judge Dillon from the country, prevents him from uniting in this report, since he has manifested very great interest in the work of the committee, and given valuable assistance through his wide experience and thorough acquaintance with the subject.

The multiplication of the law reports has attracted attention of the Bar since the day when Coke lamented the existence of so many as fifteen volumes of reports, besides treatises and statutes. In Bacon's time, when the reports were some fifty or sixty in number, the evil was so great in his opinion, as to require a "recompiling of the common law."

In the early part of the century, Bentham likened the condition of affairs to the books of the Roman law before they were digested by Tribonian. "A mass," he says, "the contents of which defy the industry of an ordinary lifetime to master."

It was on two occasions a little more than thirty years ago, resolved by the English bar, and those interested in the amendment of the law, that the system of reporting, editing and publishing law reports, required amendment, and "that the reported decisions should be consolidated, and their undue accumulation for the future be, if possible, prevented."

At about the same time the lord chancellor, deprecated the alarming condition of affairs, in an address upon the revision of the law, and urged the immense and growing number of the reports, as a reason for revision and condensation.

The matter was called to the attention of this association, in an address by Judge Dillon in 1884, followed by a paper by him on the same subject two years later, at which time a resolution was adopted, which referred to "The evils of the great volume of Judiciary Law," deeming it unwise, however, to interfere with the unlimited publication of opinions. (Report Am. Bar Association, 1884, p. 228; 1886, p. 257, 312.)

In 1891 in a paper read before the New York State Bar Association, by another member of this committee, it was said, "The necessity for reform is apparent and urgent. The evil is a serious and unfortunately a growing one," (Report New York Association, p. 178.)

The committee of that body appointed at that time, say in 1891, referring more particularly to the duplication of reports, "It has been a matter of discussion with the profession for a considerable period, and the lapse of time and the multiplication of reports only tends to emphasize the necessity for relief from the burden of miscellaneous reporting." (Report New York State Association, 1891, p. 101.)

The matter has been taken up recently by the Virginia Bar Association, and your committee is in receipt of a copy of a carefully considered report on the subject presented at the late meeting of that body, in which the calculation is made that a lawyer who devotes three hundred days in the year to the reading of the reports published in the United States must read two hundred pages every day in order to complete the work.

It may be said at the outset, in view of the decided expression of opinion by this body by the resolution of 1886, that the matter must be dealt with and remedied in some way other than by legislative restrictions of absolute freedom in the publication of adjudged cases.

The propriety or wisdom of restricting publication of the opinions of the courts has therefore not been considered as an open question by your committee, but as settled, in favor of the widest liberty to the publisher. This accords alike with the sentiment of the bar and the constitutional provision in very many States.

It is believed that the following are the more important and vital considerations, relative to the matter referred to.

*First.* The unnecessary duplication of the same matter in different series.

*Second.* The advisability of the adoption of a

scientific and uniform method in the preparation of the reports.

*Third.* The increased and ever increasing number of reported cases.

#### DUPLICATION OF OPINIONS REPORTED.

It is unnecessary to discuss, at any length, the evils arising from the publication of the opinions in separate series. The item of expense to the lawyer who desires complete sets of the reports of even his own State is an important one, where there is no duplication. When the number is indefinitely increased, it becomes an unnecessary burden. When to this consideration is added the annoyance of double or triple citations, and the not unimportant item of convenience in arrangement of shelf room, we cannot but deprecate the very general duplication of both State and Federal Reports.

Under the conditions which exist in the mother country, where reporting is, and always has been, regarded as a perquisite of the bar, and official reporters, as such, are unknown, we necessarily find the whole matter thrown open to private enterprise; but in this country, where the advice of Bacon that "The reporters, be taken from the most learned counsel and receive a liberal salary from the State," has been followed, and where the reporter is an officer of every appellate tribunal and compensated for his labor by either copyright or salary, the latter ranging from \$1,500 to \$5,000 per annum, with liberal allowance in many instances for assistance, there would seem to be but slight inducement or opportunity for private reporting, except in the collection and annotation of authorities on special subjects, or the selection of leading cases for examination and criticism.

In England, the absence of the "Official Reporter" has, from the earliest times, been supplied by a barrister, who is an "Authorized Reporter" in the sense that he is said "to be more or less recognized by the court," to the extent that "the judge will often revise his judgment for the purpose of the report," although he seemed in the earlier times to have relied altogether upon notes or memory of the oral decisions of the judges.

The "authorized reporters," however, became so numerous, five separate series being in existence, as to lead to action by the bar, in favor of a series having its sanction, which resulted in the publication of the "Law Reports," the most important step yet taken in the direction of promptness and economy, and which has formed the basis of the plan adopted in New York, to which the committee takes the liberty of calling attention, since some of its members are somewhat conversant with the method adopted in that State and the results attained.

The question was brought before the Commission to Revise the Judiciary Article of the New York Constitution in 1890, but no action was taken until the presentation of the matter to the Legislature in 1892, by the State Bar Association, as the outcome of a paper read before it in the previous year.

One of the features of the legislation was the provision for an additional official reporter, and another authorized and directed the publication by the Supreme Court Reporter of all opinions handed down in the appellate branch of that court.

While the legislation obtained was not all that was desired, yet in connection with the active and hearty co-operation of the reporters and publishers, it has accomplished substantially all that could have been brought about by the bill drafted by the Association. Before the arrangement which resulted in the present combined official series, eleven distinct sets of reports were issued in the State, in which opinions were not only published over and over again, but in some instances the same case in the same court appeared in full in five different series. In addition the legislative acts consisted of one or two volumes, the total expense being nearly \$100 per annum.

The present arrangement includes three series, Court of Appeals Reports, Supreme Court Reports and Miscellaneous Reports, the latter containing the opinions of inferior courts of record. Each of these reports is prepared by an official reporter. These three series, with the acts of the Legislature, known as the Session Laws, constitute the combined series, published in weekly pamphlets at \$30 per year. The bound volumes are also furnished at the subscription price without return of the pamphlets.

In this respect, and in the fact that the opinion in all the courts, and the laws separately paged and prepared, as in the volume, are bound together weekly, and every decision prepared by the reporter, is thus brought down to date, this plan is believed to be an improvement on the English method.

The result has been most satisfactory to the profession, in that it enables the Bar to obtain all the opinions of the appellate and other courts of record very promptly and accurately reported in an official edition at a very moderate price.

It has been thus far assumed that the official reports best deserve the support of the Bar, and are entitled to recognition by the bench and the public. This view has been taken in no spirit of antagonism to the reports which owe their existence entirely to private enterprise, but for the reason that the profession does, and doubtless always will prefer an official series, for very many reasons, not the least of which is, that the majority of citations are to these volumes, and hence they are preferable as a

matter of convenience. Beyond that, however, this view is taken because of the permanence of a series established and sustained by legislative action and which receives the sanction of the courts by the appointment of the reporter and revision of his work.

Still further under such conditions, the work of the Official Reporter if honestly done, should be much superior to any report owing its existence to private capital.

Not only is the reporter compensated and furnished suitable assistance, but the State usually intervenes to see that the report is published and placed on the market at a price scarcely compensating the cost of printing and binding. On the other hand, the publishers of reports other than those in the Official Series, are entitled to, and are here given the credit of having brought about the present condition of affairs, under which the Official Series of the Supreme Court, and of several State Courts, are furnished to the profession with great promptness, in weekly or semi-monthly parts, at a very reasonable price. It was not unusual a few years ago, to find an Official Series from one to three years in arrears, a condition not entirely creditable to the derelict officials.

This state of things brought into existence the unofficial series, which in turn forced the Official Reporters to energetic and prompt issue of the volumes in arrears, and there seems to be no difficulty, at this time, in their keeping abreast of their work.

In order, however, that the Official Reports may meet the demands of the profession, it is doubtless necessary that they should publish all the reports of the Superior Appellate Tribunals, in order to meet the demand for all the available decisions. With such authority and supported by the resources of the State, it is not too much to say, that if the Official Reporters of the Court show the energy, enterprise and sagacity of private business houses, in preparing and issuing their reports, there will be little demand for anything except the official volumes. Any reporter competent for his work should be able to do this, at least as well as can be done by any other person, without his facilities, and with the public treasury virtually at his call, he should certainly be able to perform it speedily, if not it would seem that his resignation should be promptly accepted by the Court from which he holds his appointment.

It is not only in reference to the reports of adjudged cases within a single jurisdiction that the official reporters of the courts may and should properly furnish copies promptly and cheaply, but since the preparation of the matter is necessary for the series edited by each separately, it may be advan-

tageously used for circulation both in pamphlet and bound volumes throughout neighboring jurisdictions in co-operation with others, forming thus a combination of the series of the official reports of several States under a single management, the only additional expense being that of publication.

This method would not only be a convenience to the bar by furnishing them the official reports of other States at a very moderate price, but should be a source of income to the reporters as well. It is quite certain that such a combined series could be furnished at a very moderate price for the reason suggested, and it is equally certain that, everything else being equal, lawyers much prefer the official series.

#### THE WORK OF THE REPORTERS.

It is manifestly impossible, to maintain an ideal standard, for the work of the large number of reporters and their assistants, engaged in the preparation of nearly, if not quite, one hundred series of reports, State and Federal. There must necessarily be varying degrees of excellence, and it would be hypocritical to insist upon even an approach to perfection in the details of their duties.

What is most obvious, and a just ground for criticism, is a lack of the spirit and enthusiasm necessary for success in every department, and this is most apparent in the want of uniformity, in the method and character of the reports, a failure to act in pursuance of a well considered plan, and to study and follow approved and scientific methods, adapted to present conditions, for it must be admitted, that reporting as a science has advanced but little within the century.

It is true that there exists in some few instances an apparently deep seated prejudice against clearness and simplicity of statement, an unwillingness to present the important facts, on which the discussion turns, and an anxiety to enter into minute details as to matter of no importance, except to the parties, and as to them of doubtful consequence, but it is their misfortune, that they are occasionally required to make sense out of an unintelligible statement or to reconcile with established rules, a chance conclusion which is with difficulty made to bear such a construction, and it must be conceded, that as to those matters the learned members of the court are much the greater sinners.

It is not reasonably to be required of the reporters that they "shall make bricks without straw."

It is not proposed to consider or advise as to the choice of methods to be adopted in preparing a syllabus. It is doubtless true that no hard and fast rule, even under the most approved and scientific method, can be adopted which is, or can be made applicable to all cases, yet it seems not only

possible, but comparatively easy of accomplishment, by careful analysis and diligent study of the best reporters (and their name is legion) to extract a uniform rule, or set of rules, as to treatment of the head note.

It is certainly safe to follow the plan recommended in the preface to Douglas Reports, "to state the point as a general rule or proposition," nor is there doubt of the rule laid down by a writer in the *Law Quarterly Review*, that, "if a case affords an illustration of a well-known principle, the profession does not gain by that principle being buried in a mass of facts," although a very recent writer on the subject says: "The syllabus must state not only those facts which furnish adequate premises for the conclusions reached, but every fact which may distinguish, the instant case from another, which would apparently fall under the same general principle."

The report of the Law Committee of the Virginia Bar Association, already referred to, says on this point: "The common practice of inserting the successive steps of the reasoning, merely used by the court, as the premises from which to evolve the conclusion, is wrong in principle and misleading to practitioners, and legal writers in covering up the true issue with a mass of rubbish."

Professor Wambaugh holds the duty of the reporter to be, "to determine by his own study, the proposition of the law involved in the case, and not simply to extract from the opinion a few apparently pertinent sentences."

It is quite certain too, that a very brief statement of the points involved introductory to and independent of the head note, is a matter of great convenience, while appropriate catch words in a different letter, showing the subject treated by each paragraph, will save much labor to one examining a large number of cases, and in this connection, may be urged so far as possible, at least when the principles decided are of substantially equal importance, the desirability of stating the questions decided in consecutive order, following that in the opinion, since it frequently, in fact almost always happens, that a case is consulted for the rule on a specific point, and as in preparing a brief, counsel necessarily examines a number of authorities, time is an important element, not to speak of the annoyance of searching through pages of a lengthy opinion to find that the point stated in the last paragraph of the head note is disposed of by the court, in the first sentence of the opinion.

A difference in method to a still greater degree, is found in the manner of preparing the index. This too presents a lack of uniformity, which causes a loss of much time, labor and patience, since the imagination of some reporters seems to revel in the

selection of titles and subtitles, which are not likely to occur to the mind of any, except an intellectual athlete, while his memory seems to utterly fail him in recalling those titles, likely to be in the mind of the practicing lawyer.

Whatever may be the fact as to the possibility of applying scientific methods to the drafting of the head note, there can be none as to the possibility of a system of indices, which shall be uniform and well understood by the profession, and this uniformity should extend not only to the indices to the reports, but to the digests, State and National, so that with a system of cross references, a lawyer may reasonably expect to find the same subject matter under the same title, in the different reports and digests.

The variety in type, binding and mechanical execution of the reports would scarcely merit special attention but for the fact that, as a rule, the larger the type the smaller the page, and cheaper the binding, the more expensive is the report.

So simple a matter as placing the number of the volume at the top of the page, so as to save turning the book to examine the back while holding it open to write out a citation, escapes the attention of most reporters and publishers, while the use of a style of binding, by which the volume remains open at any page, is a feature of one of the leading unofficial series which commends its mechanical execution and evokes a wish that the good example may prove contagious.

The examination of authorities is so important a part of the work of a lawyer that every effort should be made to lessen both the mental and manual labor connected with the search for cases in point, and while the details of mechanical execution are apparently unimportant, they can be readily remedied, and the most intelligent and painstaking effort should be made to embody in the head note a clear, concise, correct statement of the legal rules determined by the opinion, and the index so arranged as to afford the worker complete facilities for thorough investigation.

#### THE MULTIPLICITY OF REPORTED CASES.

The enormous increase in the number of the reports is, upon the whole, by far the most serious aspect of the question in hand. It is also the problem most difficult of solution, since the causes are deep seated and irremovable, being connected with the foundation of our system of law and form of government.

The evils from this source have their origin,

*First.* In the doctrine *Stare Decisis*, the corner stone of the common law.

*Second.* In the number of independent appellate jurisdictions which administer the law among English speaking people.

*Third.* The rule recognized by organic and statute law, authorizing the free publication of the decisions of the courts.

Coke says "the reporting of certain cases or examples is the most perspicuous course of teaching the common law."

Hale described the unwritten laws as having "acquired their binding power by a long and immemorial usage, and by the strength of custom and reception in the kingdom," and the late lord chancellor aptly described the situation in these words: "Where the judges have a new case before them they do not profess to arrive at the law by reasoning, by theory, or by philosophical inquiry, but by searching among the records of former decisions, for cases which are supposed to be analogous to the case before them, and they derive from these analogies the rules which they desire for the determination of the particular case."

The doctrine, as stated by a recent writer, is: "In the court pronouncing a decision, and in the courts subordinate to it, a decision, so far as it establishes a doctrine, is a precedent of imperative authority until it is either reversed or overruled."

Thus "the custom of the Kings Court is the custom of England, and becomes the common law."

This view, so radically unlike that prevalent on the continent under the civil law, is, and so long as it retains its position must be, fruitful in reports of opinions handed down by the courts, since such decisions constitute not only valuable precedents applicable by analogy to like cases, but embody the absolute rule of law which must be applied to the case in hand whenever the facts bring it within the principle theretofore decided.

The presentation of a cause at the bar is regarded as incomplete, and the attorney considered as remiss in his duty, if even the most elementary propositions are not supported by a citation of authorities, even though it involves nothing more than the interpretation of a rule of court, or the construction of the most unimportant local statute.

The term "case lawyer" is frequently used as a term of reproach for a laborious practitioner, but it is nevertheless true that principles are to be found in cases, and are frequently found applied to a similar state of facts. Hence the "case lawyer" wins cases because he has examined the books thoroughly, first, to find a case on all fours, then to find one where the rule is established as he contends; these failing him he looks for an analogous rule which may be applied to the case in hand, and finally, if a prudent man, takes pains to ascertain whether there is any aid or comfort given his adversary by a decision, dictum or query.

It is not at all clear but that it would be highly beneficial to the profession, the bench and the

client, if the fate of the Alexandrian library should befall very much the larger portion of the reports of adjudicated cases in all English speaking countries, but in place of such fortune, we must contemplate the multiplication of reports in forty-four States, in the federal tribunals, in England, her provinces and dependencies. It is in the large number of different and independent judicatories existing in this country that we find most of the difficulty as to the mass of authority emanating from the courts. Very many of the States have more than a single appellate tribunal, and these added to the reports of the Supreme Court of the United States, the Circuit Courts of Appeal and the several Federal Circuits, furnish a volume of legal literature which is appalling.

When we observe that the official reporters number more than sixty, and that in a State in which three official series are issued, eight volumes a year scarcely suffice for all the causes in a single court, we need not be so much surprised at the number of reports as, that under such circumstances, the common law retains its distinctive features and adapts itself so readily and wonderfully to such extraordinary conditions.

Add to these considerations the constitutional right of every citizen to cite and publish the decisions of the courts and we have no occasion to wonder at the number and extent of the law reports in this country.

There is to be found in the suggestions made abundant reasons for the publication and the preservation of such judicial decisions as will serve to aid in the determination of questions likely to be litigated, but this is also the strongest possible argument in favor of writing brief opinions, or none at all, on questions of no interest to the profession or the public, and it is such questions that constitute a very large proportion of the business of the courts. The books are crowded with discussions as to the interpretation of purely local statutes, and with the iteration and reiteration of well settled principles, applied sometimes to peculiar facts, but it must be remembered that these questions, although of no general interest or usefulness, were of great importance to the parties, have been argued by able counsel and taken much of the time and attention of the court, and thus the reasons for the decisions naturally find their way into an elaborate opinion.

Most to be deprecated perhaps is the controversial opinion written not to expound a legal principle, but to persuade other members of the bench, too obtuse to appreciate fully the reasoning, or to yield readily to the logic of their associate.

In some jurisdictions, notably in the New York Court of Appeals, the judges have come to regard

this matter as an important one, and to confine their opinions largely to cases reversed, where it is necessary to set out the grounds for granting a new trial. This plan has the additional merit of relieving the appellate tribunals, most of which are overburdened with business, from much additional labor.

Upon the whole, however, the condition of affairs as to the multiplication of reported decisions, although discouraging is very far from desperate.

In the first instance it must be borne in mind that the largely increased facilities for the examination of authorities have well nigh kept pace with their rapid multiplication.

Digests of the law, giving the points of the decided cases, have long taken the place of the abridgements like Bacon and Comyn, and by a combination of devices have made it comparatively easy, considering the mass of decisions to make an exhaustive investigation of any question. The collation and consideration of authorities in text books and elementary works upon all the principal topics of the law go far to relieve the labor of the lawyer, while the full annotations of authorities and elaborate decisions of mooted questions in the legal periodicals are no small aid. Nor is the system of marginal annotations, showing what subsequent decisions have referred to a given case, to be overlooked in considering labor saving devices. By these means the whole range of the common law, as embodied in the reported decisions, is brought much nearer to the practitioner, and he is enabled to examine the authorities on a given question much more readily and conveniently than heretofore.

The most important element, however, tending toward a remedy for the evils and inconveniences arising from the enormous volume of the unwritten law, is the gradual but certain evolution of the law.

This evolution appears in both the unwritten and the statute law, and in its relations to both has a most important bearing upon this question, since the obsolete provisions of the law, as found in the reports, are only of historical value and being of very little utility, are seldom referred to, cited or even examined.

It was this element of which Hale said: "The great wisdom of Parliament have taken off or abridged many of the titles about which it was conversant, usage and disusage hath antiquated others, and some that were anciently useful are now less useful."

The effect of modern litigation, discussion and decision has been to resettle and dispose of most of the questions which have been regarded as open, and undetermined, and to again determine and reiterate, as well as to apply the rules and principles gathered from the earlier reports. In other words,

the wealth of judicial decisions has and is to a great extent working a cure of the difficulties it occasions by rendering it unnecessary to refer to the older authorities, and confining citations not only to the more recent reports, but very largely to those decided within the jurisdiction where the particular case is brought.

While Mansfield is still recognized as the highest authority on all questions of commercial law, it is most unusual to find a citation from the reports of his decisions, and Hale and Holt are but names of great judges to conjure by, their opinions having been embodied in and superseded by modern authorities. The same is true of the great equity judges, and Hardwicke and Eldon are seldom referred to, except as the authority which has been relied upon in more recent judicial utterances. Indeed, the references to the first 100 volumes of the reports of the United States Supreme Court are comparatively few and far between, except as they are cited in support of a proposition fully discussed and determined in later volumes, and a like state of affairs exists as to the reports of the appellate tribunals of the several States. A distinguished jurist who has just retired from the appellate bench, in one of our largest States, where he sat as chief or associate for thirty years, recently remarked: "It has become quite infrequent as compared with the custom in my early days on the bench, for counsel to cite an English authority, or even that of a sister State."

The courts of almost every State have, in some form or other, grappled with the leading principles of the law and their application to diverse and peculiar facts, and litigation now arises principally from the new industrial conditions and changed business methods, which are the marked feature of the times.

The older reports thus became practically obsolete as to the bulk of legal lore spread on their pages, and the common law, as it now exists to-day, the result of centuries of change, improvement and evolution, as applied to the affairs of the day, is to be found, to a very great extent, in the later volumes of the reports of every jurisdiction. The fittest principles have been either enlarged, restricted or modified, and, as thus improved, survive in the latest utterances of the courts. It has thus come about that the language of a recent writer, used in a somewhat different connection, well expresses the situation when he says, "Adjudged cases are the mile stones which mark the pathway of judicial progress."

More marked, and fully so important, changes have been going on in the statute law, and with equal, if not greater, effect, in ridding the reports of decisions which have become useless and un-



necessary. The change in this regard has been mainly in the direction of simplifying the law and procedure. Possibly the most forcible illustration of this statement is to be found in the statutes relative to real estate, more particularly the abolition of uses and simplification of trusts.

The highly artificial system of the mother country, gave rise to numberless decisions, which by reason of statutory enactments beginning about 1830, and continuing up to this time have become of no value except to the student and the antiquarian. Almost equally great is the volume of authority rendered superfluous by the simplification of the legal relation of husband and wife, as regards property. As statute after statute has swept away the common law rights of the husband, volume after volume of reports have fallen into "innocuous desuetude."

The changes in procedure even where most conservative have rendered obsolete, scores of decisions based upon the mere technicalities, which were once the pride of the common law practice, and even in those jurisdictions where it is still retained, the increased liberality based upon statutory enactment, and rules of the court renders valueless, the opinions sustaining the refinement and subtleties of common law pleading.

The effect of statutory changes necessarily raises the question as to the probable operation of codification upon the multiplication of reported decisions.

It must be conceded that the figures presented to this association last year, as to the proportion of decisions turning upon questions of practice in the States where reformed procedure is in vogue, as compared with those retaining the common law practice seem to give but little aid to the argument for codification as a remedy for the multiplicity of opinions.

It must not be overlooked, however, that code practice, as it is now carried on, has abandoned its simplicity, and is losing its distinctive character, and unless return is made to first principles, will in a very short time be subject to all the criticisms made on its predecessor, with but few of its redeeming features.

Still, much remains to be said in favor of statutory revision by which well settled rules may be reduced to statutory form, as a relief from the examination, if not from the multiplication of reports, and as providing a statement of the law in compact, concise and convenient form. Very many elaborate opinions result from conflicting enactments in various statutes, which have never been revised or corrected, with a view to rendering them either complete or consistent, and the result of a careful and systematic revision must be to lessen the labor

of lawyers and judges, as well as to decrease largely the volume of reported decisions.

It only remains to add, that while the suggestions presented do not remedy the evils complained of, and in nowise tend to lessen the burden of expense arising from the number of reports, they to a considerable extent mitigate a burdensome condition, and alleviate a situation which would otherwise be intolerable.

#### CONCLUSIONS.

I. The duplication of reports of opinions, can and doubtless will be remedied, by the official reporters and publishers. They will find the bar eager to patronize an official series to the exclusion of all others, whenever it is edited with ability and promptness, and furnished at a reasonable price and in a convenient form.

This is true of a single series of a combination of the different series, in the same jurisdiction, and equally true of a combined series of several jurisdictions, properly edited on behalf of the official reporters of those jurisdictions.

II. The character of the reports as edited by the official reporters, should be more nearly uniform. The syllabus and index should be prepared upon a commonly accepted basis, combining the scientific and practical views, as the result of the experience of the reporters of the country. And the bar should continue to demand, and the bench select, for the work, lawyers not only possessed of legal ability, but of some degree of literary skill, and, moreover, imbued with a progressive spirit, and an appreciation of improved methods.

The preparation or careful revision of the syllabus by the court so as to cover only the points actually decided by the case would be highly desirable. Very much of the difficulty arising from imperfect or misleading head notes would be avoided if the practice which is enforced by law in some jurisdictions by which the judges prepare the head notes were adopted, or even if as in others the judges uniformly carefully examined and revised the proof of the syllabus as drafted by the reporter.

III. In the improved working tools, forming part of the Law Library, is to be found much assistance in the almost interminable labor of the search among the authorities, but still more relief is to be had in the gradual evolution by which the important principles with their almost endless modifications survive in the later volumes, relieving much of the necessity for examination of the older authorities; and, perhaps, most of all, in the more rapid growth of Statute Law, reducing to rules well established principles and reconciling conflicting decisions, so as to assimilate them to the current of recent authority, thus rendering obsolete

much of learning displayed by the Courts, and embalmed in the Reports.

IV. The hope for marked improvement in any direction, lies in discussion, criticism and organization, and it lies largely with this and the several State associations to arouse and keep alive an interest in the subject, which shall, through action by the official reporters and the courts, radically improve the condition of law reporting in this country.

Aug. 26, 1895.

J. NEWTON FIERO,  
Chairman.  
EDWARD OTIS HINKLEY,  
FRANK C. SMITH,  
WILLIAM E. TALCOTT,  
Committee.

#### SCHEDULES PREPARED BY SECRETARY OF COMMITTEE TO ACCOMPANY REPORT.

##### Table A.

This table shows the results of the committee's inquiries of the official reporters, as to the matters incident to law reporting in their respective jurisdictions, and may be summarized as follows:

Total courts whose decisions are reported..... 65  
Replies received from..... 48

Of these, two, the District Court of Appeals of the District of Columbia, and the Supreme Court of Idaho, have no official reporters.

Salary is paid in 40 States, ranging from \$200 to \$6,000 per year, and 7 of these States allow, in addition to the salary, from \$2,400 to \$8,000 per annum for assistants, while in 4 others the reporter has, in addition to his salary, the copyright of the volumes he edits.

In 5 States the reporter is compensated solely by his ownership of the copyright of his volumes.

The number of volumes of reports annually issued ranges from one in four years in Idaho, to 17 per year in New York, and is indicated for each court reported, in each State, in an appropriate column.

The varying size of the volumes presents a rather humorous feature, when it is recalled that the contents of each is of a like character with that of its fellows, and that the use to which the volumes are to be put is precisely the same in all jurisdictions.

The length of the volumes are given as follows: 10 inches in 1 state; 9 1-2 inches in 6 States; 9 1-4 inches in 7 States; 9 3-16 inches in 1 State; 9 1-8 inches in 1 State; 9 inches in 15 States. and 8 inches in 1 State.

Widths: 7 1-2 inches in 2 States; 7 inches in 1 State; 6 1-2 inches in 1 State; 6 3-8 inches in 1 State; 6 1-2 inches in 4 States; 6 1-4 inches in 1 State; 6 inches in 20 States; 5 3-4 inches in 2 States, and 5 inches in 1 State.

Thickness: 2 1-2 inches in 2 States; 2 1-4 inches in 3 States; 2 inches in 15 States; 1 7-8 inches in 2 States; 1 5-8 inches in 1 State; 1 3-4 inches in 4 States, and 1 1-2 inches in 2 States.

The measurements most general, it seems, are a volume 9 inches long (15 States), 6 inches wide (20 States), and 2 inches thick (15 States). But even these measurements are not common to any 15 States.

The number of pages varies from 550 to 1,000.

But these figures give no actual or relative idea of the quantity of matter contained in the volumes. An examination of the last volume of the official report of each court shows quite as great a variety in the type in which they are printed, as is shown by the measurements, above given, of the volumes as bound. In many instances the type is quite large, the spacing between the lines very wide, and the margins correspondingly liberal. In others the type is compact and readable, while between these two extremes the assortment of type is as varied as that shown in the catalogue of a modern type foundry. An interesting feature of this diversity is noted in the fact that, generally, the largest type, the widest spacing and margins, and the fewest pages are found in the volumes edited by those reporters whose compensation is derived solely from the copyright.

In constructing the reports, it seems that in six States the judges make the statement of facts; in nineteen instances the reporters state no facts not given in the opinion; while in twenty States the reporter goes to the record or transcript for facts not stated in the opinion, when he deems it necessary to give an accurate understanding of the case.

Tables of cases are given by 30 reporters, while 11 had no such aid to the case-hunter in the volumes they construct.

Sixteen reporters either summarize or print in full the briefs and citations of counsel, while 20 give no attention to this feature.

The answers to the inquiry as to the system of indexing followed are not subject to intelligent generalization, although it may be said that what is known as the Index Digest system seems to predominate.

##### Table B.

This table contains the results of an inquiry into the structure of the cases reported from all our courts during the year, June 1, 1894, to May 31, 1895, and shows the number of cases reported from each tribunal, and the name and number of the judicial authorities which each court cited in its opinions in the cases, together with the number of times text books were so cited.

The table may be summarized as follows: Total cases examined, 16,416; total number of citations

therein, 58,941; of which the several courts cited their own precedents 28,995 times, and all other courts 29,946 times.

In other words, over 49 4-5 per cent. of all the judicial authority used by the courts of appellate jurisdiction of this country, in making up their final judgments in the cases mentioned, was the authority of their own previous judicial utterances. To express the thought a little differently, it would seem, from this showing, that each tribunal has, within the compass of its own decisions, all the authority requisite for its determination of causes submitted to it, and that, on the average, our courts cite the decisions of other tribunals only in support of their own like conclusions. And what is thus shown to be true of the country at large is, with the exception of the tribunals in the new States, whose litigation has not yet aggregated sufficient decisions to either cover the range of cases submitted to them, or to justify the unsupported citation of their own meagre collection of cases, found to be generally true of each State, and is indicated in parallel columns.

From this date it is impossible to escape the thought that, if in those jurisdictions where it is true that they have, as a general rule, upon the pages of their own reports, decisions covering all the questions which they have to discuss and determine, the courts thereof would confine their opinions to a succinct statement of facts and the rules of law in their judgment applicable thereto, citing only cases from their own reports covering the same the ground, much space would be saved, fewer volumes be required, and yet no diminution of actual judicial authority result.

An interesting feature of this compilation, and one that is not without significance, is the number of times that the common law courts are found to have cited the decisions of other common law tribunals, and the decisions of the code States, and, on the other hand, the number of times the code States cited Code decisions, other than their own, and the decisions of the common-law courts.

By computation, and leaving out the citations which the common-law courts made of their own previous decisions, we find that our so-called common-law tribunals cited common-law cases 9,141 times, and code cases 4,861 times. The code State tribunals cited common-law cases 7,359 times, and the decisions of code States, other than their own, 6,008 times.

We ascertained, with reference to these citations, that, of the common law citations by common law courts, 5,238, or 57 per cent were cited in support of points of procedure, and that of the code State citations by common law courts 1,671, or 34 per cent were cited to support decisions upon points of procedure. Turning to the code State tribunals we

found that, of the citations they made of common law cases, 1,943 or 26 per cent were cited on procedure points, while of the code State citations by the code State tribunals, 4,172, or 69 per cent were upon points of practice and procedure.

How it happens that the common law courts require over 57 per cent of their common law citations, and over 34 per cent of their code State citations; and that the code State courts require a little over 26 per cent of their common law State citations, and over 69 per cent of their code State citations, upon the points of procedure involved in the litigations, can be readily answered by thoughtful lawyers. But the most significant, and the most conspicuous fact disclosed by this computation, is that the methods of procedure followed in this country, and known as the codes, and the common law system, modified as it everywhere is by the practice acts and statutes, are in fact, not so divergent as we have generally supposed, but that they can and should be amalgamated and shaped into a uniform system. This done, and the volume of the labor and output of our courts of appellate jurisdiction reduced one-half by the elimination of disputes in litigation reported to this association last year showed was possible and the adoption by the judges of our courts of last resort, of the suggestion afforded by our present investigations, that they confine their opinions, when practicable, to a summary statement of fact and law, basing the application of the latter to the former upon precedents of their own courts, and the great problem, to study which this committee was appointed, will be shorn of the features which to-day make it so ominous and disheartening.

FRANK C. SMITH,

Secretary.

### Abstracts of Recent Decisions.

**MASTER AND SERVANT—INJURY—CONTRIBUTORY NEGLIGENCE.**—Plaintiff was an elevator tender, and on starting to work in the morning, was informed that the elevator was out of order. Plaintiff, without reporting the fact to his superintendent, went underneath the elevator and pulled the rope, whereupon it came down on him. Held, that plaintiff was wanting in due care. (*Degnan v. Jordan* [Mass.], 41 N. E. Rep. 117.)

**NEGOTIABLE NOTE — INDORSER — DEMAND OF PAYMENT.**—A holder of a note who, upon transfer of the same before maturity, places the address of the maker below his name on the face of the note without the maker's knowledge, will be bound by a demand of payment by a subsequent holder at the address so given. (*Farnsworth v. Mullen* [Mass.], 41 N. E. Rep. 131.)

# The Albany Law Journal.

ALBANY, SEPTEMBER 14, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ONE of the changes in the Constitution proposed by the recent convention is evidently not in keeping with the ideas of many learned jurists, for from an exchange we are informed that Greek judges do not value human life so highly as the gentlemen who frequented the Capital last summer and who removed the limit which had existed for recovery of damages for death by negligence. The *Vossische Zeitung* on this subject says: "A Greek judge at Volisso, on the island of Scio, the other day decided two claims against a railroad for damages caused by a collision. One claimant was a man who lost his arm, and the other was a widow whose husband had been killed. The judge awarded 6,000 piasters to the man, but only 2,000 to the woman. When the spectators began to protest loudly, the wise judge explained:

"My dear people, the verdict must remain, for you will see it is just. Nikola has lost an arm, and nothing can restore it, but you (turning to the woman) are still young and pretty. You have now some money and you will easily find another husband who may be as good, perhaps even better, than your dead lord." So saying, the judge left the hall, and the people cheered him.

We have recently published part of the proceedings and debates at the Institute of International Law which has incorporated in its membership many of the most distinguished legal authorities and particularly is fortunate enough to carry on its rolls many jurists who have devoted their lives to the subject of International Law. The *Law Journal* gives the following summary of the discussions on August 12th last.

The meetings of the institute at Cambridge on August 12, were devoted to winding up the question of copyright and settling the rules as to the guardianship of persons of full age. As

regards copyright, the chief question was to decide as to the desirability of establishing an international tribunal to give judgment upon matters dealt with in the copyright convention. The institute adjourned the question *sine die* as being a very delicate one, which had not yet been specially considered in committee. The subject of the guardianship of persons of full age has occupied the institute for a number of years, and all the proposed articles have been frequently remodelled. In several countries of the Continent, such as France, the management of the property, not only of lunatics but also of spendthrifts, may be placed under restraint. The subject has, therefore, a much greater material interest there than in England. The main business was to decide which law should govern an application made to a court to place the person and property of a foreign person of full age under restraint. The first point raised involved the old conflict between the national law and that of the domicile. The institute, in spite of Professor Lyon-Caen, who sided with the English view in favor of domicile as regards personal property, decided that in the cases in question the national law of the person against whose acts or freedom of disposition judicial intervention was demanded should be applied. Another important decision was that the judgment of the competent national tribunal should be enforced in other countries without the necessity of submitting it for ratification by the tribunals of these other countries; further, if proceedings of the kind in question are taken against a foreigner, the institute holds that they should at first be provisional only; that the diplomatic or consular representative of the State to which the person in question belongs should be notified as to the proceedings; and that the court should decide only after hearing any observation made through such diplomatic or consular authority. The chief discussion, however, took place when the project, as a whole, was submitted for adoption. The idea of its framers is to institute what is called "*La tutelle unique*"—that is to say, that all questions connected with restrictions on persons of full age, should be treated according to the same law. It was pointed out by an English member that the subject involved three things which should be distinguished—

restrictions on the person, on immovable property and on movable property.

M. Rolin-Jacquemyns pointed out that a distinction should be made between the case of a person dangerous to society and mere spend-thrifts. The former must necessarily be considered as of public order. He was otherwise in favor of the "*tutelle unique*."

Professor Lammasch expressed his apprehensions as to the law of one State having force in another, and suggested that, as regards immovables, a distinction was indispensable.

M. Clunet explained that there was no danger to the foreigner of suffering a *minutio capitis*—i. e., a diminution of his legal capacity—inasmuch as the project provided for the application of his national law, and it was only in case no application was made to the court on behalf of his national law that the local law would become applicable. This, however, it was important to insure, and on his proposition a further article was adopted, under which the administration of the property of the person in question would be governed by the law of the court imposing the restraint. The main consideration in the project was to attain, if possible, unity of administration of the property of persons of full age deprived of the management of their affairs.

Lord Reay fully accepted the principle that the science of international law could not be stopped in its progress because nations were not prepared to accept some principles on which scientific men were agreed; but where not only was there no such agreement, and in addition almost a certainty that hardly any legislature would be prepared to accept the principle, and still less its extreme consequences, it behooved the institute to proceed with caution. This was a case in point. To say that a person should have the benefit of his personal status in a foreign country was one thing; to say that the foreign country was to provide him with all the means of protection which he would have in his own country, and to apply this even to real property, was far in excess of what most Legislatures or judicatures were prepared for, and had not even been accepted by some of the foremost international lawyers.

After a discussion in which many other members took part, the whole project was adopted.

The discussion showed the strong tendency among continental jurists to give even greater importance to the national law as regards all questions of personal status.

Sir Sherston Baker and M. Beirao (formerly Minister of Justice in Portugal), members of the institute, have been present at the meetings, in addition to those already mentioned.

The meeting of the institute at Cambridge on August 13, was devoted to considering the immunities of diplomatic missions on the territory of the States to which they are accredited. Embassies and legations, as is well known, are by a legal fiction considered to be, as it were, a portion of the territory of the State to which they belong. Hence the term "extritoriality." Moreover, by the comity of nations, diplomatic representatives in the reciprocal interest of States are treated as privileged persons. According to some writers the present practice goes beyond the limits which are justified in reason. Others treat extritorial precincts, not merely as convenient fiction which should not be extended beyond the limits of practical necessity, but as having the character of detached parts of the country represented in every respect. Furthermore, writers are not agreed as to which persons belonging to the diplomatic *personnel* should have the benefit of the privileges and immunities in question. All these matters formed part of a full report and project of regulations framed by the committee in charge of the question under the convener-ship of M. Lehr.

M. Edouard Rolin made a warm attack on the use of the word "extritoriality." It was invented, he contended, to group in one expression a number of rights. It no longer represented the real nature of the immunities of diplomatic representatives and their suite. To retain it opened the door to exaggerated notions of diplomatic privileges.

The institute, however, determined to retain it as a convenient and time-honored term which it would be inconvenient in the absence of a better to replace. As regards the jurisdiction to which diplomatic representatives are subjects, it was decided in accordance with existing practice that they should be exempt from all jurisdiction, civil or criminal, of the State to which they are accredited. A representa-

tive would, therefore, have to be sued in his own country. A discussion took place as to which court in his country should have jurisdiction, seeing that, being exempt from the local jurisdiction, facilities of jurisdiction should, if possible, be accorded to the aggrieved person in the foreign country into which he was obliged to follow the diplomatic representative.

Professor de Martens proposed that a court in the capital of the diplomatic representative's country should be declared competent.

Professor Westlake pointed out that this could not be applied in certain countries, such as the United Kingdom, where different judicial systems existed in different parts of it.

Professor Van Bar agreed with him, and suggested that the defendant should be entitled to claim the jurisdiction of his domicile.

According to the article adopted, the plaintiff should be entitled to apply to the court of the capital, but the plaintiff should also be able to contest the latter's jurisdiction, on the ground of being domiciled elsewhere. Another point which gave rise to difference of opinion was the non-liability of diplomatic representatives to taxation. Some members were in favor of restricting the immunity of such representatives to the official *personnel* of the diplomatic mission. An English member proposed that persons belonging to the country represented, and residing in the ex-territorial precincts, should be included in the immunities; but this was negatived, and it was decided that the immunity should not be extended beyond the official *personnel*. An interesting debate took place on the subject of obtaining the evidence of persons enjoying the immunities. It was decided, in spite of Professor Rolland, who objected to their having to give their testimony even in the ex-territorial precincts, that they were entitled to refuse to appear as witnesses before any local jurisdiction, on condition, if requested, of giving their evidence in the hotel of the diplomatic mission to a magistrate specially delegated by the local authority. The general impression produced by the discussion was that continental jurists show a tendency to restrict the ex-territorial rights and privileges and immunities of diplomatic agents of all kinds. A decision which will particularly interest English-

men was one to detach a clause relating to the application of death duties in respect of diplomatic representatives from the subject under discussion, and to appoint a special committee to deal with death duties in general as a question involving injustice and inequality for international successions. This subject was brought before the meeting of the associated chambers last spring as regards France and England, and it is satisfactory to see that it interests jurists of other foreign States.

On August 14 the Institute of International Law closed its session for this year. Two subjects on which much discussion was expected—namely, contraband of war and nationality—were dealt with very fully in committee, every available hour that could be snatched from the plenary meetings having been devoted to them, but little beyond this was done. The committee on contraband of war submitted a series of rules, the chief point in which is the generalizing of the criterion of destination. The conveners, Councillor Kleen (Sweden) and Professor Brusa (Italy), had proposed the adoption of exclusive lists of contraband and non-contraband articles. A counter-proposal by Director Perels, of the German Admiralty, struck out fixed enumeration and retained the principle of what is called "accidental contraband." This was defined and regulated without, of course, affecting its essential feature of destination. The whole subject will be discussed in plenary meeting at Venice next year.

The nationality question made rather greater progress. Double nationalities are a source of infinite trouble in countries where there is compulsory military service, and to none is the hardship greater than, for instance, to Englishmen who happen to have been born in France and whose children, if born there, are French absolutely, and therefore excluded from French soil unless they do military service in that country, though Frenchmen born under similar conditions in England have to do no military service in England. The committee on the subject, under the convenership of Professor Weiss, of Paris, having considered itself bound to deal with a few aspects of the subject only, a fuller counter-project by an English member meeting with some opposition as to the rules proposed on the points omitted, confined itself

to enumerating the points upon which agreement was unanimous, and these, which were also adopted unanimously by the plenary meeting, were essentially as follows: (1). No one should be without a nationality; (2) no one should have two nationalities; (3) every one should be able to change his nationality; (4) to change nationality a simple declaration should not suffice; (5) the nationality of origin should not be indefinitely transmissible from generation to generation on foreign soil.

Professor Holland, on behalf of himself and Sir Travers Twiss, stated that a standing sub-committee on extra-territorial jurisdiction and mixed cases in Japan could now be suppressed. The treaty of July 16, 1894, between Great Britain and Japan had fixed a period of five years for extinction of the privilege of extra-territoriality. The British example had now been followed by the United States and Italy, and would, no doubt, be in turn followed by other Western Powers. Professor Holland congratulated the Japanese on having been admitted to the European concert as regards the administration of justice at a moment when they were about to take a high place among the military Powers of the world.

Perhaps the most important work which must be performed by Messrs Lincoln, Johnson and Northrup, who have among other duties the revision of the statutes and advising the governor about legislation and pardons, is to prepare a Code of Civil Procedure which will be approved by the lawyers and legislators. Among other suggestions which have been made in answer to the request of the commissioners is one from Joseph C. Rosenbaum, Esq., of New York city, who writes thus:

"Section 418 of the Code of Civil Procedure should be modified by substituting six instead of twenty days, the time in which to plead or appear in an action. Twenty days has always been the time that a defendant had to appear or plead, and seems to have been the result of the then existing facilities for communications between attorneys in different counties.

"The twenty days' time still in use seems to be without change or modification, although the mode and facility of communication has greatly improved since then. It generally took three or four days between the extreme points

of this State, while now any part of the State can be reached in twelve hours. There is no good reason why a defendant should have twenty days to appear in an action or to serve a pleading. To litigation this is a great and often an unfortunate delay, considering the time it really takes before a case is ready for the trial calendar, and is often the cause of injustice to a plaintiff in an action.

For instance, a summons has been served on a defendant outside of the city of New York; within twenty days the defendant appears in the action; then the attorney for the plaintiff serves a complaint on the defendant's attorney; if such service is made personally on the attorney, then the defendant has twenty days from the date of such service in which to answer; but, as often happens, if the service is made by mail, the defendant has double time, forty days to answer, and has the same time, subsequently, to amend his pleading.

"In such cases the defendant actually has sixty days from the time of the service of the complaint; and if the complaint has been served on the attorney by mail, and the answer served by mail, the defendant has one hundred days before issues can actually be joined and the cause noticed for trial. The result of such long lapse in a litigation is decidedly disadvantageous to the plaintiff, because it affords the defendant abundant opportunity for delaying the payment of what may possibly be a just claim by the interposition of an answer which may be false.

"It is true the Code provides that false pleadings may be stricken out and the service of such answers punished as a contempt of court, but cases in which such relief is given and punishment meted out to litigants are so exceedingly rare that it can reasonably be said that it is no remedy at all.

"Another reason why such long time for joining issue is injurious to the plaintiff and his cause is that in the meantime the defendant may dispose of all his property, even before the case can be placed on the calendar, to say nothing of the time which must elapse before a judgment is rendered.

"The delay being so sure that not alone the plaintiff becomes tired of litigation a long time before it has actually begun, but it offers a real

inducement for a defendant vicious or temporarily embarrassed to take advantage of.

"Cases are defended simply because the apparent defense gives such an abundance of time. Actions are litigated that should have been settled or paid at once, and probably would be, but defendant takes advantage of this antiquated practice, and the long extension of time, with the small penalty of a few extra costs, is very often too great an inducement for business honesty to overcome.

"There is no reason why a defendant cannot plead in six days, no matter what part of the State the defendant resides or appears from. A person who knows that his litigation will be promptly and quickly disposed of is more apt to press honest claims (too often allowed to drop), and if a defendant knows that judgment must be recovered against him within a short time, and cannot rely on the time consumed in pleading, the probability is that the claim will be liquidated or paid. If such a change is made the number of litigations would be greatly decreased, and our courts could keep up with the volume of litigation that increases every year.

"The Code of Civil Procedure should be further amended by doing away with the notice of trial. It certainly has not the effect of bringing cases to trial. A plaintiff may bring an action and never place it on the calendar, and never intend to try it, yet if defendant receives a notice of trial he will assume that plaintiff intends to try the action when reached, and prepares accordingly. A much better practice would be a notice on the part of plaintiff or defendant that the case has been placed on the calendar, giving the number of the same, and could be placed on the calendar at any time, and date from the filing of the note of issue instead of the succeeding first Monday.

"At the present time the situation is that if a malicious or foolish litigation is brought against a defendant he must wait until the plaintiff places the case on the calendar for trial; if he does not do so the defendant must wait until younger issues have been disposed of (in the Supreme Court about a year and a half) before he is in position to make a motion for a dismissal of the complaint for non-prosecution.

If such a motion is made by defendant the Court, as a general rule, allows the plaintiff to file a note of issue upon the payment of nominal costs, and, of course, another year and a half must elapse before the case can be reached on the calendar. The result of such practice is easily seen in a case where plaintiff replevins a quantity of property, giving the undertaking required by the present Code of Civil Procedure and taking the property into his possession. The defendant appears in the action, and the issue is joined, and there the plaintiff rests.

"Plaintiff, having the property in his possession, has all to lose and nothing to gain by the continuance of the litigation. Of course, the plaintiff never notices the case for trial or files his note of issue. In the course of about a year and a half, after younger issues have been reached on the general calendar and disposed of, a motion is made by defendant to dismiss the complaint for want of prosecution. This motion is usually granted unless plaintiff pays nominal costs and files a note of issue, and then about another year and a half elapses before the case is reached for trial.

"If the notice of trial was abolished and a notice of placing on the calendar substituted plaintiff could be made to place his case on the calendar within a given time, say a month. If the case was not placed on the calendar within such fixed time the defendant could move to dismiss the complaint for the non-filing of the note of issue, and then on such motion the court could compel plaintiff to file a note of issue or suffer a dismissal. Instead of losing a year and a half's time only one month's time would be lost.

"It has become the plaintiff's general practice in replevin actions to simply take the property and allow the defendant to worry about its return or its value.

"The time for pleading in the city court should be reduced from six days to two days, which time is ample for an attorney to serve a pleading in the city, and if for a good reason it is impossible to serve it within that time, the court has power to grant a reasonable extension of the time so to do. The same applies to the Supreme Court.

"Section 553 of the Code of Civil Procedure should be stricken out. That section pro-



vides that a woman cannot be arrested, excepting in a case where an order can be granted only by the court, or where it appears that the action is to recover damages for a wilful injury to person, character or property. In that same connection section 1488 of the Code of Civil Procedure should also be stricken out.

"That section provides that an execution cannot be issued against the person of a woman unless an order of arrest had been granted and executed in the action. The above two sections should be abolished. While, theoretically all persons, male and female, were equal, that theory has developed into an actual condition (at least the women think so), and there is no reason, if such is the case, why any discrimination should be made in favor of women. They should be subject to all the liabilities and entitled to all the privileges same as males. They claim to be on the same footing as man, and they should be consistent enough to resent any partiality or discrimination in their favor.

"Section 3221 of the code, which allows an execution against the person of a defendant, and keeps him actually confined in jail for a period of fifteen days, in an action where a woman recovers a judgment against him for \$50, or less, for services rendered, should be abolished. To the same effect is section 3131, excepting that 3131 applies to Justices' Courts throughout the State, while 3221 applies to District Courts in this city. Both of said sections should either be entirely abolished, or should be made in favor of both men and women.

"As the law stands at the present time a woman who recovers judgment in an action for services performed by her, whether for seamstress, maid, physician or lawyer, is entitled to an execution against the person, provided the judgment is for \$50 or less; such right is denied to a man, and that right is denied to a possibly poorer woman who recovers a judgment for \$51.

"Irrespective of whether a woman ought to be paid in preference to a man, or whether they should be entitled to more legal rights than man, these sections have become the foundation for a great deal of abuse on the part of those entitled to its benefit.

"I believe, and have always contended, that

such sections of the code are unconstitutional in that it is class legislation, in favor of a class of people of the State. The poorest and most needy woman who recovers \$51, has an only remedy in an execution against the property — no property, no money — while a female lawyer may recover a judgment for \$50 for services rendered, and have not only an execution against the property, but is entitled to an execution against the person of defendant, and have him actually confined in jail for fifteen days. Either all persons should be entitled to an execution against the person in such actions or the sections entirely abolished.

"It has been suggested by some lawyers, that the District Court Justices should sit in different districts at least every week. The District Courts, more than any other courts, reach the populace; before them appear the bulk of the people, and it is in their power to do good or evil.

"If the Justices of the various District Courts intend to do their duty as such, there can be no objection to the suggested change.

"While I am on the subject of reforms, I would suggest that a woman's dower in a husband's real estate only attach at the death of her husband, instead of the absolute dower right in her husband's real estate as soon as he acquires it. Although such rights have existed from or before the time of the Magna Charta, the object for which such right was given does not present itself in our advanced condition. At the time this dower right was created a married woman was considered of the same class as infants, lunatics, drunkards, &c., and, as such incompetents, presumed to be incapable of entering into a contract. When she married all her goods and chattels became her husband's property, and she became an absolute dependent on her better or worse half. If she committed a wrong her husband was jointly liable with her, and her very existence theoretically merged into his.

"For her protection the law gave her an absolute interest in her husband's lands. To-day no such state of affairs exist. A woman, although married, may do as much business as her capital or ability will permit. If she holds real estate she can dispose of it as suits her fancy or convenience, and her husband, as far

as his rights in her property are concerned, assumes the condition of a large cipher. On the other hand, the husband's land is undeniably handicapped by his wife's dower. He can't sell, mortgage or do anything with his realty without her written acquiescence or waiver, and many a sealskin garment has been wrung from the helpless husband as the price of such consent."

How long will Americans, and lawyers and legislators stand such a state of affairs as we print later in this section? Or is it how long will Americans stand legislators who frame such statutes as exist in Oklahoma, in regard to divorce? There is a time when cheap advertising stops and when land booms return to their original particles of earth and air. The *Chicago Legal News* in an article on "Divorce while you wait" treats of this nickel-in-the-slot disgrace thus:

"It is remarkable how rapidly the average Oklahoma judge can dispatch divorce business. The defendants usually know nothing about the proceedings until the papers are served by the successful litigant. As a rule, no defense is ever offered in divorce cases in Oklahoma, for the reason that defendants are seldom aware of the beginning of the suit. This is one of the chief advantages this territory offers to divorce litigants.

Court records tell but little of the pending suits, and it is difficult to obtain much accurate information concerning them either before or after decrees are granted. Usually complaints are of the briefest possible character and tell nothing of the domestic troubles that are responsible for the legal proceedings.

"Within the last year the territory has become the temporary abiding place of more than 2,000 men and women who have been attracted there by the lax divorce laws. For many years divorce colonies composed a large per cent of the population of South Dakota. It did not take long, however, for men and women who wished to sever the matrimonial bonds to learn that Oklahoma offered superior advantages.

"The people who are now gaining the necessary 90-day residence in Oklahoma before filing their petitions for divorce reside in the four largest cities of the territory — Guthrie, Kingfisher, Elreno and Oklahoma City. There

are in Guthrie and Oklahoma City several fashionable boarding houses that cater exclusively to the trade of the divorce colony, and elaborate social entertainments of every character are given by the enterprising proprietors. Coaching parties make frequent trips to the neighboring Indian reservations."

When will this machine wear out?

In *Van Olinda v. Hall*, the General Term of the Third Department, holds that to maintain an action for alienating the affections of a husband and enticing him away, it is not enough that there was an attempt to alienate and entice, but the attempt must have been successful.

A verdict of \$2,000 for alienating the affections of a husband and enticing him away is excessive, where the husband did not provide for his family and the wife was not anxious for his presence at home.

Judge Putnam, in writing the opinion of the court, says:

That such an action may be maintained by a married woman is now well settled. (*Eldredge v. Eldredge*, 79 Hun, 511; 29 N. Y. Supp. 941; *Manwarren v. Mason*, 79 Hun, 592; 29 N. Y. Supp. 915; *Bennett v. Bennett*, 116 N. Y. 584; 23 N. E. 17.) It is held that such an action may be maintained for alienating the affections of the consort of a plaintiff, although such consort has continued to live with the party (*Heermance v. James*, 47 Barb. 120). To maintain the action, plaintiff was compelled on the trial to show a wrongful and willful attempt on the part of the defendant to alienate the affections of her husband, or to entice him from her and to deprive her of his society; that such attempt was successful, and that plaintiff was not a consenting party. We will not attempt any extended discussion of the evidence, but we have examined and considered it carefully, and we are of opinion that it was insufficient to support the verdict. There is no proof whatever that when Mr. Van Olinda came to defendant's house, in December, 1893, he came at her solicitation or request. Whatever evidence there is in the case on the subject shows that he came in search of employment, and that she gave him work at his solicitation. Nor is there any satisfactory evidence that, while he was there, she used any improper or other influence to keep him at

her house, or to alienate him from his wife, or that there was any improper or wrongful intercourse between them. All the evidence in the case on that subject seems rather to show a contrary state of facts. It is shown that on February 14, 1894, the last day that Van Olinda lived in defendant's house, while she remained at home, plaintiff called there and saw her husband and defendant; that the interview was friendly. Plaintiff made no complaint of her husband's absence from home or his relations with defendant. Up to the time that defendant left her home in Saratoga Springs and went to St. Paul, Minn., there is no testimony in the case showing any wrongful act on the part of the defendant, any wrongful intercourse between her and Mr. Van Olinda, or any attempt on her part to entice him from his wife. After she left for St. Paul, it does not appear that she and Mr. Van Olinda ever met again, except two or three times in Schenectady, where she saw him, as far as the evidence disclosed upon business, and in the presence of the family with whom she was living.

While the defendant was at St. Paul and other places in the West, and afterwards at North Adams, Mass., she wrote a number of letters to Mr. Van Olinda; and it is claimed that the admissions and statements contained in those letters are sufficient to uphold the verdict rendered by the jury. The letters show a considerable intimacy between the parties, a strong desire on her part that Mr. Van Olinda should join her in the West, and afterwards at North Adams; and one of the letters seems to suggest a proceeding for a divorce to be undertaken by him. In regard to those letters, it should be remembered that defendant and Mr. Van Olinda were connected by marriage; that she was among strangers in a western State, and might naturally desire the presence of Mr. Van Olinda, who was to be accompanied by her adopted daughter. But assuming that the letters evince an intent on her part to entice Van Olinda from his wife, or to alienate his affections, the evidence fails to show that defendant succeeded in her attempt. Van Olinda did not go West. He did not go to North Adams. He did not undertake any proceedings against his wife for a divorce. He never, after the letters, as far as the evidence dis-

closes, met the defendant, except on two or three occasions, upon business, and in the presence of the family with whom she was boarding. Therefore, there is no satisfactory evidence that by the letters in question defendant enticed Van Olinda from his wife.

Nor does the testimony sustain the contention of the plaintiff that the defendant alienated the affections of Van Olinda from the plaintiff. As we have seen, while Van Olinda and defendant were living in her house at Saratoga Springs, there is no evidence indicating any improper attempt on her part to estrange him from his wife, or to show that she had succeeded in such attempt, if made. If her letters from the west and from North Adams indicated an attempt to alienate the husband from his wife, the evidence does not show that the attempt succeeded. We have no letters from Mr. Van Olinda to the defendant in evidence. We are not shown the state of his feelings towards the defendant or his wife. It does not appear that there was any change in his feelings in regard to the plaintiff. The evidence in the case hereinafter referred to indicates that prior to this time the relations between the plaintiff and her husband were not what they should have been. Whether those relations were at all changed in consequence of the letters of defendant, or her influence, the evidence does not disclose. As we have seen, plaintiff was bound not only to show the wrongful attempt of defendant to alienate Van Olinda, and entice him from plaintiff, but that such attempt had succeeded. The letters of defendant may show the unlawful attempt on her part to influence Van Olinda, but plaintiff fails to show by satisfactory evidence that defendant was successful in such attempt.

The Supreme Court of Appeals of West Virginia in *Flannegan v. Chesapeake & O. Ry. Co.* discusses the interest point as to who are "fellow servants" and Justice Dent in his opinion on this subject says:

"The definition of 'fellow servant,' as settled by recent decisions, is, those 'who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another' (*Madden v.*

Railway Co., 28 W. Va. 619), while it is held that those who act in a superior position, and have the right to direct and control the conduct of others are not fellow servants of such others, especially in discharge of superior duties (Riley v. Railway Co., 27 W. Va. 146; Core v. Railroad Co., 38 W. Va. 456). The rear brakeman or flagman on a train is the fellow servant of the front brakeman, for each has his respective, separate, yet dependent, duties to perform in the running of the train; and they may influence, and even control, each others conduct, yet they are neither superior to, nor can they control each other. Yet the flagman occupies a far different relation towards the trainmen of all other trains, for, in giving them warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal or nonassignable duties to keep the track free from obstructions, for the safety of his employes. So a flagman, in discharging the same duty, acts as a fellow servant to some, and as the superior or master to others of his coemployes. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employe, in its discharge. For instance, the flagman protects his coemployes by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and management of all trains, and yet it is no part of any train, but is entirely stationary. The one acts for self protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business. In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority, by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were

under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master, yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow-servant of the trainmen, who are entirely at her command and who can neither influence nor control her independent actions? She is as much the master of her section block as the master is of the whole road. In *Lewis v. Seifert*, 116 Pa. St. 647, it is held: "The master owes to every employe the duty of providing a reasonably safe place in which to work. This is a direct, personal and absolute obligation; and while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate." *Mullan v. Steamship Co.*, 78 Pa. St. 25; *Railroad Co v. Bell*, 112 Pa. St. 400. "It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably, result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of, and represent, the principal. In other words, they are vice-principals." (*Lewis v. Seifert*, 116 Pa. St. 647.) In the case of *Railway Co. v. Salmon* it is said: "Higher officers, agents, or servants cannot, with any degree of propriety be termed fellow-servants with the other employes, who do not possess any such extensive powers, and who have no choice but to obey such superior officers or servants. Such higher officers, agents, or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal in the place of their principal, and in fact to be the principal." (14 Kans. 524; *Darrigan v. Railroad Co.*, 52 Conn. 285.) A volume

might be written on this subject, and numerous authorities cited for and against the rule of vice-principal, as propounded in the case of *Haney v. Railway Co.*, *supra*; but such rule has become too firmly established in this State to be departed from now, and must be carried out to its legitimate results, until abrogated or altered by legislation. It undoubtedly bears severely on corporations, but its object is the safety and preservation of life and limb. The doctrine, as recognized and enforced in this State, is that it is the personal or nonassignable duty of the master (1), to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; (2) to exercise a like care to provide and retain suitable servants for each department of service; (3) to establish, conform to, and enforce compliance with proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he intrusts them to a department, or any employee, of any grade, and the neglect of which by the agent or agents to which they are entrusted renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence cannot be shown or imputed, from his own act or the act of a fellow-servant, whether it be of commission or omission. (*Daniel's Adm'r v. Railway Co.* 36 W. Va. 397; *Cooper v. R. R. Co.* 24 W. Va. 37; and other cases heretofore cited; also, *Schroeder v. Railway Co.*, 108 Mo. 323; *Foster v. Railway Co.*, 115 Mo. 165.) The decisions of many jurisdictions are not in line with our decisions on this subject. (7 Am. & Eng. Enc. Law, 821 tit. "Fellow Servants"). The rule of *stare decisis* applies with impregnable force in this instance, and from which there is no way of escape, even if the Court were so inclined, unless by an utter and reprehensible disregard of all precedent.

As we have suggested several times before, the press and the public are giving much attention to secure uniformity of laws, not only as between our own States, but also between countries, as an international reform. Doubtless the latter would be difficult to accomplish, but its inception can very well be made now and its growth will undoubtedly be rapid in pro-

portion to the sentiment of the communities affected. In the *Law Times* appears an article on American divorces in English courts which is as follows:

It is becoming every day more evident that some international agreement on jurisdiction in divorce will be found a necessity to civilized life in the near future. The increasing facilities of communication, the fact that expatriation is less and less regarded as abnormal or a thing to be avoided, the extended facilities for naturalization offered by all civilized powers—all combine to multiply questions of doubtful jurisdiction in every department of family relations. But, as regards this country and the United States more particularly, the identity of language and the common ties of race and history are tending to make the English speaking world one vast community. In no one point of legislative policy is the divergence more marked than in English and American ideas on divorce and marriage relations generally; while from the frequency of intermarriage between English and Americans, in no department of law is there to be found such occasion for conflicts of jurisdictions. The social consequences of such conflicts are too obvious to require to be dwelt upon; while merely from the point of view of the administration of justice, it is plainly desirable that, in the two countries in which the "Reign of Law" has been most securely established, contradictory decisions of English and American tribunals should be constantly rendered between parties in an identical cause, to the common detriment of the authority of tribunals on both sides of the Atlantic.

The decision of the Probate and Divorce Division on the 29th July, in the cause of *Cox v. Cox*, furnishes a striking illustration of the drawbacks of the present system of disputed jurisdiction. A litigant, who by a decision of the United States Circuit Court of Illinois, rendered on the 18th Oct. last, was granted a divorce and authorized to re-marry, has been judicially declared by an English court on the 29th July to be living in adultery, having re-married under the authority of the court of the State in which he has become a citizen. "Naturalization," his Lordship is reported to have observed, "does not prove anything. Inasmuch as the original domicile was English,

the safest course is to treat the English marriage as a good one."

The facts of the case are not particularly important. The only one deserving notice is, that the defendant has resided in America since 1887. So his domicile would undoubtedly be American. What is really important to bear in mind is, that such conflicts of jurisdiction, while producing the gravest inconvenience to both British and American subjects and to the authority of courts of justice, present no prospect whatever of being solved by judicial agreement. Treaty alone, as recommended by the Conference of the Hague of June 1894, appears to be the sword to cut the tangled web of judicial theory.

For the theory of jurisdiction in divorce put forward in the present case is only one of divergent, if not contradictory, theories affected by English courts within recent years. The present criterion, as stated in *Cox v. Cox*, may be taken as that of the original matrimonial domicile; that is to say, that jurisdiction in divorce appertains to the tribunal of the domicile of the husband at the time of marriage, although he has meanwhile become domiciled in and a citizen of another State. But several other decisions of English courts acknowledge the validity of American divorces if the husband has become domiciled in the United States. On the other hand, the theory peculiar to our courts of the jurisdiction appertaining to the courts of the "matrimonial home"—originating in *Niboyet v. Niboyet*—disregards the domicile altogether.

The law of the United States, however, is not any more logical or consistent. A recent law of Pennsylvania, which incidentally came before the Probate and Divorce Division in 1893, enables any American woman who is a citizen of Pennsylvania, and marries a foreigner abroad, to leave her husband, return to Pennsylvania, and obtain a divorce there for offenses, some of a minor character, enumerated by the Pennsylvanian Legislature.

The fact appears to be, that the courts in both countries, desirous to administer justice to all applicants, are inclined to adopt such theory in the case immediately before them as may give them authority to decide. But this perfectly intelligible desire to assist suitors in the concrete case overlooks the injury to all civilized

communities of fostering that strange justice which alters its features on crossing a frontier.

It is needless to say that what is desirable, and what it is to be hoped may some day be arrived at by an international agreement, is not the victory of any particular theory of jurisdiction in family relations. One or other must, of course, be fixed upon, whether it be that of political nationality, of the last common matrimonial domicile, or of the present domicile of the husband or of the wife. But what is eminently desirable is that some fixed criterion should be adopted. It might even be adopted as a rule that a divorce pronounced by a tribunal having jurisdiction over one of the parties should be valid all over the civilized world. What is not desirable is the present anarchy, under which a man or woman may be held by dissenting courts to be married to one person in England, to another in the United States, and to yet another in the Australian colonies.

#### ROMAN JURISPRUDENCE.

In the maxims of Roman law the practical lawyer and judicial administrator still finds an unfailing resource when in quest of principles to guide him to an equitable decision. These principles of equity and legal maxims have become common to all forms of government and to all systems of laws; are suitable to all men, among all peoples, at all times and applicable to every community, for they are universal in their character, minutely discriminative in their application, substituting natural, just and expedient laws for those which were arbitrary, capricious and inopportune.

Out of the rudiments of political thought and the cardinal institutions of family, tribe and State, inherited from the East, the Roman people developed a system of public and private law which presented the highest type of national feeling and the keenest discrimination of the grounds of national justice. When the words *cedant arma toga, concedat laurea lingua* were spoken by Cicero, they expressed the destiny of the Roman law. While the larger conception of humanity, incident to the evolution of society has reduced its proportions in its relation to modern development, we are still indebted for the institution of positive law, in its modern sense as rights founded upon facts, to Roman wisdom. And this beautiful system of jurisprudence stands in its original strength, above the broken masses of the philosophy and science of the country upon whose history it was engrafted. The philosophic student delights to contemplate its noble

proportions and just analogies. It took its rise in an age of magnificent achievements, but has outlived the nation and people from which it emanated, impressing wisdom upon the institutions of all civilized communities. The different branches of Roman jurisprudence grew up from the deepest roots of old Roman life, and expanded with its increasing energies. Its sources were those of long established use and want, codified in the twelve tables, the decisions of its decemvirs, or ten ablest men, continued by constitutional enactments, magisterial edicts and imperial decrees. The Romans were the first western community to work out systematically from their own experience a series of practical judgments for universal guidance in the varied political and social relations of life. They lifted the human mind and its social activities from out of the contracting influence of the code law of the stationary and sacerdotal East, and opened the way to the expanding laws and secular civilization of the West.

Rome, when first established, was governed by purely arbitrary authority, without laws or recognition of right. The first institutions which are noticed, are the royal laws; which began to assume something like settled forms under Romulus. The first code of this prince began with the family, and regulated the authority of fathers over their children; and regulations adopted with respect to the succession of heirs to the property of the ancestors. Among those of his successor, Numa, we are told of ordinances governing sacrifices, their ceremonies and filial rights, prescribing boundaries to territorial possessions, and declaring it a sacrilege to the god Terminus, to displace or violate them. The credit of a law charging the public treasure with the expense of nourishing three infants produced at a birth, was due to Tullus Hostilius; and a law condemning vestals for the violation of their vow, was attributed to Tarquin the elder. The various laws existing previous to the time of Tarquin were known as the Papyrian laws, from their being collected by Papyrian. Serrius Tullius prescribed laws against creditors who imprisoned their debtors, against oppressions of the poor by the rich, and rules for the adjustment of contracts and the redress of injuries. These laws were abolished by Tarquin the Proud, but observed after his expulsion because they were humane and agreeable to the people.

The law which established the power of the Tribunes repealed all these regulations; some however continued to be observed, not as royal laws, but customs of the Roman people. With the view of reducing the laws to a less arbitrary rule, Terentillus Arsa, a tribune of the people, soon after the expulsions of the kings, demanded the selection of five citizens to make laws under the authority of the

consuls. This proposal failed in consequence of war. Afterwards a Virginius renewed the demand and, after a long and bitter contest with the Senate, S. P. Posthumius, A. Manlius, and P. Sulpitius were selected to visit Athens and collect a body of laws suitable to the character and habits of the Romans. They were particularly ordered to collect the laws of Solon, and visit each of the cities of Greece for the purpose of studying the manners and customs of the people. From the laws collected in Greece, and the ancient usages of the Roman people, a code was written on ten tables of wood, and exposed to the correction of the people, in a public place. After being approved and engraved upon columns of brass they received the addition of two others, and thus were the twelve tables established, otherwise termed the decemviral laws, because owing their authority to the decemvirs. This body of laws was considered as the foundation of the civil law, both public and private. In Greece, in Italy and on the Hellenized sea-board of Western Asia codes made their appearance at periods similar in point of the relative progress of each community. But the twelve tables of Rome, whereby laws engraved on tablets and published to the people took the place of usages deposited with the recollection of a privileged oligarchy, was the most famous specimen of all ancient codes and marked a sharply defined epoch in the history of jurisprudence in the progress from the period of customary law to the era of codes. Contrary to the practice of preceding nations which had placed the body of precedents and customary laws under the care of a traditionary priesthood or aristocracy, the practical Roman people placed them in the hands of the most experienced men of affairs, and then allowed their jurists and judges the largest discretionary powers in applying existing laws or creating new ones to meet the exigencies of each case. The spirit of Rome so constantly and successfully directed to objects of public utility, ensured to the laws their minute and practical provisions. It is true that the twelve tables mingled up religious, civil and merely moral ordinances without any regard to differences in their essential character, but we must remember that the severance of law from morality and of religion from law belonged very distinctly to the later stages of mental progress. Infants were taught to commit the twelve tables to memory, and Cicero placed them beyond the writings of philosophers, for their admirable precision, the justice of their expressions, and the equity and wisdom of their principles.

However, these laws were soon found inadequate to the wants of the increasing populace of Rome, and resort was had to interpretations and expositions of numerous jurisconsults, increasing largely the number of annotations upon their precise sentences;

and a long acquiescence in practice gave them the force of laws, and they thus became the source of the customs and usages of the Roman people.

These actions of the law or *soleman* forms to enforce what the law itself prescribed more indifferently, known as *actus legitimi* or *legis actiones*—in fact, the twelve tables were the theory of the law, the book of actions its practice. These curious forms were locked up from the people until published by C. Flavius, and from him called the Flavian law. Subsequently Oelius Sextus collected in a book called *Tripartitorum libro*, the text of the twelve tables, the interpretations connected with them, and the ancient and new actions of the law. This collection was known as the Oelian law. Next in order to the laws we have mentioned stood the *New Laws*, by which designation was understood all laws established under the emperors or the republic after the adoption of the twelve tables, including those made by the people, the *senatus consulti*, and the constitutions.

The laws made by the people were such as were passed by the centurius after a decree of the senate, and such as were enacted by the people, without the authority of a *senatus consultum*. The *senatus consulta* were decrees of the senate, sometimes rendered in the exercise of a republican authority, and sometimes a form under which were masked the worst tyrannies of the prince. The constitutions, properly so called, were the declarations of the emperors, made either by decree, edict or epistle. They exercised legislative, administrative or judicial powers. A decree was the determination of a matter in dispute between parties; the edict was a general law binding every one; and *rescriptæ*, which embraced epistles and subscriptions, were answers to public or private consultations. Then came what was known as the perpetual edict. This was prepared under the order of the Emperor Hadrian by Salvius Julianus. This emperor, or singular combination of the mind and qualities of a good and bad man, in one of his paroxysms of public virtue, became sensible of the imperfect state of the law, and provided for its reform in this celebrated edict.

He was fortunate in the assistance of a man, termed with justice, one of the finest jurists ever produced in Rome, according to the authority of Justinian, the greatest reformer of his time, and the highest authority, the man most learned in the law, the most estimable, the most eloquent and most wise. The fragments of this splendid monument of juridical industry comes down to us in fifty books covering almost every ground of legal necessity, and were an elaborate condensation of all previous edicts of either utility or force. Then followed the public discussions, the interpretations and responses of jurists. The object of these seem

to be the application of the existing general rules of law to particular cases. These discussions and interpretations exercised a powerful influence in moulding the rigid principles of the law to circumstances of peculiar hardship.

The manner in which these consultations were had and the responses given is worthy of note. The most celebrated jurisconsults sat every morning upon a tribunal, placed in the vestibule of their houses, and responded not only to questions presented by suitors but gave explanations to those who sought instruction. They often pursued the same practice in public; and before the Temple of Apollo disputed questions on which they differed. If permitted to fly from the stern presence of the genius of the law to the arms of the alluring maid of song, we can here profitably quote the satire of Horace:

"When early clients thunder at his gate,  
The barrister applauds the rustic's fate,"

to prove the custom of annoying jurisconsults early in the morning at Rome.

From a consideration of the various and intricate sources of the Roman law, it is apparent that the work of collecting, elaborating and applying it, was an effort of extraordinary usefulness, but still more extraordinary difficulty. It was, however, successfully achieved by Justinian. However historians may divide upon the question of Justinian's virtues and vices, or contest the integrity of that ambition which subdued Persia and delivered Italy from the Vandals and Huns, there can be no controversy as to the merits of his immortal codes of law. If his equestrian statue has thundered forth war and carnage from the Turkish cannon, into which it was melted down, a more virtuous and beneficial voice has issued from his body of the civil law, to instruct men in the science of jurisprudence, and establish them in the arts of peace and civilization. And the study of the Justinian code shed almost the first gleam over the dark ages and revived not only the jurisprudence, but the philosophy of Europe. The strong will and unusual opportunities of Justinian were needed to bring the Roman law into its existing shape, removing the involved language and useless difficulties.

The compilations of Justinian were known as the Institutes, the Pandicts, the Code, and the Novels. The Institutes were designed as rudiments of the law, or as an introduction to the Pandicts. The Code was a compilation into one Code from those of Gregorius, Hermogenianus and Theodosius and contained decisions of Justinian himself upon unsettled questions of law. The Novels was a term applied to the new constitutions, which consisted of a collection prepared two years after the promulgation



of the Pandicts. The Pandicts or Digest constitute the greatest of the collections we have mentioned. It is the fruit of researches into two thousand volumes, embracing three millions of articles of law. After three years of severe labor it was completed, fifteen coadjutors assisting in its preparation, and was promulgated in the year 529 of the Christian era. The plan was marked out by Justinian himself, in the order of the perpetual edict; it was divided into fifty books, broken into titles. Under each title was placed the fragments of ancient juriconsults, considered pertinent to the subject treated; and these so modified or extended as to conform to the necessities of the times. It has been said that the language of the Pandicts is so pure that the Roman language might be fairly deduced from it, were all other Roman writers lost.

The invasion of Italy by the barbarians was the beginning of a dark period, during which the laws of Justinian were almost wholly obscured. In 867 Basilus of Macedon, with a mean jealousy of Justinian's fame, and in the hope of shading forever his immortal system, published a new code of laws, and these continued to be interpreted and annotated upon until the original works of Justinian were entirely obscured. The authority of the completion of Basilus, corrected and added to by his son Leon, existed until the taking of Constantinople by the Turks. At the time of the restoration of the empire of the west, by Charlemagne, nothing remained of the noble system of laws prepared by Justinian except a few fragments. But in 1186 an entire copy of the Pandicts was recovered at Amalfi in Italy. Lotharius the Second, in the war undertaken in favor of Innocent against Roger, Count of Sicily, who sought to elevate Peter of Leon, had received valuable succours from Pisa.

The people of the latter, valuing more highly the conquests of the mind than the usual military rewards, demanded for their recompense this copy of the Pandicts. It was given and religiously preserved until 1446, when, in a contest with the Florentines, it was taken and conveyed triumphantly to Florence, where it still remains a wonderful relic of the sixth century.

From this period the study of the civil law began to be pursued with enthusiasm in the west, spreading everywhere over Italy and France. Then the beauty and harmony of the system began to be displayed in the institutions of all Europe. It governed all Italy, spread itself to Holland, Asia and Africa, and became the favorite scheme of law for Germany, Portugal and Spain. In France it was the basis of nearly all her judicial authority, and the boasted common law of England, but emanates from the obscured, but still generous and overflowing fountains of Roman jurisprudence. In

Blackstone and other English law, writers may be seen occasionally shed the gleams of this Roman jurisprudence, and its brilliant radiations may be traced to almost every settled doctrine of the law distinguishing the present times.

It will not be considered necessary to argue the usefulness of simplicity in any code of laws. Their perfection consists in their simplicity. If by a superabundance of the phrases and terms in which laws are involved, anything is left uncertain, that uncertainty must be controlled by the arbitrary decision of the judge. Human laws should leave nothing for the judge arbitrarily to construe or supply. The terseness and conciseness necessary to avoid these evils were wonderfully displayed in the Roman laws. These qualities were most apparent in the law of the twelve tables. "Go immediately with him who cites you before the judge," would in our day be a mandate filling an octavo page. Compare the provisions of that law which forbids usury with the extensive regulations of modern statutes. "Let him who takes more than one per cent interest for money loaned, be condemned to pay four times the sum lent."

The present age has not done justice to the Roman law. The tendency has been continually to reject it in favor of an exclusive system — a system not of principles but of precedents. The lawyer spends his time in investigating analogies of circumstances, while perhaps constantly deviating from the line of truth. His mind instead of expanding upon the broad surface of science is prone to a comparison of parallel cases. His library is filled with books of reports and a few elementary works. The number of cases, not the weight of principle, moves the scale of justice.

The chief facts mitigating against the use of the civil law, is the political evils with which its origin was associated. The fact that amidst the defects of the Roman government such a system could be perfected, is a pleasing evidence of the decided independence of her judicial department. Many evils, therefore, attracted to the civil law, were evils, not of the system, but of the arbitrary blending of several departments of government in the same person. In modern times, we recognize a just distinction between the several departments of government. From ancient history, it is difficult to trace in clear lines the boundary or capacity of these. Science has been applied with happy success to the structure of society; and we recognize a simple and useful division of its powers into executive, legislative and judicial. Indeed, the most valuable conquest of government, in modern times, is the separation of these into distinct and independent departments; for the principle of liberty is resistance. In the original organization of the

Roman government this blending together of the several departments of society in one person, and the consequent arbitrary exercise of their functions was productive not only of many of the social evils of former times, but was one reason why a system of laws, correct in principle, might have been improperly administrated. We cannot, therefore, sufficiently admire the superior wisdom and justice which separated the principles which regulate the judicial functions of the State or prince, from mere political prerogations, and establish them upon the firm basis of natural justice. This was done by Justinian, and in the Roman jurisprudence we find the longest known history of any set of human institutions, and from its commencement to its close, it was progressively modified for the better, or for what the authors of the modification conceived to be the better. Proceeding upon the ground of human experience, their whole system of law begins and ends in a series of practical judgments, declaring the just relations daily arising out of the conflicting interests of a vigorous and mighty people, and exceptional value is given to these judgments for all nations and for all time, as having their origin and cultivation, not in the arbitrary decisions of irresponsible rulers, but in the labored opinions of successive jurists elucidating, age after age, universal principles on which to determine all manner of private and public rights. Jurisprudence, like oratory, was closely linked with the State and with the forum and encouraged by favor and renown among the Roman people. To this science, therefore, the noblest devoted their talents and their time; and many, who have spent their prime in the more active service of the commonwealth, benefited their countrymen by their legal advice, at a period of life, when, to the technical skill of the lawyer they added the enlarged wisdom of the statesman.

Louisville, Ky.

BOYD WINCHESTER.

### Abstracts of Recent Decisions.

**ATTACHMENT — SUFFICIENCY OF AFFIDAVIT.** In a statute which makes it ground for attachment that defendant has disposed of his property with intent to cheat, hinder and delay his creditors, or is about to do so with the same intent. (Mansf. Dig. [Ark.], ch. 89).

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EXPRESS COMPANIES.** An ordinance imposing a license tax upon "every express company having an office in the city of A, Va., and receiving goods and forwarding them to points within the State of Virginia, or receiving goods within the State of Vir-

ginia, and delivering them in the city of A," is repugnant to the interstate commerce law and is void. (Webster v. Bell, [U. S. C. C. of App.], 68 Fed. Rep. 193).

**CORPORATION — STREET RAILROADS — LIEN OF JUDGMENT.** The Iowa statute (McClain's Code, § 2008), making a judgment against any railway corporation, for injury to person or property, a lien superior to that of mortgages on its property does not apply to street railway corporations. (Manhattan Trust Co. v. Sioux City Cable Ry. Co., [U. S. C. C. Iowa], 68 Fed. Rep. 83).

**CORPORATIONS — CONSOLIDATION — NEW STOCK.** — Where several corporations transferred their entire property and business to a new corporation, which accepted the same subject to an agreement between the members of the original corporations that payment for the transfer should be made by an issuance of stock of the new company to the several original incorporators, respectfully, in exchange for the old stock held by each, an original stockholder could sue the new company to compel it to issue to him the number of its shares conceded to be his proportion. (Anthony v. American Glucose Co. [N. Y.], 41 N. E. Rep. 23.)

**CORPORATIONS — IDENTITY OF STOCKHOLDERS.** The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other, through ownership of its stock, or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one, so as to make a contract of one corporations binding upon the other. (Richmond & I. Const. Co. v. Richmond, [N. I. & B. R. Co., U. S. C. C. of App.], 68 Fed. Rep. 105).

**CORPORATIONS — TRANSFERS OF STOCK — NOTICE.** The statutes of Connecticut provide (Gen. St. § 1924) that no pledge of stock of a corporation organized under the laws of that State shall be effectual except as against the pledgor or his executors or administrators, unless it is consummated by an actual transfer of the stock, or a copy of the power of attorney to transfer is filed with the officers of the corporation: *Held*, that the purpose of this statute is to protect persons dealing upon the faith of the apparent ownership of the stock in ignorance of the pledge, and accordingly actual notice thereof is equivalent to a transfer on the books, or the filing of the power of attorney. (Hotchkiss & Upson Co. v. Union Nat. Bank, [U. S. C. C. of App.], 68 Fed. Rep. 76).

**COURT — JURISDICTION — COLLATERAL ATTACK.** Where a probate court in Louisiana has assumed to grant administration upon the estate of one who, at the time of his death, was in fact a resident of Mis-

Mississippi, and whose estate has been judicially administered there, such action of the court is wholly unauthorized by law, and its decree can be impeached collaterally. (*Fletcher v. McArthur*, [U. S. C. C. of App.], 68 Fed. Rep. 65).

**DEATH BY WRONGFUL ACT—DAMAGES.**—Where a minor is killed, leaving him surviving, a mother, but no father, it is not necessary for her, in order to recover substantial damages for his death, to prove pecuniary loss since she is entitled to his earnings, and therefore pecuniary loss will be presumed. (*Bradley v. Satler* [Ill.], 41 N. E. Rep. 171.)

**EQUITY — GARNISHMENT — INTERPLEADER.** — A creditor sued in attachment and garnished a fund in the hands of a trustee. While this suit was pending, a third person filed a bill in another court to compel the trustee to turn such fund over to him, and the trustee thereupon filed a cross-bill of interpleader. Held, that the court had no jurisdiction, either of the bill or the cross-bill, the remedy at law in the garnishment proceedings being adequate and the court of law having first acquired jurisdiction. (*Newman v. Commercial Nat. Bank of Peoria* [Ill.], 41 N. E. Rep. 156.)

**FEDERAL COURTS — JURISDICTION — FEDERAL QUESTION.**—If it appears from the plaintiff's complaint that in any aspect which the case may assume, the right of recovery, so far as it turns upon the construction of such statutes, is not merely a colorable claim, but rests on a reasonable foundation, a federal question is involved which is adequate to confer jurisdiction, although the right of recovery is also predicated on other grounds not involving federal questions, and although the case is ultimately decided upon grounds not involving the determination of any federal question. (*St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.* [U. S. C. C. of App.], 68 Fed. Rep. 2.)

**JUDGMENT — COLLATERAL ATTACK — PROBATE COURT.**—When a petition for administration has been presented to a parish court in Louisiana, containing a representation of all facts necessary to confer jurisdiction to grant administration to the public administrator and decree the sale of property to pay debts, and such court, having power to inquire into the facts, and in the regular exercise of its jurisdiction, has made a decree granting administration and directing a sale, such decree cannot be questioned collaterally, either on the ground that the succession was not vacant, but had been assumed by the heirs by a tacit acceptance, or that the decedent died in another parish, or that there were no debts, or that no notice of the proceedings was given to the parties interested. (*Garrett v. Boeing* [U. S. C. C. of App.], 48 Fed. Rep. 51.

**MECHANIC'S LIEN — WAIVER — INCONSISTENT SECURITY.**—It seems that, while the right to a mechanic's lien may be waived by the acceptance of a contract to pay for the work in securities whose existence is inconsistent with the existence of a lien, such waiver is only conditional upon the actual performance of the contract, and if it is not performed, the right to the lien continues. (*Central Trust Co. v. Richmond, N. I. & B. R. Co.* [U. S. C. C. of App.], 68 Fed. Rep. 90.)

**MUTUAL BENEFIT INSURANCE — APPLICATION.** — Where, by the terms of a certificate of insurance, issued by a mutual benefit association, the application and medical examination are made a part of the contract, and in such application it is stipulated that the statements made therein and answers made to the medical examiner are to be deemed warranties, untrue statements in such application and untrue answers made to the medical examiner in answer to questions propounded, constitute a breach of the warranty, and avoid the contract. (*Knudson v. Grand Council of Northwestern Legion of Honor* [S. Dak.], 63 N. W. Rep. 911.)

**RAILROAD MORTGAGES — AFTER-ACQUIRED PROPERTY.**—The S. Ry. Co. made a mortgage covering after-acquired property, which was recorded in W. county, Iowa, on January 31, 1890. On January 21, 1890, the railway company took a lease of certain lands for depot purposes within W. county. Most of the rolling stock acquired by the railway company was shown to have been delivered to it before being used on such depot grounds, and none was shown to have been used there before delivery to the railway company: Held, that, as to all rolling stock acquired after the recording of the mortgage, the lien of the mortgage attached immediately upon its delivery to the company in W. county, or upon its coming within that county, and before any lien could attach in favor of the landlord under the Iowa statute (*McClain's Code*, § 3192), giving a landlord a lien for rent on any personal property of the tenant used on the premises during the term. (*Manhattan Trust Co. v. Sioux City & N. Ry. Co. Trust Co. of North America* [U. C. C. C., Iowa], 68 Fed. Rep. 72.)

**SALE ON EXECUTION — OBJECTIONS TO APPRAISAL.**—Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisal, before the sale occurs. (*Kearney Land & Investment Co. v. Aspinwall*, [Neb.], 68 N. W. Rep. 827.

# The Albany Law Journal.

ALBANY, SEPTEMBER 21, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE candidates for the Republican nomination for Associate Justice of the Court of Appeals at the recent Republican Convention of New York were Justice Celora E. Martin of Binghamton; Hon. Jesse Johnson of Brooklyn, who was a member of the recent Constitutional Convention, Justice Henry H. Childs of Orleans county, Judge William H. Adams of Ontario county, and Supreme Court Justice Pardon C. Williams of Watertown. All of these are men of ability and learning and have for years been regarded as men of credit to the bench and bar.

Judge Martin was nominated on the second ballot and his nomination was then made unanimous.

Judge Celora E. Martin is a resident of Binghamton. He was admitted to the bar in July, 1856, and began his practice in Broome county the following year. In 1867 he formed a partnership with the Hon. O. W. Chapman, late Solicitor-General of the United States. The firm had a large and successful practice, and built up a business second to none in their part of the State.

The partnership continued until May, 1877, when, upon the petition of practically all the members of the bar of the district, irrespective of party, Judge Martin was appointed Justice of the Supreme Court of the Sixth District by Gov. Lucius Robinson. The appointment was confirmed by a Republican Senate. In the fall of that year he was nominated by both parties for the full term and was elected unanimously. After filling the office for more than fourteen years he was renominated by both Republican and Democratic parties, and again was elected unanimously. After having been engaged in circuit work for ten years, he was designated by the Governor as a member of the General Term of the Fourth Department. At the expi-

ration of his first term he was named again for the same office, which he has occupied ever since.

The nomination is made to fill the vacancy caused by the forced unfortunate retirement of Judge Finch. The loss of Judge Robert Earl on the bench of the court of last resort has been felt keenly in many ways where his vast experience was of great value, and we but echo the universal sentiments of the bar when we regret that Judge Finch must retire however talented his successor may be.

For the first time in the history of the Court of Appeals, it convened in extraordinary session on Tuesday, September 17, 1895. The session was held to listen to argument of the constitutionality of the annexation of part of Westchester county to New York city by the act of June 9, 1895. The appeal arose on the application of Augustus M. Field for a *mandamus* to compel the board of aldermen of New York city to reapportion the Assembly districts of New York county so as to include the annexed part of Westchester county. There is also an appeal from the decision of the General Term granting an application of Henry C. Henderson for a *mandamus* to compel the board of supervisors of Westchester county to apportion the annexed territory in one of the Assembly districts of that county. There are also two appeals from decisions denying an application for an injunction against the police authorities of New York city to restrain them from interfering in the affairs of the town of Westchester and the village of Williamsbridge, part of the annexed territory.

The courts below have decided that the act of annexation is constitutional, so far as it annexes the territory in question to the city and county of New York for municipal and administrative purposes, but that the territory still remains a part of Westchester county for the purposes of Assembly, Senatorial and judicial elections. The citizens of the annexed territory represented by Augustus M. Field, who brought the *mandamus* proceedings against the Board of Aldermen, assert that the act is constitutional in every respect, that the effect of the act was to transfer this territory bodily from Westchester county to New York county; that it was thereby taken out of the Twenty-second

Senate district, which is described in the Constitution as the county of Westchester, and became a part of the Twenty-first Senate district, which is described in the Constitution as embracing all that part of the city and county of New York "not hereinbefore described." It is further asserted that inasmuch as this act went into effect before the date fixed by the Constitution for the division into Assembly districts by the Board of Supervisors of Westchester county and the Board of Aldermen of New York city, the territory in question should have been apportioned in one of the Assembly districts of New York county. The Senate districts would then be bounded by county lines instead of being intersected by the dividing line between Westchester and New York counties. The number of inhabitants in the annexed territory is about 13,000. Adding these to the Twenty-first Senate district and taking them from the Twenty-second tends to equalize those districts and to carry out the spirit of the constitutional apportionment. It is asserted further that it will be an injustice to the citizens of the annexed district if they are merged in New York county for municipal purposes and remain in Westchester county for election representation. These contentions were the basis of the argument of Mr. William B. Hornblower, who appeared for Mr. Field.

The argument of William D. Guthrie, who represented the people opposed to annexation, was based on the theory that where county lines form the boundaries of either judiciary or Senate districts they cannot be altered, under the Constitution of the State, by the Legislature, except immediately after a census of the State provided for by that Constitution. In support of this theory he directed attention to a number of the provisions of the State Constitution referring to Senate and judiciary districts. It is provided, for instance, that the "State shall be divided into fifty districts, to be called Senate districts," each of which shall choose one Senator. Among these fifty it appears that "District number twenty-two (22) shall consist of the county of Westchester." Further on it provided "that no county shall be divided in the formation of a Senate district, except to make two or more Senate districts wholly in such county."

Still further it is provided in the apportionment of Assemblymen that "until after the next enumeration members of the Assembly shall be apportioned to the several counties as follows: \* \* \* New York county, thirty-five members; \* \* \* Westchester county, three members."

It was argued that if the Legislature, in spite of these provisions, could take a part of one county and add it to another, then, instead of the small slice taken from Westchester, say nine-tenths might have been taken and the one-tenth left, with a Senator and three Assemblymen to represent it in the State Legislature. Or, on the other hand, an arbitrary Legislature might annex a half of New York county to Westchester, which would still have but one Senator and three Assemblymen, while the part of the city left to be New York county would have its twelve Senators and thirty-five Assemblymen.

Then there were the provisions of the Constitution, defining the judicial districts and departments. Quotations from two sections were made. One provides that "the existing judicial districts of the State are continued. \* \* \* The Legislature may alter the judicial districts once after every enumeration, under the Constitution, of the inhabitants of the State, and thereupon reapportion the justices to be thereafter elected in the districts so altered." The Constitutional Convention found the judicial districts bounded by county lines and declared its intention to continue them as so constituted. That is to say, it provided in the Constitution that "the Legislature shall divide the State into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof."

Under the mandate of this last provision a judicial department was created that included Westchester county. And yet in the face of this constitutional mandate, as it was argued by Mr. Guthrie, the Legislature, by its act of June 6, 1895, altered the judicial department of which Westchester was a part, thus: The annexed part now in dispute, according to that

act, "is hereby set off from the county of Westchester and annexed to, merged in, and made part of the city and county of New York, and of the Twenty-fourth ward of said city and county, and shall hereafter constitute a part of the city and county of New York and of the Twenty-fourth ward of said city and county, subject to the same laws, ordinances, regulations, obligations and liabilities, and entitled to the same rights, privileges, franchises, and immunities, in every respect and to the same extent as if such territory had been included within said city and county of New York at the time of the grant and adoption of the first charter and organization thereof, and had so remained up to the passage of this act."

It is argued by those who favor the annexation scheme, said Mr. Guthrie, that the annexed district could become an integral part of the city save in the matter of the elections of senators and in judiciary matters. To this Mr. Guthrie replied at length. The whole theory and the entire system of the administration of justice in criminal cases depend upon the integrity of the county. Crimes are to be tried in the county where committed. Jurors are selected within the limits of the county, and such county officials as sheriffs, district attorneys and clerks must act only within the limits of the county. A crime not indictable by the grand jury of the county where committed, not triable by a petit jury of that county would be an anomaly, and yet such results must follow the division of a judicial district by the alteration of a county line.

Then the place of trial of many civil actions pending in the Supreme Courts is determined by the county in which the parties reside. "If the annexed territory continues a part of the Second Judicial district, will actions between its residents be triable in Westchester county or in New York county? In the former case, the action would be tried in a county in which neither party resided. In the latter case, the trial would be had before a tribunal whose judges the parties had no share in electing and before a jury upon which neither they nor their neighbors had the privilege of sitting."

Reference was made to the sentiment of the people, and the arbitrary and rude severing of old ties without the consent of those in-

involved. The fact that about 13,000 people were involved was not to be considered. Whether many or few were connected with the case was a matter of absolutely no moment, for this was wholly a question of principle and constitutional law. The argument ended in an eloquent appeal for a strict observance and a strict interpretation of the Constitution in all matters involving the fundamental law of the State.

Corporation Counsel Scott, of New York city, argued that the act was unconstitutional, and that its effect was to annex territory to New York county for municipal purposes, but that it left this territory in Westchester county for electoral purposes.

William B. Hornblower, of New York city, contended that the annexation was constitutional, not only for municipal but also for Senatorial and Assembly purposes.

In view of the historical and legal value of Mr. Guthrie's legal argument, we print it in this issue of the JOURNAL. The court announced that it would file its decision with the clerk on September 27, 1895, and then adjourned until October 8th.

Comptroller Bowler has gained considerable fame and achieved great distinction by his fearless and bold stand in the sugar-bounty case. We never could comprehend why one class of producers should receive any benefit which all other individuals did not possess, and it is immaterial to us whether Mr. Bowler acted in a judicial capacity as an executive officer or not, so long as he performed his duty in a proper and legitimate way. We think no one will gainsay us that, in preventing the payment of an unconstitutional appropriation, Mr. Bowler only carried the powers vested in him to their proper end. It is through the bold and independent exercise of the judicial function that this country has more than once escaped attempts by Congress to overthrow or evade the fundamental laws. Some one has said that the preservation of our republican institutions is due more to the interpretations of the Supreme Court than to any legislation enacted by Congress, and without inquiring closely and with particularity into the assertion, it is clear to all students of our political history that if the courts had not the power to apply to every stat-

ute the test of the Constitution, we should be in much greater peril than we are from the demagogues and populists who too often succeed in controlling Congress.

In the case of the sugar bounty, if the attempt to secure it succeed, the courts will be deprived of the opportunity to pass upon the constitutionality of many important statutes. It was contended by the counsel for the claimants of the bounty that the executive branch of the government has not the power to pass upon the constitutionality of a law; that that function rests with the judicial branch of the government alone, and that the executive must obey an act until the courts decide that it is void. If this view be sustained, then Congress may compel the expenditure of public moneys as it sees fit. The courts have decided that the public money shall not be expended for private uses; that the people of a town may not be taxed for the purpose of encouraging manufactures, and that forced contributions may not be levied in aid of inns, banks, farmers, commercial enterprises, or for the promotion of the interests of individuals, on any pretext whatever. But if the treasury officials must pay every appropriation authorized by Congress, without question, then these decisions are of no avail, and the limitations imposed by the Constitution upon the power of the legislative branch of the government in this respect are no limitations at all.

If no executive officer can prevent payment of an unconstitutional appropriation, the power of Congress to give away the public money for any purpose whatever is only limited by its own loyalty to the fundamental law. But Mr. Bowler has taken the only ground that can be sustained, for the courts have passed on this question more than once. An unconstitutional law is void, and no one is bound to obey it. On the contrary, no executive or administrative officer ought to obey it. As Mr. Bowler says in his opinion, "It is true that the officer acts at his peril if he does not execute a constitutional statute, but it is none the less true that he acts at his peril if he executes an unconstitutional statute." He must be the judge. Justice Field has said, "An unconstitutional act is not a law; it binds no one and protects no one."

The Comptroller is an executive and not a judicial officer, but he is charged with very important judicial functions. It is his duty to grant or refuse the payment of money under the laws of Congress, and if he believes that an act of Congress directing a payment is contrary to the higher and controlling law of the Constitution, it is his duty to refuse payment. Mr. Bowler has obeyed his view of the Constitution, and his view is sustained, in principle, by more than one decision of the Supreme Court of the United States, and, in respect to this very sugar bounty, by the Court of Appeals of the District of Columbia. In view of the decision rendered by the Court of Appeals, which has been referred to and quoted in these columns, Mr. Bowler would have put himself in serious peril if he had not declined to pay the sugar bounty.

Whether he is right or wrong in his view of the constitutionality of the appropriation for the bounty is a question that may now be passed upon by the Supreme Court. The claimants of the bounty may bring an action for the recovery of the money in the Court of Claims, and from the decision of that court either they or the government may appeal to the Supreme Court. The question could not have been presented to that court in any other way. If Mr. Bowler had signed the warrant and the claim had been paid by the treasurer of the United States, a precedent would have been established, and Congress might have gone on evading the Constitution by making appropriations for every communistic and private enterprise that pleased its fancy or that aroused its demagogic fears. If Congress by a simple appropriation can set the Constitution at naught, and can escape from the interpretations made by the courts, it can compel the payment of public money in aid of one crop or all the crops, in aid of egg-raising or tree-planting, in direct loans to farmers or merchants or manufacturers, or in bounties to railroads or rain-makers. For if the sugar bounty is constitutional, or if the constitutionality of the act authorizing it cannot be questioned by the Comptroller of the Treasury, or by any other executive officer having any duty to perform with respect to it, then any gift or any loan of the public moneys is possible, and there is no

limit to the taxes that may be imposed upon the country for the gain of private persons.

The bounty claimants are now confronted by a situation. Will they go to the courts and have the constitutionality of the statute passed on by the Supreme Court of the United States or will they attempt to have a seemingly unconstitutional statute of Congress amended to conform to our fundamental law? The latter course would require the act to be repealed as any act unfairly discriminating in favor of any class is properly without the authority of Congress to frame. This sort of legislation will cease only when representatives fairly give expression to the sentiments of their constituents.

#### WESTCHESTER ANNEXATION CASES.

ORAL ARGUMENT OF WILLIAM D. GUTHRIE BEFORE THE COURT OF APPEALS IN SUPPORT OF CONTENTION THAT ACT OF JUNE 6, 1895, IS UNCONSTITUTIONAL AND VOID.

At the close of the last session of the Legislature, this act was hurriedly passed, arbitrarily transferring fifteen thousand inhabitants from one county to another without consulting their desires, or submitting the measure to the vote of those vitally affected. As the comptroller of the city of New York has publicly declared, the annexed territory is to the city an unwelcome foundling left on its doorstep. The feeling of indignation in the locality at once precipitated a contest in the courts. The utmost confusion reigns; for our whole system of laws, providing for the administration of public affairs and civil and criminal justice, is based upon the integrity of the counties. We have another instance of the deplorable results arising from hasty and ill-considered legislation which is so fruitful of unconstitutional measures in national and State affairs. One judge in Westchester county declares the act constitutional in some aspects; the surrogate of the same county decides that it is wholly unconstitutional. Under the circumstances, there was no alternative except to pray your honors to convene in extraordinary session. We hope it has been sufficiently shown that the public interests imperatively demanded this sacrifice of your convenience.

The issues to be discussed and decided in these cases are of far-reaching importance, involving, in the gravest form, a question of constitutional law. The determination of the court will unfold a standard of truth for the interpretation of the Constitution of 1894, as our organic and fundamental law, not merely for the litigants be-

fore you; not for one political party, nor for one locality, but for all the people, for all parties, for the whole State. The advocate at your bar can never be called upon to perform a duty of more vital and comprehensive interest or of greater dignity than that of assisting the court to maintain and enforce the Constitution according to its letter and its intent. Indeed, the highest office of our epoch of the profession is that of conservators of established and time-honored institutions against the spirit of change now so rampant.

The following argument is made on behalf of the relator in the Westchester mandamus proceedings and on behalf of the town of Westchester and village of Williamsbridge in the injunction suits. The latter proceedings were instituted to restrain the officers of New York county from taking forcible possession of the town and village. The validity of the act is challenged by our clients upon the ground that it violates the express provisions of the Constitution of 1894 which apportion the Senate and Assembly districts among the counties and establish the judicial districts and departments of the State. We contend that the whole act is void, and cannot be sustained in any respect. It conflicts with express constitutional provisions; it violates the spirit thereof, and it tends to destroy the unity and integrity of counties and local associations upon which the Constitution itself was framed.

There are six controlling provisions of the Constitution of 1894 to be brought particularly to your attention, although in almost every article the county system is referred to. Section 3 of article III provides that the "State shall be divided into fifty districts to be called Senate districts, each of which shall choose one senator."

The districts are then apportioned among the sixty counties of the State, but the county lines are rigidly adhered to as boundaries for these Senate districts.

The section further provides "District number twenty-two (22) shall consist of the county of Westchester."

Section 4 of article III provides: "No county shall be divided in the formation of a Senate district except to make two or more Senate districts wholly in such county."

These constitutional provisions, of course, had reference to the county of Westchester as it existed when the new Constitution took effect, namely, January 1, 1895. Article XV so provides.

Section 5 of the same article of the Constitution declares as to Assembly districts: "Until after the next enumeration, members of the Assembly shall be apportioned to the several counties as follows:  
\* \* \* New York county, thirty-five members;  
\* \* \* Westchester county, three members."



Upon an examination of the apportionment of Senate and Assembly districts made by the Constitution of 1894, it will be observed:

1. That the basis of the apportionment is the *county*.
2. That each Senate district is wholly within a county or bounded by county lines.
3. That each Assembly district is wholly within a Senate district, and wholly within a *county*.
4. That the apportionment then made is to remain unalterable "until after the next enumeration," viz., 1905.

These features observed and followed in the constitutional apportionment then made, are, moreover, commanded to be observed by the Legislature in 1905 and in all future apportionments.

Section 1 of Article VI of the Constitution of 1894 provides as follows;

"The existing judicial districts of the State are continued until changed as hereinafter provided. \* \* \* The Legislature may alter the judicial districts once after every enumeration under the Constitution, of the inhabitants of the State, and thereupon reapportion the justices to be thereafter elected in the districts so altered."

The convention found the judicial districts bounded by county lines (Ch. 24, Laws 1876), and declared its intention to continue them as so constituted.

Section 2 of the same article provides:

"The Legislature shall divide the State into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof."

In obedience to this mandate of the Constitution, the Legislature, on the 13th of April, 1895, two months prior to the passage of the Act we are now considering, divided the State into judicial departments (Chap. 376, Laws 1895, amending Sections 219-222, Code Civ. Proc.), and used the following language:

"The State is hereby divided into four judicial departments. The first department shall consist of the county of New York; the second department shall consist of the counties embraced within the present second judicial district. \* \* \*"

The counties embraced in the present second judicial district (Chap. 24, Laws 1876) are Richmond, Suffolk, Queens, Kings, Westchester, Orange, Rockland, Putnam and Dutchess.

We now come to the act of June 6th, 1895, attacked in these proceedings. The act provides that

the territory in question, with its inhabitants and estates—to quote its exact language:

"Is hereby set off from the county of Westchester and annexed to, merged in and made part of the city and county of New York, and of the twenty-fourth ward of said city and county, and shall hereafter constitute a part of the city and county of New York and of the twenty-fourth ward of said city and county, subject to the same laws, ordinances, regulations, obligations and liabilities, and entitled to the same rights, privileges, franchises and immunities, in every respect and to the same extent as if such territory had been included within said city and county of New York at the time of the grant and adoption of the first charter and organization thereof, and had so remained up to the passage of this act."

Two views are advanced by our adversaries for your consideration. On the one hand, the board of supervisors of Westchester county, represented by Judge Robertson, and the relator in the New York *mandamus* proceedings, represented by Mr. Hornblower, contend that the intention of the Legislature was to annex the territory in question to the county of New York in every respect and for all purposes, and to make it part of the Senate and Assembly districts of New York county as well as part of the first judicial district and department. They insist that the act is not in conflict with the Constitution, and is valid in all its aspects. On the other hand, the corporation counsel of the city of New York agrees with us that the Legislature could not constitutionally change the county boundaries so as to alter the Senate and Assembly districts apportioned by the Constitution or the judicial districts and departments; but he contends that nevertheless the act of 1895 can be given some force and effect by considering the territory annexed to and merged in the county of New York for all purposes except as to the boundaries of the Senate and Assembly districts and of the judicial districts and departments.

According to the contention of the corporation counsel, the use by the constitutional convention of county lines as the boundaries of the Senate districts and judicial departments sprang from no fundamental principle or public policy, but was merely and solely the adoption of convenient measurements and lines of survey upon an apportionment map. As he conceives it, the strict preservation of the integrity and unity of counties in the division of political power, found in the present Constitution, embodies no recognition of any organic or essential characteristic of our form of State governments. This argument, if sound, leads to the conclusion that the Legislature can at any time change the lines and boundaries of every county in the State, and read-

just the entire county system, even if the result should be that the majority of senators and assemblymen would represent districts composed of parts of different counties. It logically leads to the conclusion that that body can, at its will, destroy the counties altogether and erect in their place new political subdivisions of the State.

The other view is more extreme. The contention of Judge Robertson and Mr. Hornblower seems to be, or at least it amounts to the proposition, that the Legislature was left absolutely free to change the Senate districts at its will by simply altering the county boundaries, and thus increase or diminish a Senate district at any time according to the existing wishes or interests of the dominant party. This argument, of course, leads necessarily to the conclusion that the Legislature could have annexed to the county of New York four-fifths or more of the county of Westchester, leaving the remaining fifth or less entitled to the senator representing Senate district twenty-two, and also entitled to the three assemblymen allotted to Westchester county by the Constitution of 1894. Further, if the Constitution intended to refer to the counties solely as political organizations, leaving power in the Legislature to change the boundaries at its will, then it must follow that nine-tenths of the county of Westchester could be annexed to the county of New York, leaving the remaining tenth entitled to one senator and three assemblymen. It would also follow that the county of New York could be divided by the Legislature and one-half thereof annexed to Westchester county, leaving the remaining half entitled to the twelve senators allotted to New York county. Then, the first half, incorporated into Westchester county, would be entitled only to the one senator now allotted to that county! If the Legislature has the power to change the territory of a Senate district to any extent under the guise or mask of changing county boundaries, who is to say how far it can or cannot go in this process of remodeling and reapportioning the State—what test is to guide—what principle is to be followed—what rule of restraint is to check?

If, however, the view of the corporation counsel be approved and sanctioned by this court, the result must be that, although the Constitution expressly provides that "district number twenty-two shall consist of the county of Westchester," this district under the operation of the act of 1895 is now to consist of the county of Westchester and part of the county of New York. It will also result that, although the Constitution allots to Westchester county three assemblymen, the new act practically changes the effect of the Constitution so that three assemblymen are allotted to the county of West-

chester and a certain portion of the county of New York.

Again, further considering this view, the Constitution found the judicial districts of the State bounded by county lines, and directed that they should continue as so bounded until 1905. Under this new legislation, as construed below in the Westchester proceedings, the first judicial district no longer consists of the county of New York, but of a portion thereof; the second district is no longer bounded by county lines. The Constitution of 1894 expressly directs, in the clearest of language, that the State shall be divided into four judicial departments comprised of entire counties. It reads: "The first department shall consist of the county of New York; the others shall be bounded by county lines." Under the new act, if valid, the first department no longer consists of the county of New York, but of a portion thereof; the second department is no longer bounded by county lines, for it now consists of several entire counties and a portion of the county of New York. And so, the constitutional mandate can be nullified as to every judicial department of the State.

The argument will also be submitted to your honors by our adversaries that the Constitution simply evidences the purpose to observe county lines in the *formation* of Senate and Assembly districts and judicial departments, and that when this rule has been once applied and the districts formed, it has spent its whole force, leaving the Legislature at liberty the next day to change every county line. It must strike the court that this is mere sophistry, and a play upon words. Certainly, if there is any policy manifested by the Constitution in this provision that counties shall not be divided in the creation or formation of Senate districts and judicial departments, it cannot be that the object and aim of that policy vanish or become exhausted the moment the Senate districts and judicial departments have been formed. No reason can possibly exist why there should be any limitation at the original organization of a Senate district or judicial department, and then permit it to be changed at the will of the Legislature the next hour. The reason which dictates the observance of county lines must certainly survive the process of formation. The objections to a disregard of county lines are as actual and manifest, as potent and convincing, in the one case as they are in the other.

It was the declared intention of the framers of the Constitution of 1894 to recognize more emphatically than ever before and to perpetuate a system of representation in senate and assembly based upon the unity of counties. The great contest in the convention was as to the apportionment article.

The] principal attack during the electoral campaign was upon the apportionment article. The avowed purpose of the framers, announced in language which they conceived and which they boasted would be unmistakable — their purpose was to prevent any apportionment by which a Senate district might be made up of parts of two or more counties. In the Constitutional Convention, the Republican majority insisted upon the importance of the distinct and independent recognition of counties as such in the distribution of the law-making power. The Democratic minority urged that such an apportionment would result in inequalities of population, and that an arithmetical division of the State according to population should be made. Those triumphed who contended that the system of counties and the unity of interest and association and ties there found should be rigidly preserved unmoled. That basis was adopted, and it has been approved by an overwhelming majority of the people of the State. The apportionment article was attacked on the ground, and the attention of the people specifically and repeatedly called to the point, that inequalities resulted from this county apportionment as distinguished from a mathematical division according to population. But the complete answer was that the fixed habits and customs and the best and noblest traditions and sentiments of the people were embodied in and limited to county concerns, to county organization, to representation by counties in State affairs, and that the maintenance of county lines and of the community of interest found therein was of supreme interest to the people of the State and of far more importance than a mere inequality of population incidental to a county apportionment. As Mr. Root said in the debate: "Destroy these county lines in order that the State may be districted for senators and assemblymen, and you create new lines and new divisions in which the people are to create new friendships and which any future convention may destroy." In the same debate, Mr. Cookingham declared that the people would not tolerate the breaking down of their county lines, and that if the convention should divide counties in order to make up the Senate districts, a constitutional provision submitted to the voters that proposed any such division for Senatorial districts would be buried under hundreds of thousands of votes.

From an examination of the debates in every Constitutional Convention, it will be seen that the framers considered that the placing of parts of the same county in different Senate districts (as in this case a part of New York county in the Westchester Senate district) was an evil and a vice to be avoided. It was not a matter of serving some political or parti-an purpose.

It went far deeper than that. The objections assigned to thus dividing a county were that it destroyed the unity and integrity of counties, dissociated in political action those who were united in interest and associated those who were opposed in their interests, interfered with fair representation by unequal combinations in which the just claims of the weak fragment might be unheard and disregarded, and, above all, imposed upon the representing senator or assemblyman the impossible duty of acting as the agent of antagonistic and irreconcilable interests. An your honors will perceive, these objections have no relation to the manner in which the division of a county is effected or to the main purpose to be accomplished thereby. The objection exists to the thing itself in any form, in any shape, to accomplish any purpose. If these objections are to be given their weight and we are to read the Constitution in that light, an act of the Legislature must be declared unconstitutional and void, which imposes upon the senator and one of the assemblymen of the twenty-second Senate district the duty of representing at once the county of Westchester and part of the county of New York.

It seems to be the idea of our learned adversaries that this court will fail to recognize any sound reason or wise public policy for observing and continuing county lines in the distribution of political power. They imagine that the county system is not organic or essential; that the adoption of county lines as the constitutional basis and standard of division is of no particular significance, and that, at any rate, you will permit this act to stand because the offense is not great, and may tend to equalize the population in one of the Senate districts, and thus render the apportionment more systematic. But, if your honors please, those who seek the true principles of the government of this State by exploring the source and origin of our institutions, by going up the river of time to the first fountains, discover that our race has little regard for scientific arrangement or mathematical classification in the composition of their representative governments. They learn to appreciate the truth that human nature is composed of something more than mere intellect and calculation of present interests and convenience. They see that of far more controlling influence are our sentiments, our customs, our instincts, our traditions, our affection for the soil, our sense of unity of interest with our neighbors. These are the forces which have guided our destinies before we were born, and which stir all the reverential sentiments of the heart. These are the ties which really hold States together. They have not sprung from philosophical theories. They are the invisible roots of our institutions, which lie deep in the customs of the past. Custom is of the very essence of our consti-

tutional systems, and custom, the Romans tell us, is almost a second nature. In our habits and customs, under the surface, where the depths of national life and instinct and constitutional organism are heaving constantly, you will find the true source and explanation of our institutions. Nothing in the past should be dead to him who would learn how the present comes to be what it is, and who would trace that continuity of life which runs through the whole series of political causes and consequences—a series which seems one mighty and continuous stream of mingled experience, sentiment and reason, deepening and washing itself clearer as it runs on to find its flood-gate in the written constitutions of the American commonwealths.

The county organization existed before the Declaration of Independence. When, at the suggestion of the Continental Congress, the first Constitution of this State was drafted and submitted to the people in 1777, they voted for it by counties and as residents of counties. From time immemorial, through many troubled centuries, has come down to us our system of county governments. The framers of the first Constitution in 1777 and those who drafted the new Constitutions in 1821, in 1846, and in 1894, knew better than to commit the folly of breaking with the past. They saw, as Mr. Bryce has so well said in speaking of our system of commonwealths, that "Everything which has the power to win the obedience and respect of men must have its roots deep in the past."

The statesman who refuses to appreciate and consider the influence of custom and sentiment upon institutions is as blind as the man who concludes that because he cannot see the north star at noon-day, it has disappeared from the firmament. Yet that star, obscured temporarily though it be by the sun, still guides the compass by a force beyond analysis and irresistible. So also, by a power as subtle, as potent, as resistless have custom and sentiment ever swayed the destinies of the human race.

If your honors please, all these considerations as to local unity of interest, association and sentiment are, according to the views of our adversaries, to be wholly disregarded; and one of the following theories is to be sanctioned—to use the exact language of Mr. Hornblower's brief in this court.

(1) Construction of corporation counsel as to effect of reference to "counties" in Constitution:

"Fixed territorial areas, namely, areas whose boundaries are permanently fixed by the lines which were boundaries of certain counties at the adoption of the Constitution; the boundaries of these fixed territorial areas permanently continuing the same, irrespective of any change that may be made in the

boundaries of the counties. In other words, that the counties determine the districts merely in the sense that their boundaries on a certain day were used as convenient measurements for the districts. Under this view there is, therefore, no organic connection between the county and the district."

(2) Construction of relator in New York *mandamus* proceedings:

"If this is not the meaning of the word 'counties,' as used in article III, section 4, it must mean as the only possible alternative:

"Political organizations, namely, organic historical units whose organization is preserved, irrespective of any shifting of their boundaries."

The political division of the State of New York has always been based upon the counties. The colony of New York was so divided, and such was the theory of the first Constitution in 1777. The wisdom and necessity of preserving the integrity of counties as the local organizations and the community of interest and local association therein, has always been recognized in every constitution. The State is not divided partially into one or more cities and the remainder into counties; but every inch of ground in the State is part of some county. It is merely accidental that the boundaries of the city of New York are co-terminous or identical with the county lines.

Counties are something more than ordinary municipal corporations, or mere territorial boundaries for convenient measurement or use in connection with an apportionment map. They are of a substantial and fundamental political character, constituting the machinery and the essential agencies which have upheld our free governments derived from and modeled upon the popular features of the English constitution. To the remotest period of Anglo-Saxon history do we trace our ideas of government by means of counties. It may be that our Constitution does not expressly provide for the division of the territory of the State into counties, but that division is taken for granted and is assumed to be necessarily implied. The system of counties exists in every State, and the idea of counties underlies all American constitutions. Our organic laws presuppose both the existence and the necessity of counties. Starting from that foundation, the people proceed to base thereon frames of government in which counties act the all-efficient parts. The local interests, associations and customs of the people are centred and united in counties, and through the representatives of counties the Senate and Assembly have always voiced the will of the people.

The legislative power of the State is composed of representatives from counties or from Senate districts composed of counties, not from towns and cities. These political county organizations are intimately

connected with popular interests and with our very political existence. Thus, the courts have not hesitated to assert that the counties cannot be destroyed by legislation, and that the importance of preserving the character of these political county organizations, for the common good, is far above any consideration of private convenience, or the desires or interests or personal benefit of any class or faction.

In the case of *People, ex rel. Townsend, v. Porter*, 90 N. Y. 68, 73, Andrews, Ch. J., said:

"It requires but a very cursory reading of the Constitution to discover that the separation of the State into counties, towns, cities and villages, for the purpose of local government, is an essential part of the framework of the State government, and that these were the only divisions for the purpose of local government contemplated by the framers of that instrument. The perpetuation of these divisions is essential to many of the arrangements of the Constitution, and their continued existence, and the expansion of the system, is provided for."

In the case of *The People, ex rel. Wood, v. Draper*, 15 N. Y. 532, 541, the court, per Denio, C. J., speaking of the counties as essential political divisions of the State, used the following language:

"It cannot be denied that an act of the Legislature which should propose to abolish counties would be hostile to the arrangements of the Constitution. There are a great many provisions of that instrument, to the execution of which counties are indispensable. Members of the Assembly are required to be apportioned among the counties; electors must be inhabitants of counties; county boards are required to form Assembly districts. There are to be county judges and county courts. The boards of supervisors, which are county authorities, may be made the recipients of a portion of the legislative power."

The State exists to-day as a commonwealth by virtue of its Constitution. The Legislature is not omnipotent. It is the creature of and subject to the Constitution, and its power to legislate is derived from a constitutional grant. Beginning with the very foundation of the State in 1777, through every change, the people, exercising a sublime act of self-restraint, have had the virtue and the wisdom to embody in the Constitution certain fundamental rules of law and policy which they desire shall be organic and permanent, and which they decree shall be placed out of their own reach and power to hastily or inconsiderately change. They have thus raised a bulwark against the unadvised action and the uninstructed will of their legislators—a bulwark which saves the people not merely from their enemies; it saves them from themselves. Every State has its written constitution, embodying and declaring the organic law. Such a constitution and frame

of government may indeed be said to be essential under the Federal Constitution which guarantees "to every State in the Union a republican form of government."

In the construction of the Constitution, we must look to the history of the time and examine the condition of the people and the state of things as well as the statutory law existing when it was framed and adopted. In fact, immemorial usage may be considered as part of every State constitution.

This court has repeatedly recognized that the provisions of the Constitution are intended to be certain and fixed and to declare the permanent will of the people as to the policy of the State government. As has been said by you, the very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a constitutional provision is made upon any subject, the presumed object and intention, as well as the legal effect of such provision, are that it shall be permanent. No act of the Legislature can be valid which is in conflict with a constitutional provision upon the same subject or with its implied or manifested intent or spirit. We need not point to express inhibitions of legislative action. The affirmative provisions are themselves sufficiently fruitful of restraints. Every positive direction contains an implication in itself against anything contrary to it, or which would frustrate or disappoint or nullify or circumvent the purpose or spirit of that direction. An implied prohibition is as effectual as if it had been recited, for is not what is implied as much a part of the instrument as what is expressed?

If your honors please, when the framers of the Constitution recognized the public policy of fostering and perpetuating the local unity of interest and associations existing in the counties, and therefore adopted the counties as the basis of the apportionment of Senate and Assembly districts and judicial departments, they intended the Constitution to speak of such counties as they were, and dealt with them as permanent divisions of the State in substance and spirit, and not as arbitrary lines of survey or measurement upon an apportionment map. The power certainly cannot exist in the Legislature, by changing county lines, to destroy all the significance of the theory, scheme and spirit of the Constitution, and thereby leave the apportionment by counties meaningless and purposeless.

As one of the judges said in the *Draper* case (15 N. Y. 532, 560):

"The Constitution of 1846 did not provide a government for a new people, for a community of men just collected together and without civil government. It was the amendment and reforma-

tion of a scheme already existing; the substantial and material institutions and forms of which had come down to us from our English ancestors. They embodied the reason, the wisdom and experience of many generations. They were consecrated by time, by habit, by long usage, by tradition and the noblest historical associations. It was the object of the organic instrument to preserve them, to perpetuate them, to improve and perfect them by the knowledge and the suggestions of later times; not to impair their strength or deform their fair proportions."

It may be true that our appeal for the preservation of the local ties and community of interest found in the counties will be received with little sympathy from those who reside in the great city of New York. There the drift is ever towards the cosmopolitan. But all who hail from a county, or from what the constitutional convention itself called the "country districts" of the State, will not fail to be touched by the reference to associations which have been living influences in their whole lives and careers.

If your honors please, we may now consider the cases which we assert are decisive in our favor.

In *Lanning v. Carpenter*, 20 N. Y. 447, the court held that the Constitution then in force required each judicial and Senate district at all times to be composed of entire counties, and that no new county could be organized so as to include fractions of two or more judicial, Senate and Assembly districts.

The following extract from the opinion of Denio, J. will show how pertinent the case is, viz.:

"The Senate districts, being established by the Constitution, could only be changed in pursuance of its provisions; and the only authority to make any change in them is that found in the provision allowing them to be so altered at the first session after the return of every enumeration, so that each district shall have an equal number of inhabitants, as near as may be. So with the judicial districts, the Legislature were to form them, by dividing the State into eight portions, of contiguous counties, and then leave was given to re-organize them at the first session after the return of every enumeration, and at no other time. \* \* \* If we bear in mind that it is established by the Constitution that no county shall be divided in the formation of a Senate district, and that the judicial districts are always to be bounded by county lines, that is, to consist of whole counties, and never of fractional parts of counties, we shall have a view of all the constitutional provisions bearing directly upon the case" (pp. 452, 453).

It was claimed below and is repeated here that the *Lanning* case overruled and was inconsistent with the decision in *Rumsey v. The People*, 19 N.

Y. 41, and that the earlier case had declared the act creating Schuyler county constitutional while the later decision held it unconstitutional. The facts do not warrant this statement. If sound, it would only tend to emphasize the importance of the later decision. But reference to the *Rumsey* case will show that it was the opinion of Johnson, Ch. J., and Denio, J., concurred in by Comstock and Grover, JJ., that controlled. The decision was not based upon the ground that the act was originally constitutional, but that it had been validated by the subsequent enumeration and legislation. The prevailing opinion in the *Lanning* case did not overrule, and is entirely consistent with, the true ground of decision of the *Rumsey* case.

The case of *Lanning v. Carpenter*, decided in 1866, has remained without challenge or criticism for nearly thirty years. It was the opinion of the court, binding and authoritative as such, notwithstanding the fact that three of the judges dissented. It has never been questioned, much less criticised. During that period, the Constitution has been amended ten times and a new Constitution framed. The rule of the *Lanning* case has not been changed. The Constitution should, therefore, now be interpreted as adopting and approving the doctrine announced in that decision and in the light of which it was framed.

Then, seven years later, came the case of *Kinne v. City of Syracuse*, 3 Keyes, 110, 111, which involved the provisions of the Constitution of 1846 as to Assembly districts. Chapter 841, of the Laws of 1858, provided, among other things, that the boundary of the city of Syracuse should be changed so as to set off from the city and annex to the adjacent town of De Witt a strip of land about a mile wide and two miles long, containing two hundred and fifty inhabitants, of whom fifty were voters. The act was held unconstitutional by a unanimous court. There was absolutely no reference in the act itself to Assembly districts, and on its face it did not purport to change any such districts, but simply to alter the boundary of a city. Prior to such legislation, as appears from the record on file in the clerk's office of this court, the board of supervisors of the county of Onondaga, in 1857, had divided that county into three Assembly districts. The city of Syracuse and the towns of Salina and Cicero were constituted as the second Assembly district under such division; and the town of De Witt and eight other towns were constituted the third district. As I have stated, the case was argued and decided seven years after the *Rumsey* and *Lanning* cases, which were discussed at length in the briefs of counsels. It was urged in the *Kinne* case that the changing of

the boundaries of a city did not affect the Assembly districts, because the lines of the old city could be continued in theory for Assembly district purposes. So, in the case at bar, it is urged by our adversaries, that for Senate district purposes as well as for judicial departments, the physical lines of the old boundaries may be considered to continue. It is true that the record in the Kinne case shows that the board of supervisors of Onondaga county had specifically constituted the city of Syracuse and the adjacent towns of Salina and Cicero as the second Assembly district; but in the case at bar, the Constitution has specifically constituted the county of Westchester as the twenty-second Senate district. If the Assembly districts were necessarily altered in the Kinne case so as to violate the Constitution of 1846, because of the change of the boundaries of the city of Syracuse, so also must the boundaries of the twenty-second Senate district be altered by the legislation of 1895, changing the lines of the two counties.

After the Kinne case, and in view of the rule there laid down, section 5 of article 3 of the Constitution of 1846 was amended in 1874 so as to provide as follows: "Nothing in this section shall prevent division at any time of counties and towns, and the erection of new towns and counties by the Legislature." Thus, the rule as to Assembly districts was changed by constitutional amendment, but the rule as to Senate and judicial districts previously announced in the Lanning case was left unamended and in full force. *Expressio unius est exclusio alterius.*

The court will observe that this amendment was inserted in the section which applies to Assembly districts. No such provision is made with regard to the Senate districts or the judicial departments. If the framers of the amendment or of the new Constitution had intended that the provision as to Senate districts and judicial departments should not limit the power of the Legislature to change the boundaries of counties, broader language would have been used. The provision would have been: "Nothing in this article or in this Constitution shall prevent," instead of the language carefully chosen so as to be confined to the section on Assembly districts, namely: "Nothing in this section."

The true construction of this provision is that, so far as respects Assembly districts, the Legislature may divide existing counties and change the boundary lines thereof *within* Senate districts or judicial departments; in other words, provided the attempted alteration of a county line does not clash with the boundary of the Senate district or the judicial district or department within which that county lies. Under this view, the Legislature can divide the greater portion of the boundary lines of fifty out of

the sixty counties of the State without interfering with the boundaries of the Senate districts, and can divide the greater portion of the boundaries of fifty-nine counties (every county except New York) without necessarily conflicting with the mandate of the Constitution, that the judicial departments shall be "bounded by county lines." For example, let us take Senate district No. 24, consisting of the counties of Dutchess, Columbia and Putnam, or district No. 27, consisting of the counties of Montgomery, Fulton, Hamilton and Schoharie. The county lines dividing the respective counties within these Senate districts may be changed by the Legislature in any way it sees fit, provided the line of the Senate district and those portions of the county lines which are coincident with it be not changed. The second judicial department consists of nine counties. The greater portion of the boundaries of these counties may be changed without in any way crossing the boundary line of the second department. In a word, the purpose of the Constitutional Convention to preserve the integrity and unity of interest of Senate districts and judicial departments as formed of *counties*, or bounded by county lines, can remain inviolate and unmolested, leaving power to change county lines *within* such districts or judicial departments even if this change of line crosses the boundary lines of towns or Assembly districts.

It is perfectly feasible, therefore, to give the Constitution a practical and a sensible interpretation which shall grant to the Legislature full power to change county lines within Senate districts, and preserve the spirit and intention of the Constitution as to Assembly districts, viz., "each of which shall be wholly within a Senate district formed under the same apportionment." Any other construction would leave the whole county system of the State entirely at the mercy of the Legislature. It is only therefore, when the attempted alteration conflicts with the integrity and unity of interest of the Senate and judicial departments that it must be delayed until the period of re-enumeration and apportionment, as shown in the Lanning case. In this view, no provision or arrangement of the Constitution is inconsistent with any other, and the language of each section is given adequate scope and effect. The amendment of 1874 would stand as effective as it ever has been since its adoption, limited, however, by the new provisions requiring an Assembly district to be wholly within a Senate district, and requiring that county lines should bound the Senate districts and the judicial departments.

If your honors please, I shall briefly review the history of the constitutional provisions in question, as this may aid the court in considering our argument and brief.

The Constitution of 1777 apportioned seventy Assemblymen among the various counties as such, and divided the State into four Senate districts bounded by county lines from which a Senate of twenty-four members was elected. No county was divided in the formation of a Senate district. The amendment of 1801 made the number of Assemblymen 100 and not to exceed 150, and provided for 32 Senators. Twenty years later the Constitution of 1821 provided for 128 Assemblymen and 32 Senators. The State was then divided into eight Senate districts consisting of entire counties. Again, no county was divided in the formation of a Senate district. It was expressly provided that the same rule should be observed in future apportionments, the words being, "and no county shall be divided in the formation of a Senate district." This was the first time this language was inserted in the Constitution, and it has continued there for over seventy years. The Constitution of 1846 divided the State into thirty-two Senate districts. No county was divided in the formation of a Senate district, but the direction for the future was amended so as to read: "and no county shall be divided in the formation of a Senate district, except such county shall be equitably entitled to two or more Senators." The members of Assembly were apportioned among the several counties as such.

We now come to the Constitution of 1894. It will be important to note that in no instance was a county divided in the formation of a Senate district except where two or more Senate districts were contained wholly within one county. So also as to the Assembly districts. The fifty Senators and the 150 Assemblymen were divided not according to population, but among the counties, and the counties were recognized as the political units of representation. The command as to the future was again changed so as to go back substantially to the inflexible and unbending rule of 1821, namely: "and no county shall be divided in the formation of a Senate district except to make two or more Senate districts wholly in such county."

As to Assembly districts, the Constitution of 1777 provided that in case of an increase of population "the number of representatives for such county shall be increased or diminished accordingly." The Constitution of 1821 provided that "the members of the Assembly shall be chosen by counties," and the apportionment of assemblymen according to counties was to remain unaltered until the next enumeration. The Constitution of 1846 again provided that the assemblymen should be divided among the counties as such, and that the apportionment so made should remain unalterable until another enumeration. The Constitution of 1894 specifically apportions members of assembly until

after the next enumeration, namely, 1905, among the several counties of the State as such, the county of Westchester getting three members and the county of New York thirty-five members. The same rule was prescribed as to the future coupled with what had then been observed, namely, that the counties should be divided into Assembly districts, "each of which shall be wholly within a Senate district formed under the same apportionment."

The first division of the State for judicial purposes was in 1821, when the State was directed to "be divided by law into a convenient number of circuits, not less than four, nor exceeding eight." The Constitution of 1846 provided that the State should be divided into eight judicial districts, "of which the city of New York shall be one, the others shall be divided by county lines." This was the first time that the word "district" appeared in our Constitution. The judiciary article, framed by the Constitutional Convention of 1867, was the only portion of their work accepted by the people, and it was adopted at the general election held November 2d, 1869. The language used was: "The existing judicial districts of the State are continued." The convention found them divided and bounded by county lines, and continued them so. It is true that in the amended judiciary article of 1869, the provision as to bounding the districts by county lines was omitted; but as the Constitution continued the existing districts bounded by county lines, it was evidently assumed that when a change was made, the same rule which had always been observed would be followed. In 1876, the Legislature divided the judicial districts as they now stand, constituting the city of New York as the first district, and bounding all the other districts by county lines. The Constitutional Convention of 1894 found the districts bounded by county lines, and continued them so bounded.

In the meantime, however, there had grown up in the State a system of general terms and departments. The Constitution of 1846 had provided for four general terms within the several districts. The amendment of 1869 specified that "provision shall be made for organizing in the Supreme Court not more than four general terms." The Legislature, in 1870, divided the State into departments, as follows:

"The State is hereby divided into four departments. The first department shall consist of the first judicial district; the second department of the second judicial district," etc.

The act of 1870 is apparently the first instance of the use of the word "department." Such departments were bounded by county lines, for all the districts were so bounded. After the amendment



of the Constitution in 1882, providing for the organization of five general terms, the Legislature made a new division of the State into five judicial departments, bounded by county lines (chapter 320 of the Laws of 1883). Finding this system in force, the framers of the Constitution of 1894 expressly provide for the formation of four departments to be bounded by county lines.

There is no distinction in this case between judicial districts and judicial departments, and any argument based upon the omission of the provision "shall be bounded by county lines," in section 1 of article 6, is a mere play upon words, without a shadow of substance or relevancy. The second district and the second department are co-extensive. Whether we consider "judicial district" or "judicial department," the Constitution is violated by this attempt of the Legislature to change the judicial district or to alter the judicial department.

If your honors please, the only reference found in the Constitution to any particular existing law in connection with the apportionment is as follows (Art. 2, sec. 6):

"Existing laws on this subject (*i. e.*, elections) shall continue until the Legislature shall otherwise provide."

The election laws, therefore, must be construed as part of the system established by the Constitution. Every constitutional provision was framed in the light of those laws, and every part of the Constitution is consistent with their enforcement. The Legislature has not changed those laws. It should follow, therefore, that any statute conflicting with those laws equally conflicts with the intent and spirit of the Constitution itself.

Our brief shows in detail that it is practically impossible to administer the present election law in this annexed territory if we are to follow the theory of the continuance of the boundaries of the twenty-second Senate district and the second judicial department into the county of New York.

Much stress was laid below upon the precedent of 1873 and the fact that it had not been attacked in the courts. We have, therefore, shown upon our brief that the prior legislation did not present the constitutional questions involved in the act of 1895.

Moreover, the former act provided that the annexation should be submitted to the vote of the people. The vote of the district was overwhelmingly in favor of annexation. This should sufficiently show why the validity of the act was not then challenged in the courts. The present act, disregarding the wise and fair precedent of 1873, denies to the people of the county of Westchester any vote whatever upon the question. Without consulting their wishes, the territory is arbitrarily cut out of the county of Westchester and added to

the county of New York. It is hardly a cause for wonder that those vitally objected should spring forward to insist upon their constitutional rights.

Upon our brief, we have gathered together references to the various laws in force at the time the Constitution was adopted relating to the administration of public affairs, to criminal justice, to civil practice, in order that your honors might see the practical necessity and infinite wisdom of framing the Constitution upon the county system. It would take far more time than your patience will indulge me, to refer to these laws provision by provision; but the brief contains them. As before stated, the election laws were expressly approved and adopted by the Constitution; yet those laws cannot be enforced except by the observance of the county lines, for they are framed to fit into the county system, and to no other system. It would take all the time of a session of the Legislature and an entire revision of almost every general act, to provide the necessary changes which must be made if this legislation is to stand. At the present moment, the utmost confusion—we might almost say a disgraceful mess—is presented in the attempt to administer the law in the annexed district under the theory of the court below.

The whole theory and the entire system of the administration of justice in criminal cases depend upon the integrity of the county. Crimes are to be tried in the county where committed. Grand and trial jurors are selected from the limits of that county. Sheriffs, county judges, district attorneys and county clerks are local officers confined in their duties to the limits of their counties. A crime not indictable by the grand jury of the county where committed, nor triable by a petit jury of that county would be an anomaly. But such results follow the division of a judicial district by a change of a county line.

Again, in civil actions also, county limits are of importance. The place of trial of many actions pending in the Supreme Court is determined by the county where the parties reside. (Code Civ. Pro., § 984.) If the annexed territory continues a part of the second judicial district, will actions between its residents be triable in Westchester county or in New York county? In the former case, the action would be tried in a county in which neither party resided. In the latter case, the trial would be had before a tribunal whose judges the parties had no share in electing and before a jury upon which neither they nor their neighbors had the privilege of sitting.

Actions affecting the title to real estate must be tried in the county where the land is situate. (Code Civ. Pro., § 982.) Will an action concerning land in this territory be tried in the second judicial dis-

strict where the land continues to be, or in New York county which, as extended, includes the premises?

There are other points which are sufficiently stated in our brief, and having been thus indicated to our adversaries, may be reserved for our reply to their answer.

If your honors please, my learned brother Hornblower will tell you that the breach of the Constitution and the offense in this case is small; that it involves the transferring of only 13,000 inhabitants from one county to another, and that he thinks it is within the spirit of the Constitution because it may eke out a deficiency of population in the twenty-first Senate district. When such an argument was once addressed to Chief Justice Marshall in a famous case in the Supreme Court of the United States, he at once sternly reminded counsel that he was discussing a constitutional question, and that no matter how small the violation might be shown to be, it could not be tolerated. Your honors will remember how insignificant the question was in this aspect in the Kinne case; it involved 250 inhabitants and barely fifty voters. Yet counsel could not there argue that the degree of violation was relevant, and a unanimous court condemned and declared void this infraction of the Constitution there found. It is in slight and apparently insignificant instances and by silent approaches, that unconstitutional measures get their footing. Though small at first, like a crevasse in the Mississippi, they grow until the whole stream of arbitrary power exercised by the Legislature goes rushing through, carrying the whole structure to ruin.

Our motto must be *obsta principiis*.

If your honors please, in conclusion, may we not recall the warning of Junius to the people of England, uttered seven years before the American Revolution?

"Let me exhort and conjure you never to suffer an invasion of your political Constitution, however minute the instance may appear, to pass by without a determined, persevering resistance. One precedent creates another; they soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy. Be assured that the laws, which protect us in our civil rights, grow out of the Constitution, and that they must fall or flourish with it. This is not the cause of faction or party, or of any individual, but the common interest of every man in Britain."

The historian, Grote, whom so many think the most learned and thoughtful of modern writers, has shown by many examples that fidelity to the fundamental law — which he terms constitutional moral-

ity — is the one indispensable condition upon which the safety and success of every free government must depend. The high career of Athens in her glory was due to the faithful practice of this supreme virtue. When her people took legislation into their own hands and became destitute of all attachment to their Constitution, which had guided them to their prosperity by the very checks and restraints which it imposed — when they refused to recognize or give obedience to any rule clashing with their present convenience and the momentary will of the majority, then the government of Athens was shattered and dissolved — not by the spears of her conquerors, but by the folly of her capricious majority. Who will sincerely plead that we can safely place all our time-honored institutions and immemorial customs at the mercy of our annual legislators? The thirst for tinkering with the Constitution and for experimenting with new institutions is an appetite which grows by what it feeds on. Is it not safer to anchor by the teachings of the past and to insist upon the preservation of our institutions in all their integrity? By every rule of interpretation that ever was invented — by every principle of law and logic — by that good faith which holds the moral world together — by that constitutional morality — by that decent respect which every man is bound to feel for the traditions and the sentiments of his neighbors, we invoke the conservative influence of this high tribunal, and we pray you to adjudge again that no act of the Legislature shall stand which seeks in the slightest degree to nullify or to circumvent the letter or the spirit of our Constitution.

### Abstracts of Recent Decisions.

**ADMINISTRATION—EXECUTORS.**—Where money is collected on an insurance benefit certificate by the executrix who is named as beneficiary therein, it is not subject to administration, and the probate court has no right to order the executrix to file an inventory of it. (*White v. White* [Tex.], 32 S. W. Rep. 48.)

**BOUNDARIES.**—Where parties by mutual agreement fix a boundary line, and thereafter acquiesce in the line so established, such line will be considered the true line, though the period of acquiescence be less than that fixed by statute for gaining title by adverse possession. (*White v. Peabody*, [Mich.], 64 N. W. Rep. 41.)

**CARRIERS — PASSENGER — NEGLIGENCE.**—It is negligence on the part of a railroad company for those in charge of a passenger train to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to

stop the train entirely, and give the passenger ample time and opportunity to alight. (*Atchison, T. & S. F. R. Co. v. Hughes* [Kan.], 40 Pac. Rep. 919.)

**CONTRACT — ACCEPTANCE OF OFFER.**— Where a series of articles by different authors is offered to a paper for publication for a year at \$100 per week, an announcement in the paper that it had engaged certain writers, including many of those in the offer, is at most only evidence of an acceptance of the offer, and does not preclude the paper from showing that there had been no acceptance, or only a modified acceptance. (*McClure v. Times Pub. Co.* [Penn.], 32 Atl. Rep. 293.)

**CONTRACT — LAW OF PLACE.**— Plaintiff, an Ohio corporation, having its principal place of business at A, in that State, made a contract with defendant, a resident of Michigan. The contract was executed by defendant in Michigan, and subsequently countersigned by plaintiff's agent in that State and approved at plaintiff's main office at A, pursuant to a provision, contained in it, that it was "not valid unless countersigned by our manager at L and approved at A:" *Held*, that the contract was made in Ohio, and was not within the terms of a statute of Michigan relating to contracts made in that State. (*Aultman, Miller & Co. v. Holder* [U. S. C. C. Mich.], 68 Fed. Rep. 467.)

**CORPORATIONS — UNLAWFUL PAYMENT BY DIRECTORS.**— Where directors of a corporation wrongfully appropriated money in salaries to themselves, the court may, in an action by the minority stockholders against the majority and the corporation, when the prayer is ample, decree direct payment by the majority stockholders, who were directors, to the minority, of their aliquot share of the amount found due the corporation. (*Eaton v. Robinson* [R. I.], 32 Atl. Rep. 339.)

**DECEIT — DAMAGES.**— Defendant, falsely claiming authority to do so, agreed to sell lands to plaintiff at a certain price. Pending the negotiations plaintiff told defendant he intended selling his interest in a fertilizer business to raise money to pay for the land. Plaintiff did not allege that he was obliged to sell his business to raise the money, nor that he intended to go into any other business in the event of his purchase of the land, nor did it appear but his loss would have been the same if he had purchased the land: *Held*, in an action for damages, that plaintiff cannot recover special damages resulting from the sale of his business. (*Webster v. Woolford* [Md.], 32 Atl. Rep. 319.)

**EQUITY — JURISDICTION.**— The city of Y advertised for bids for certain bonds about to be issued by it. Complainant submitted the highest bid, and was notified that the same would be accepted. It then

asked for information and documents relating to the bonds, in order to submit them to its counsel, and, after receiving an opinion from its counsel that the bonds were invalid, declined to take them, and demanded the return of \$3,500, deposited on making its bid. The city refused to return the money and notified complainant that it would sell the bonds to the highest bidder, and hold complainant liable for any loss. Thereupon complainant filed its bill, praying an adjudication as to the validity of the bonds, a return of the \$3,500 if they were found invalid, or the delivery of the bonds on payment of the price if found valid, and an injunction against the city's disposing of the bonds: *Held*, that equity had jurisdiction of the suit, the remedy at law being inadequate. (*German-American Inv. Co. of New York v. City of Youngstown*, [U. S. C. C. Ohio], 68 Fed. Rep. 452.)

**STOPPAGE IN TRANSITU — DELIVERY.**— As affecting the right of stoppage *in transitu* on account of the insolvency of the vendee, it is a question for the jury whether the transit has ended when the vendee, being unable to pay the freight, was, to save demurrage, allowed by the railroad to unload the cars, and pile the goods in its yard until he could pay the freight. (*Rogers v. Schneider*, [Ind.], 41 N. E. Rep. 71.)

**TRADE-MARK — UNFAIR COMPETITION — FRAUD OF PLAINTIFF.**— Fraud, such as to disentitle a plaintiff to relief against unfair competition in his business, cannot be predicated of statements which, owing to the brevity required by the limited space of a label, are not minutely accurate; nor of the use on two classes of goods of labels which might be mistaken for each other, the statements on both being true; nor of the use, to a limited extent, of the name of a firm to which the plaintiff believed itself to have succeeded; nor of the use of "trade talk" in advertisements. (*Clark Thread Co. v. Admitage*, U. S. S. C. [N. Y.], 67 Fed. Rep. 896.)

**WILL — DEVISEES — VESTED ESTATE.**— A testator, having two daughters, devised one-half of his estate in equal proportions to the four children of one, and the other one-half in equal proportions to the five children of the other. The will, in devising each child its portion, provided that at such child's death, his or her portion was to go to his or her children or child, but if he or she left none, then to his or her brothers and sisters. *Held*, that each child took a vested interest on the death of the testator, and on the death of one of the devisees without issue, the surviving children of a previously deceased devisee would take an equal portion with the surviving brothers and sisters of the share of such devisee. (*Graves v. Spurr*, [Ky.], 31 S. W. Rep. 483.)

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THERE appears to be little doubt but that more was added to medico-legal learning at the recent meeting in New York than at any previous gathering of the association. The presence of distinguished foreigners, who are experts in criminal cases, was, of itself, of great importance, and we believe that many of the improved practices of our medico-legal brethren can be emulated with great success by lawyers. The advance in medicine and surgery has been, perhaps, more rapid than the accommodation of legal procedure to the increased business of the country. At the least the discussions which took place at the medico-legal conference have great intrinsic merit and value to the members of our profession.

It is well known that Dr. L. Forbes Winslow of London, recently wrote an article for a London magazine on the Madness of Genius, which is condensed in an interview thus:

"There is a great relationship between insanity and genius. It is a most difficult thing to define the line that separates the sane from the insane, the babbling, driveling idiot from the man of transcendent genius. Such a line of demarkation is not easy to define; on the one side a highly wrought and gifted mind, and on the other an intellect distracted and tainted.

"Another difficult thing is to draw the distinction between the creations of genius and the wanderings of insanity. Excessive expansion of brain matter, great sensibility, acute sensitiveness, quickness of apprehension, and vividness of imagination are all indications of a state of brain bordering closely on the confines of disease. In the majority of studious men there often exists a predisposition to brain disease which may have actually existed. This is manifested in many ways.

"In Sir Walter Scott and Lord Byron the

malformation of the foot and leg and talipes, to which they were subject, indicated that a nervous attack occurred during intra-uterine life of a paralytic or spasmodic character. Such an occurrence has been proved beyond doubt to be liable to be accompanied by modifications of the mental characteristics, and in some instances by downright idiocy. This is specially so when the spasmodic attack has been severe and the deformity great.

"In others it is followed by eccentricity, impetuosity of temper, waywardness, or genius, even when there is only a small deformity, such as a slight strabismus or a twist of the foot.

"Byron was a child with a temper sullenly passionate. The irregular action of his nervous system and the peculiarity of his temper were inherited from his parents. His parental ancestors were remarkable for their eccentricities, irregular passions, and daring recklessness. His mother was liable to outbursts of ungovernable temper and feeling. With such a parentage and so constituted, it is not remarkable that Byron fell so early. His last moments, as depicted by Moore, must produce a feeling of melancholy. Madden described Byron's malady to be epilepsy, and he had doubtless many signs of cerebro-spinal disorder, as indicated by his frequent twitchings and strong emotion. It is on record that he awoke every morning with a feeling of melancholy, despondency, and actual despair.

"The very infancy of genius is often marked by eccentric behavior. Michael Angelo was called the 'Divine Madman,' while Oliver Cromwell was designated 'an inspired idiot.' Turner, the great painter, was considered by many people in his day to be hardly responsible for his actions.

"As I said in an article which I wrote a little while ago, and which has created so great a sensation, genius is often a fatal gift, like beauty. Genius, as is so often seen, is seldom combined with common sense. The irritability of genius, which is so common, is the first link in that chain of psychical maladies so often terminating in hypochondriasis, when melancholy marks the martyr of thought and genius as its own.

"Many geniuses are developed in infancy,

and frequently the so-called prodigy, who does not ultimately become a genius, will stop half way, becoming insane. Insanity is a half-way house, and the precocious youth, having well passed its confines, will, in all probability develop into a genius; but, alas! many fail to pass this barrier, and consequently our institutions are full of brilliant intellects cut short in the precocity of their youth.

"The genius of Sir Walter Scott ended in a state of imbecility. He first became conscious of his condition by a partial loss of memory and want of recognition of even his own sonnets.

"Shakespeare died in the meridian of his splendor of a foolish excess, for it is in the records of the Medical Society of London that 'Shakespeare, Drayton, and Ben Jonson had a merry meeting, and, it seems, drank too hard, for Shakespeare died of a fever there contracted.' That is from the diary of Mr. Ward, who was an intimate friend of Shakespeare.

"The insanity of genius, is a psychological problem, and comes before us with the most awful contrasts respecting life and death. Illusion is a pronounced characteristic of genius, and this is not to be wondered at when we consider that the workings of the imaginative mind are one protracted course of ideal creation.

"Torquato Tasso suffered from 'mania periodique,' and was a victim of the literary envy of the sovereign. He suffered from auricular delusions and phantasmagoria. He would converse eloquently with his imaginary familiar spirit, who, according to his statement, paid him various visits. It is a very dangerous thing to indulge to any extent in phantasy, as the impression becomes permanent, and what was imaginative may become real. Abnormal circulation of the brain is the supposed cause of these states of phantasmagoria which we read of as occurring in so many poetical geniuses.

"Rousseau, the great French poet, suffered from immoral insanity, William Cowper was confined in an asylum for eighteen months, suffering from religious melancholia. Thomas Chatterton, suffered from monomania, which culminated in suicide. Frederick Schiller, the great Shakespeare of Germany, became a dipsomaniac. Jonathan Swift suffered from organic

disease of the brain. Samuel Taylor Coleridge was a typical example of monomania, associated with an uncontrollable craving for opium. Robert Southey suffered from melancholy and threatened paralysis, and would frequently tap his forehead, exclaiming, 'Memory, Memory, where are thou gone?'

"Charles Lamb suffered from 'Folie circulaire,' but he came from an insane family. His sister plunged a carving knife into the bosom of her mother, and was the cause of his becoming mentally unhinged. Shelley, a contemporary of Byron, was a confirmed opium eater. His mind was completely absorbed in his studies, and one day he wandered into Leicester Square and unconsciously threw himself on the pavement, where he was discovered at an early hour next morning.

"If we turn to American poets, we find that Percival of Connecticut suffered from melancholia, following the eccentricity of genius while Hoffman, a great American poet, suffered from 'mania errabunda.'

"It is not the geniuses of poetry, art, science, and literature who alone fall the victims of mental disorder. Those minds which are continually engaged on the collusions and jealousies of the political arena are often found to fall in the struggle. Pitt, Fox, and Canning died in the meridian of their fame, their lives cut short by the continued strain of overwhelming mental conditions.

"Lord Randolph Churchill is the latest example of a genius cut short in his prime, of whom great things were expected, and whose career I closely watched with a curious psychological interest, his condition being perfectly apparent to me for some time previous to his death. This is a typical illustration of the decadence of a master mind prostrated by disease which had its origin in abnormal and undue political excitement.

"If we glance at the comparative statistics of mortality in genius, we are enabled to form some idea of the final effect of different studies and pursuits. At the apex and lower end of the scale we have the natural philosopher and poet. The aggregate duration of the lives of the former may be stated to be seventy-five, and of the latter fifty-seven.

"Nearly all imaginative writers are of an

irritable nature. Many hard brain workers continue their labors long after they have received a warning, as indicated by acute headaches, but, notwithstanding the caution sent us, we persevere with our mental labor, heedless of what must be the inevitable result.

"I have had under my personal observation a well-known London comedian, who, on his own admission, felt inclined to cut his throat while waiting in the wings, but whose entrance on the stage was greeted with roars of laughter.

"Another person who came under my personal attention was Sir Edwin Landseer, the famous painter. He died from general paralysis.

"Musicians, though men of marked genius, are often eccentric, but our records do not give many instances of mental derangement among them.

"When we come to sum up the whole question of the genius of madness, I cannot do better than repeat what I have already written on the subject, and that is that when the history of the present century is written there will be many geniuses to be recorded who, having commenced with brilliant careers, were driven by mental disorder to do something strange, which has handed their memory down to posterity not only as the brilliant geniuses they were, but also as examples of mental decadence which, though dormant in them for some time, ultimately culminated in a positive outburst of insanity. The insanity of genius is one of the many awful proofs of immortality—that the unfettered spirit that moved the lips and pen to speak or write the syllables which still delight mankind is unchanged, unchangeable; but the phenomena which our senses perceive, both of intellect and madness, are the results of health or disease in that structure, by its emancipation from which the intellectual, yet tainted mind, becomes the pure, immortal soul."

At the meeting of the Medico-legal Society Dr. L. Forbes Winslow's paper on the increase of insanity is one which is most instructive—especially his history of the lunacy law in England—as statistics showing the increase in insanity in England and that there is less in this country than in England. On this subject he said:

"The 1845 lunacy act, with one or more unimportant amendments, remained in existence

until our present law, which came into operation in 1890. In 1877 a parliamentary committee sat, in consequence of alleged irregularities in the law. It consisted of fifteen members, who sat patiently throughout the whole of the summer. The chief witnesses were lunacy experts, government officials, discharged lunatics with imaginary grievances, former inmates of asylums, ever eager to make complaint. The result of this was a bulky official blue book as the outcome of what had taken place.

Clouds and mists were dissipated and there remained the fact, as testified to by reliable witnesses, that the law as then administered was sufficiently equitable and humane. The report concluded by stating, notwithstanding all the evidence, "in no single instance had *mala fides* been proved."

Thirteen years after this, without any further government inquiry, was passed the act of 1890, which I will at once pronounce as inferior to the old act, and in certain ways very complicated. A lengthy consideration does not appear to me to come within this department of the congress, and I therefore only very briefly propose to allude to that part of it which directly refers to the admission of patients into asylums in England.

To admit a patient into an asylum in ordinary cases of lunacy can be dealt with in one or two ways. First, a petition signed by a relative, accompanied by two medical certificates, are presented to a justice of the peace, magistrate or county judge, who, if he is satisfied, signs the reception "order," and the patient can be admitted forthwith, and those taking part in such removal are protected by the statute. There are certain persons who are prohibited from signing the order or medical certificates, but I will not weary you with a detailed account of the act, with its 342 sections. I only think desirable to inform you as to the admission of lunatics in England. Then, in an urgency case, a patient can be admitted on one certificate, accompanied by an order of a relative. Upon these documents anyone can be received into an asylum. Within a specified time of the reception under these circumstances, two fresh medical certificates have to be obtained, and a petition signed by the relative.

These are presented to a justice of the peace having authority in the matter, who, if he is satisfied, signs the reception "order."

In Great Britain on the 1st of January, 1895, according to the very latest available statistics, there were 94,081 persons registered as of unsound mind in the various institutions of England and Wales. As compared with the registered lunatics on the 1st of January, 1894, there is an increase of 2,014. These lunatics are distributed in private asylums called licensed houses, in county and borough asylums, registered hospitals, naval and military hospitals, criminal lunatic asylums, workhouses, private single patients and outdoor paupers.

Of the gross total, 61,908 are detained in county and borough asylums, whereas the private lunatics in licensed houses amount to 4,178, the remaining number being distributed in the other receptacles for lunatics which I have previously mentioned. Taking the decade from 1859 to 1869 inclusive, the average annual increase was 1,641; in that between 1869 and 1879 it was 1,671; in that between 1879 and 1889 it was 1,425, while in the six years between 1889 and 1894 it was 1,628.

The estimated population of Great Britain at the present day is 14,724,164 males and 15,666,914 females, making a gross total of 30,394,078 individuals. The ratio per 10,000 of lunatics to the population is 29.06 males and 32.75 females, or a gross total of 30.95. Whereas in 1886, when the total population amounted to 27,581,780, statistics show us that in every 10,000 of the population there was the ratio of 29.12 of lunatics. Thus we see that in ten years there has been an increase of over 1,000 persons of unsound mind in every 10,000 of the gross population in Great Britain.

The increase of pauper lunacy has been very general throughout the country, and in only eight of the fifty-six counties in England is there a decrease; the increase being largest in the county of London, viz., 482. Notwithstanding what we have written on the contrary, there has been, as it is proved by statistics, a gradual increase in insanity in Great Britain, though many of the insane when at first stricken, can be treated outside an institution. There is no provision for such treatment beyond the hospital founded for lunacy in America.

It was not until the middle of the eighteenth century that any steps were taken for providing for the care and treatment of the insane in America. Drs. Bond and Franklin in 1750 inaugurated a movement for this purpose in the city of Philadelphia, Penn.; a memorial was presented the following January to the Provincial Assembly for a charter for an insane asylum and asking for pecuniary assistance.

A bill in accordance with this wish was passed in February, 1751. Two thousand pounds were voted as a preliminary, and Thomas Bond and Franklin were nominated two of the managers. Steps were immediately taken to provide for the care of the insane, and a private asylum was rented for a time, pending the construction of a proper establishment. This private house was open in February, 1752, and on the 11th day of that month the first patients ever placed in such an institution in the United States were admitted for treatment, and I understand that ever since that time one wing of the Pennsylvania Hospital has been devoted to the care of the insane.

On May 23, 1755, patients were received in the new building. The first State institution for lunatics was opened in 1773 at Williamsburg, Va., also one in New York in July, 1797. This was the germ of what is now known as the Bloomingdale Asylum. The Maryland Hospital, in Baltimore, made provision for lunatics the same year, and this accommodation was increased in 1807. From that date up to the present there has been a steadily increasing interest taken in the management and welfare of the insane in the United States, and I am looking forward with much pleasure to visiting these institutions and adding my poor testimony to what I have already heard of the general excellence of your system.

According to figures which I have collected, I have discovered that there is less lunacy in America, as compared with some other countries. In Great Britain the proportion of lunatics is 1 in every 400 of the population. In Scotland, 1 in 430; in Ireland, 1 in every 303, in France 1 in every 747, and in America, 1 in every 623, one of the smallest ratios being 1.60 in every 1,000 of the population. In Australia many of the present asylums were originally used as prisons.

The chief official here is called a Master in Lunacy, whose duty it is to exercise his surveillance over all persons *noncompos mentis*. He is the guardian and trustee for the time being of the lunatic.

In New South Wales there is one lunatic in every 361 of the population. The number of the general paralytics are considerably less than in England, being one-third of that existing in that country.

In Scotland and Ireland the management and treatment of the insane has much improved during the last few years. The law in each of these countries differs from each other, and also from that in vogue in Great Britain. The first Scotch act being passed in 1857, and the present one in 1866. In the whole of Scotland there are between 10,000 and 11,000 persons of unsound mind. The first effectual act dealing with the lunatics passed in Ireland was in 1821, and the first public asylum opened in that country was that of St. Patrick's Hospital, in Dublin, in 1745, by Dean Swift, who, as he himself has stated:

"Gave the little wealth he had  
To show by one satiric touch  
No Nation needed it so much."

Dean Swift left nearly all his property for the purchase of the land to erect this hospital. As long ago as 1710 a committee appointed by the English government sat to consider the condition of the insane in Ireland. Several minor acts were passed, but nothing satisfactory until the one previously mentioned in 1891. There are between 8,000 and 9,000 persons of unsound mind in Ireland, and the ratio is, as mentioned previously, one in every 303 of the general population.

As we noted before, the papers and addresses at the recent meeting of the American Bar Association were of unusual merit and interest. The president, Hon. James C. Carter, of New York city, in his address said:

"A society that has not the moral energy to enforce its will in any particular case should never embody that will in the form of a statute. I know of nothing more needed among us than a deepened conviction that the sphere of legislation, like that of other forms of human activity, has its proper limits, which can never be ex-

ceeded without mischief, and a sufficient knowledge of what these limits are.

"In urging the increased study by our profession of the science of legislation I mean that science in its broadest extent. It should embrace, as I conceive, two principal branches: First, the just limits of the province of legislation; that is to say, what subjects are really fit for legislative action as distinguished from those that should be left to the disposition of courts or to the discipline that proceeds from the moral agencies of society.

"I am not unaware of the extent of the field of inquiry thus embraced. It includes the fundamental elements of economic science and the principles upon which sociological inquirers are generally agreed. I do not mean that these sciences must be mastered in their details, but that the main features should be known so far as to enable the student to avail himself of their results and to employ their methods. The other important branch is the study of the proper manner in which subjects fit for legislative action should be treated; that is to say, the art of framing appropriate and effective laws. Our association takes much interest in bringing about a certain measure of uniformity in our laws.

"Our unwritten law is already substantially the same, and that I have always regarded as an impressive reason from abstaining from any attempt to reduce it into written forms, which would at once tend to plunge it into diversity. Whatever can be done to secure this desired uniformity must be done by voluntary concerted action. The appointment made by several States during the last year of commissions designed to forward this effort affords us much encouragement."

Judge Wm. H. Taft of the United States Circuit Court of Appeals for the sixth circuit said, in part:

"The right and opportunity freely and publicly to criticise judicial action are of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their judgments and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny of their



fellow men, and to their candid criticism. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are, therefore, highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus have a strong influence to secure uniformity of decision. But non-professional criticism is by no means without its uses, even if accompanied, as it is often, by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common sense the protest of many average men may evidence a defect in a judicial conclusion, though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just conclusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge, but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who cannot be reached and made to pause and deliberate by hostile public criticism.

"In the cases of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance because it is the only practical and available instrument in the hands of a free people to keep their judges alive to the reasonable demands of those they serve. On the other hand, the danger of destroying the proper influence of judicial decisions, by creating unfounded prejudices against the courts, justifies and requires that unjust attacks shall be met and answered. Courts must ultimately rest their defense upon the inherent strength of the opinions they deliver as the ground for their conclusions, and must trust to the calm and deliberate judgment of all the people as their best vindication. But the bar has much to do with the formation of that opinion, and a discus-

sion before them may sometimes contain suggestions which bear good fruit. Many persons whose good opinion is a high compliment regard the Federal judiciary with so much favor that they would deprecate a consideration of the criticisms already stated, as likely to give an importance to them they do not deserve. I cannot concur in this view. I believe that in large sections of this country there are many sincere and honest citizens who credit all that has been said against the Federal courts, and that it is of much importance that the reasons for the existence of these criticisms and their injustice be pointed out. It is not unfair to those governors who are the chief accusers of the Federal judiciary to say that they knew they were not speaking as they did to unwilling ears. They were merely putting into language the hostile feeling of certain of their constituents toward the Federal courts, and but for such feeling and criticisms would hardly have been uttered. It will in a large measure account for them, if we account for the popular sentiment they express.

"It will be my endeavor, therefore, first, to show that much, if not all, of the present hostility to the Federal courts in certain parts of the country and among certain groups of the people can be traced to causes over which those courts can exercise no control, and is necessarily due to the character of the jurisdiction with which they are vested, and not to injustice in its exercise; and second, that the criticisms which such hostility has engendered are in themselves without foundation.

"The Federal judiciary was the arbiter in the first great political controversy of the United States, and one which is continually reappearing in different forms. The general language of the Constitution required construction to apply it to cases arising in the organization and maintenance of the government. The two parties which had engaged in heated controversy over the adoption of the covenant at all continued it over its narrow or broad interpretation. The Supreme Court in the beginning was made up largely of men whose predilection was for a liberal construction, and who believed thoroughly in the national idea. This was soon manifest in their decisions which brought down upon the court in the anathema of the strict constructionists whose great effort it thereupon

became to weaken the judiciary. It was attempted to control their independence by making very wide the grounds for impeachment. The great chief justice was constantly threatened with this fate by partisans, and the attacks upon his alleged usurpations were frequent and fierce. Jefferson's severe words concerning the Federal judiciary, now so often quoted by these latter day critics, were written about 1820, as the result of a decision in *Cohens v. Virginia*, reaffirming the power of the Supreme Court of the United States on the validity of a State law.

"The change of feeling toward the Federal courts because of the change in their jurisdiction with respect to the negro race, affords an apt illustration of how mere jurisdiction may affect the popular feeling toward a court. Before the war the southern people had not looked with disfavor upon courts which did so much to preserve their property, while the abolitionists regarded them with aversion. After the war, when for the protection of the negro in his electoral and civil rights the election and civil rights bills were passed and their enforcement were given to the Federal courts, they became at the same time the objects of hatred and condemnation at the south and the great reliance of those who had been abolitionists at the north. Now that both parties have wisely decided to let the election problem work itself out and to await the local solution which the result of fraud and violence in elections will compel, the feelings of hostility at the south against the Federal judiciary has greatly abated.

"The last two generations have witnessed a marvelous material development. It has been effected by the organization and enforced corporation of simple elements that for a long time previous had been separately used. The organization of powerful machines of delicate devices by which the producing power of one man was increased fifty or one hundred fold was, however, not the only step in this great progress. The aim of all material civilization in its hard contest with nature was, and is, the reduction of the cost of production, for thereby each man's day's work nets him more of the comforts of life. Within the limits of efficient administration the larger amount to be produced at one time and under one management, the less the expense per unit. Therefore, the aggre-

gation of capital, the other essential element with labor in producing anything, became an obvious means of securing economy in the manufacture of anything. Corporations had long been known as convenient commercial instruments for securing and wielding efficiently such aggregations of capital. Charters were at first conferred by special act upon particular individuals, and with varying powers, but so great became the advantage of incorporation with the facility afforded for managing great enterprises, and the limitation of the liability of investors, that it was deemed wise in this country, in order to prevent favoritism, to create corporations by general laws, and thus to afford to all who wished it the opportunity of assuming a corporate charter in accordance therewith. The result was a great increase in the number of the corporations and the assumption of the corporate form by seven-eighths of the active capital in the country. The great saving in the cost of production brought about by mechanical inventions and the organization of capital worked incalculable benefit to the public, but the necessary price of it under our system of free right of contract and inviolate right of private property was a division of the profit between those who were to consume the product and those whose minds conceived and whose hands executed the work of production. The total wealth of the whole country was thus enormously increased, but of the increase more was necessarily accumulated in some hands than others. In the general prosperity caused by the revolution of methods of production, captains of industry amassed fabulous fortunes, and the aggregations of capital under corporate management became so great as to stagger the imagination.

"In the mad rush for money which previous successes had stimulated, it is not to be wondered at that some of the accumulated wealth was corruptly used to secure undue business advantages from legislative and executive sources, and that many of the political agencies of the people became tainted. The impersonal character of corporations afforded a freedom from that restraint in the use of money for political corruption, which is often present when the would-be briber is an individual. Men of good repute, with complaisance and intentional ignorance, acquiesced in the use of corporate

funds to buy legislators and councilmen in the corporate interest, when they would not wish or dare to adopt such methods in their individual business. The enormous increase in corporate wealth furnished the means of corruption, and the prospect of ill-gotten gains attracted the dishonest trickster into politics and debauched the weak, while the honest and courageous were often driven into private life. The genius of corruption in politics, which the corporation called up, has lived to plague them, and although great companies have secured all they wish from legislative bodies, they are regarded by the political blackmailers as fair game, and their corruption fund must still be retained to prevent oppression. The people, not unjustly, have charged all of these evils to the management of corporations.

Another evil has been the injustice done to the real owners of the corporate property by the reckless and dishonest management of its nominal owners. The great liberality of the general laws for the formation of corporations and the entire failure to exercise any stringent visitorial powers over them have enabled the active promoters and managers of large enterprises carried on at a distance from the homes of the real owners to increase the corporate indebtedness and capital stock so far beyond any fair valuation of their property as to put the entire control of it in the hands of the holders of worthless stock, who have nothing at stake in the corporate success. The real owners, the bondholders, are at the mercy of this irresponsible management till insolvency comes. The reckless business methods which such an irresponsibility and lack of supervision invite, create an unhealthy and feverish competition in every market, wholly unrestrained by the natural caution which the real owner of a business must feel. The concern is kept going with no more hope of legitimate profit, but simply to pay large salaries, or to favor unduly some other enterprise in which the managers have real interest.

"The prejudice against corporations has led to much legislation hostile to corporations, both resident and non-resident. It takes the form of discriminating taxation of the regulation rates to be charged by those companies engaged in quasi-public business, and sometimes of direct

deprivation of vested rights. In all such cases resort is at once had to the inferior Federal court, by the corporations injuriously affected, to test the validity of the State's action, and it not infrequently happens that it becomes the duty of such court to declare the legislation involved void, and to enjoin State officers from seizing or injuring the property of corporations under its provisions. Such a decision in a corporation-hating community at once tends to mark the Federal courts as friends and protectors of corporations.

"The real abuses, however, find their chief cause in political corruption, which is wholly beyond the power of the Federal courts to prevent or eradicate. Too frequently the popular impulse is to remedy or punish the evil by giving judgment against the great corporations in every case, no matter what the particular issue or facts are, on the ground that the corporation has probably increased its capital or attained its success by corrupt methods. It is hardly necessary to point out that this mode of punishment by forfeiture and chance distribution cannot be countenanced in a court of justice, however meritorious the cause of complaint upon which it is founded. The bribery of which many corporations are guilty is the most difficult of legal proof, and the crimes of this character are usually committed against the State, so that Federal courts have no cognizance of them.

The combinations known as trusts are now before the State courts, and I have no doubt from their decisions that legislation which experience will suggest, both by way of supervision over corporations and by criminal laws, will suppress much of their evil methods. It is settled, and rightly settled, that the National Government can do nothing in this direction except where interstate commerce is directly affected by them, and not where in the course of their operation interstate commerce may occur as an incident."

William Wirt Howe, Esq., of New Orleans, who followed Judge Dillon as the Storrs Lecturer at Yale university, read a paper. A part was:

"It seems reasonably certain that the class of writers who persist in denying the obligation of England to the Roman system are contradicted

by analogy, by history and by high authority. If we consider the English language we find that a very large and important part of it has manifestly been derived from the Latin, either directly or indirectly. Take, for instance, the name of our own society, the American Bar Association. There is not a word in it of British or Anglo-Saxon origin. All have come from Italy or France, and may be said to be of Latin origin. The question is not whether the civil law, so called, is the basis of jurisprudence in England in the same sense as in Germany or Louisiana, but what have been its historical relations and its effect in the evolution of the law of England. Down to the times long after Blackstone the civil law was associated in the minds of many Englishmen with a system that was thought to be hostile and alien to the liberties of England.

"From the time Julius Cæsar landed in Britain, 54 B. C., and until the legions returned, about the year 450 A. D., a period of about 500 years, the Roman republic, as it styled itself, embraced the civilized world and all that there was therein of art, science and philosophy. Its jurisprudence was like the sunlight, diffusing itself in all directions, and could not be excluded from even those places which attempts might have been made to darken. The Romans governed Britain, and the long period known as the Roman Peace gave an opportunity for the arts of peace. Agriculture and commerce were largely developed; cities, towns, villas, theaters, roads were built. Young Britons of good family were encouraged to travel and study abroad. There was a constantly developing civilization. Is it rational to suppose that such a people lived without any jurisprudence?

"The British Church was represented in all courts, highly educated both by books and foreign travel. By the end of the fifth century it had its own edifices, intercourse with Rome, and even with Palestine. To every churchman Rome represented the seat of everything that was great in jurisprudence as well as power. The kings and nobles were unlearned and the clergymen monopolized the learning of the period. They knew the Roman law and its offspring, the canon law. They stood for peace and justice at a time when violence was

common. If there was to be a contract drawn up, a deed or charter to be framed, a will to be prepared, they alone, as a rule, could do the work. Many of them became statesmen, and many of them were judges. Secular and ecclesiastical courts were not separated, and the two jurisdictions were hardly distinguished. The bishop sat in the county court and the church claimed for him a large share in the direction of even secular justice, and the claim was fully allowed by princes who could not be charged with weakness. In the eleventh century, we find that the Normans brought with them 'the power of organization, the sense of law and method, the genius of enterprise.' It was Stephen Langdon, an Englishman, educated at Rome, who produced to the constitutionalists the charter of Henry I, on which their demands should be based and from which Magna Charta sprang. During the most formative period of the English law the churchmen stood for some kind of educated justice.

"The custom of the King's Court was the custom of England and became the common law, and if the King's Court was of men whose chief culture was Romano-canonical the syllogism seems complete and the conclusion inevitable.

"Another source of influence is found in the middle of the twelfth century, when Vacarius, imported from Italy by Theobald of Canterbury, began to teach law at Oxford, and that school had a flourishing school of both civil and common law.

"We are all familiar with the curious association in England of probate and admiralty, and there can be no dispute that the principal rules of both systems are Roman through and through. The principles and practice of the English court of chancery are largely derived from Roman sources, modified in some respects by the canon law. It is conceded by such writers as Cruise that the devices in conveyancing known as fines and common recoveries were derived from the civil law. They were in principle the *in jure cesso* of the Roman law, which was a fictitious surrender in court of property resulting in a judgment settling the title in the person in whom it was desirable to have it settled. It will hardly be contended that such refined method of conveyancing could have been de-

rived either from the ancient Britons or the Anglo-Saxons. We are often told that an Englishman's house is his castle, but we find the same idea quite as strongly expressed in classical Roman law at a time when neither Briton nor Teuton had any houses worth mention. The system of trial by jury was of Roman origin. The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact and suggests that the proceeding probably came to England as it did to Spain, from the Roman law. It seems certain that this writ might have been applied for in Britain during the five centuries of Roman occupation, at least, when not suspended by a condition of martial law.

"The law of England is like a composite photograph to which many features have contributed their influence to form eventually one picture. It has become distinctly national like the English language itself, and like the language, it has spread to the uttermost parts of the earth. It is not a mere mosaic, but a living organism, a true body of doctrine which has gathered and assimilated its nutriment from many ages."

#### LIABILITY FOR LOSS BY FIRE.

IF the property of A is burned, and the fire is thence communicated to the property of B, which also burns, and thence, the fire spreading from B's property, the property of C is also burned, where is the legal liability for the loss? It is a brief discussion of this question, and its subdivisions, or possible phases, that is intended in this paper.

By the ancient law of England, the person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, must make good the loss, whether the origination of the fire was due to his default or negligence or not.<sup>1</sup> This never became the common law of the States of America, however, but in most, if not all, of the common law States the rule is, as it was made in England in 1707, by statute of 6 Anne, that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby,"<sup>2</sup> and the word accidentally has been construed properly to include the negligence of strangers.<sup>3</sup> This statute, though, or rather the

common law rule identical with it, has not been construed to apply to defendant's negligence,<sup>4</sup> and the liability of a defendant, for the damages sustained by another because of his negligent use of fire depends on the same principles and learning as his liability for negligence in any other way, or with any other element.<sup>5</sup> It is therefore unquestionably true, if fire is thrown by A's negligence, and falls directly on B's property and destroys it, that A is liable in damages.<sup>6</sup>

The courts have not, though, answered unanimously the question as to A's liability when the fire is not communicated to B's property immediately by A's negligence, but immediately and through the burning of A's property. *Ryan v. Railroad*, decided by the Court of Appeals of New York, in 1866, had these facts for its basis, to wit: "In the city of Syracuse, the defendant, by careless management, or through the insufficient condition of one of its engines, set fire to its woodshed and a large quantity of wood therein. Plaintiff's house, situate at a distance of 130 feet from the shed, took fire from the heat and sparks, notwithstanding diligent efforts were made to save it. Plaintiff sued to recover damages. The court held that he could not recover, and in the course of its discussion said: "If an engineer upon a steamboat or locomotive, in passing the house of A, so carelessly managed its machinery that the coals and sparks from its fires fall upon and consume the house of A, the railroad company or steamboat proprietors are liable to pay the value of the property. If, however, the fire communicates from the house of A to that of B and that is destroyed, is the negligent party liable for his loss? And if it spread thence to the house of C, and thence to the house of D, and thence consecutively, through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by the twenty-four sufferers? Where is the principle upon which A recovers and Z does not?" Finally, in accordance with this argument, the court concludes that "the remoteness of the damage forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case." The Pennsylvania court in *Railroad v. Kerr*,<sup>8</sup> followed the *Ryan* case, but the courts of the country generally have not done so. Indeed the New York court itself, in a case decided in 1872, and in subsequent cases has, to say the least, not strongly supported the

<sup>4</sup> Wharton on Neg. § 867.

<sup>5</sup> *Day v. Lumber Co.* (Minn.), 56 N. W. 243; S. C. 23 L. R. A. 513, and annotations.

<sup>6</sup> Wharton on Neg., § 867; *Bishop on Non-contract Law*, § 833, or any work on negligence or torts.

<sup>7</sup> 35 N. Y. 210.

<sup>8</sup> 62 Penn. St. 858.

<sup>1</sup> Anonymous, Cro. Eliz., 10.

<sup>2</sup> 6 Anne, chap. 31, § 6.

<sup>3</sup> Wharton on Neg. § 867.

reasoning in its own earlier decision.<sup>9</sup> The Supreme Court of the United States has expressly refused to follow Ryan's case in *Railroad v. Kellogg*, and has, in that case, as it seems to me, layed down the rule:<sup>10</sup> "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. (*Scott v. Shepherd*, 2 W. Bl. 892.) The question always is, "Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" To the same effect is the very persuasive voice of Mr. Cooley,<sup>11</sup> who, after mentioning Ryan's case and Kerr's case, adds: "But a different view prevails in England and in most of the American States. The negligent fire is regarded as a unity; it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone, put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would have intervened, back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or of nearness in time. The slow match which causes an explosion after such time and at a considerable distance from the ignition, and the libelous letter which is carried from place to place by different hands before publication, produces an injurious result which is as proximate to the cause and as direct a sequence as if in the one case the explosion had been instantaneous, and in the other the author had called his neighbors together and read to them his libel."

It is impossible to resist, by any legal reasoning, I think, this doctrine. It is involved in the most elementary law of negligence, and indeed in the very definition of the term. Dr. Wharton's definition of negligence is as follows,<sup>12</sup> and it is free from any but hypercritical objection: "Negligence, in its civil relations, is such an inadvertent

imperfection, by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another." That fire will communicate from one house to another, and thence to another, and thence again to another, is the "ordinary and natural sequence" of the negligent act that sets fire to the first house; and the fact that it is the ordinary and natural sequence is shown in any particular case by the fact that in that particular case it has done that very thing without the intervention of a new causative power.

It would seem, therefore, clear on principle, that if A's house is burned by A's negligence, and the fire is communicated to B's house and burns it, and is thence communicated to C's house and burns it, and there has been no independent negligent act, nor "act of God," intervening between the negligence of A and the infliction of the damage, then A is liable to pay the damage done to both B and C. The question asked by the court in Ryan's case, *supra*, as to what reason there is for the first sufferer's being able to recover and not the last, when they are both damaged by the negligence of the defendant, does not need to be answered until some reason is given, or some principle invoked, to preclude the last sufferer from his action. Of course, this doctrine would not give a cause of action to any one damaged when he or any other whose duty it was to stay the progress of the flames had, purposely or negligently, failed in that duty. If the fire company, for instance, ought to have prevented the fire's spread from A's property, and did not do so, the further damage suffered was not the proximate result of A's negligent act, but of the intervening neglect of the fire company. So, if during the fire there arises a wind of extraordinary force, and it carries the fire to distances beyond the line of ordinary danger, A will not be liable, for the damage is the proximate result, not of A's negligence, but of the intervening act of God. These are limitations on the rule enforced by the logic of the rule itself. "Fraud is not purged by circuitry," is a maxim, and it is true as well of negligence, or any other wrongful act.<sup>13</sup> As long as the chain of events is found by the triers of the facts to be unbroken and following in ordinary and natural sequence from one causative act or neglect, that act or neglect is the proximate cause of the damage, and the *tortfeasor* must answer for the damage that is suffered anywhere in the chain; or, as has been recently said by the Supreme Court of Kentucky,<sup>14</sup>

<sup>9</sup> *Webb v. R. R.*, 49 N. Y. 429; *Pollett v. Long*, 56 N. Y. 200; *Lowery v. R. R.*, 99 N. Y. 158.

<sup>10</sup> 94 U. S. 469; S. C., 24 Law Ed. 256.

<sup>11</sup> Cooley on Torts, 87.

<sup>12</sup> Wharton on Neg. § 3.

<sup>13</sup> Cooley on Torts, 84.

<sup>14</sup> 21 S. W. Rep. 347; see, also, among recent cases, *Martin v. R. R.* (Conn.) 25 At. Rep. 239; *Face v. R. R.*, 22 N. Y. State, 958.

"if the fire spreads from the matter first ignited, the intervention of considerable space, or of various physical objects, or a diversity of ownership, does not preclude recovery by the party injured, or affect the defendant's liability for the first negligent act."

But let us suppose that the property of A, B, and C is all insured in the same insurance company, and through the negligence of A all the houses are burned, what is the status of the matter so far as the insurance company is interested. In the first place, the negligence of A would not be a defense to the insurance company in an action brought by either one of the insured on his policy, if the policies were of any of the ordinary forms. Of course, this is true as to the loss of B and C, for neither their own negligence nor their default had aught to do with the loss. It is also true as to the loss of A, because the ordinary contract between the insurance company and its policy holder provides for an insurance against *any* loss by fire except such as is expressly excepted in the conditions and limitations of the policy, and loss arising from the negligence of the insured is not usually among the expressed exceptions. Having paid, however, the amount of damage due B and C, under their policies, what would prevent the recovery by the insurance company against A of a sum sufficient to make good the loss sustained by it in its payments to B and C? Even without the provision usual in the standard policy that the insurer shall be subrogated to all the rights and actions that the insured would have had, the doctrine of subrogation would of itself operate to vest in the insurer the cause of action that had been in the insured, to the amount of the payment on the loss by the insurer to the insured.<sup>15</sup> While there is a contract between A and the insurance company that would prevent the recovery by the insurance company from A for damages to indemnify it for the loss paid to A himself, this does not apply to the cases of B and C—as to their property there is no contractual relation between A and the insurance company—and there seems to be no reason why even the same insurance company that had insured A and paid him the amount of his loss on his own property could not maintain an action just as could B and C, or an insurance company to which A was a stranger, for the damage that had come to it in the burning of the houses of B and C, as the proximate result of the negligence of A.

Against these views there are two arguments made by the New York court in Ryan's case, *supra*, each of which may be not disrespectfully termed

<sup>15</sup> Hall v. R. R., 13 Wall. 367; Ins. Co. v. Frost, 37 Ill. 333; Ins. Co. v. R. R., 25 Conn. 265; Day v. Lumber Co., *supra*.

an *argumentum ad hominem*, rather than legitimate legal reasoning; the first is thus stated, to-wit: "That the defendant is not liable may be strongly argued from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, although the occasions for it have been frequent and pressing." Whatever might have been the condition of things in 1866, when this was written, it is no longer true that "no such action has been maintained in any of the courts." Such actions have not been frequently brought, it is true. Railroads, steamboat lines and mill owners have occasionally had to suffer, but the general digest and the American digest show not more than half a dozen cases in half a dozen years in which individuals not engaged in one of these vocations have had to make good the loss occasioned by their negligence. Many reasons for the infrequency of such actions suggest themselves, but it cannot be said that they have never been sustained. Littleton's maxim, "that which never has been ought never to be," can no longer be pleaded in bar of the right. The second *argumentum ad hominem* advanced by the court in Ryan's case is thus stated: "A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society." To this it may be pertinently replied that nobody, since the statute of 6 Anne was passed, in 1707, has contended that a man was the "insurer of the security of his neighbors on both sides and to an unlimited extent." When one uses the care that may be reasonably expected from a reasonable man, he is not liable to any action for negligence, and it surely is not "destruction to all civilized society" to hold its members to that degree of care, by making them liable for the damages that follow in ordinary and natural sequence from their reckless disregard of the rights and property of others.

This, though, suggests a counter-remark that it might be beneficial to, rather than destructive of, civilized society for people to learn practically that they are liable for negligence in handling fire just as they would be in handling any other thing. There are cases, too frequent, of property owners who, being fully insured themselves, are not so careful as they would otherwise be with the fire on their premises, and are not careful in either their inquiry as to whether the property of their exposed neighbor is protected even as theirs. This is one evil, but it is not so great as another that might be named:

The annual aggregate of fire loss in this country is so enormous as to be past comprehension.<sup>16</sup> Much of it is covered by insurance, and some people, who regard only their own localities, would be inclined so subtract the amount of insurance from the aggregate loss, and call only the balance that might be left the net loss. This is a mistake; when an insurance company pays to the insured a sum of money there has been no creation of value nor increase of wealth, there has been simply a change of ownership of so much money; but when improvements on realty, or personal property, is burned there has been an actual decrease of wealth—there has been, to all practical purposes, an annihilation of value—there has been a *devastation* of the assets of the country—whether there is insurance to cover the loss or not. It is not unlikely that the annual fire loss would be materially decreased by the enforcement of the duty of reasonable care in the use of what is, though a necessary, still a dangerous, agency. With a decreasing annual fire loss would come decreasing insurance premiums, and this would be a “good diffused, and in diffusion ever more intense.”

JUNIUS PARKER.

Knoxville, Tenn.

#### SOME NOTABLE SCOTCH LAWYERS.

HENRY COCKBURN.

NO one has a better claim to be enrolled in the catalogue of notable Scotch lawyers than Henry Cockburn. Not only did he attain to such professional eminence as of itself would entitle him to a place in this series, but by his books, with their charmingly fresh and striking portraits of the great lawyers, both on the Bench and at the Bar, among whom his lot was cast, he has made for himself a much more enduring claim to remembrance. To his works, it is almost needless to state, we have been under a deep obligation for much interesting information relative to Erskine and the other lawyers whose careers have been already sketched.

Henry Cockburn was born on the 26th October, 1779, either in Edinburgh or its vicinity; he never

<sup>16</sup>It seems to me impossible for there to be reliable statistics on this subject, but any statistics, honestly gathered, will, of course, err on the side of an under-statement, not an over-statement. The Chronicle Fire Tables for 1895 gives the total property loss in the United States during 1894 as \$140,006,484, and of this sum \$89,574,699 was covered by insurance. These tables also have statistics as to the causes of fire, and from these it appears that of the 62.12 per cent of fire loss whose causes were reported, 28.47 per cent, or very nearly half, was because of exposure to burning property.

appeared to really know where the interesting event took place. His father was Archibald Cockburn, then Sheriff of Midlothian, afterwards a Baron of the Scotch Court of Exchequer. Through his mother Cockburn claimed kinship with the county—and, indeed, country—potentates, the Dundases of Arniston, his mother and the wife of Henry Dundas, Viscount Melville, being sisters. Cockburn was in due course sent to the High School of Edinburgh, where, among his fellow pupils, was Henry Brougham, distinguished even then for a sturdy independence. At school Cockburn gave little indication of future success, and he passed from it in 1793 to the University, but slenderly equipped for its curriculum; but in its atmosphere, more genial than that of the High School, his mind, in course of time, expanded, and he could intelligently, and even enthusiastically, appreciate the lectures of Dugald Stewart and some of the other professors. As befitted one who was destined for the Bar, he joined the celebrated Speculative Society, the cradle of so many famous lawyers, which contributed its share in transforming an unpromising speaker into a practiced orator. At the University he took the usual arts and law courses, and, having passed his legal examination, he was, in December, 1800, admitted a member of the Faculty of Advocates. With such a connection as he was born into—relationship to the Dundases—success might have been predicated of any man, for his uncle was then, and had been for many years, the autocrat of Scotland, setting up and putting down whom he chose. But young Cockburn, notwithstanding his upbringing and the obvious advantages to be gained by a continuance in the political faith of his father and other relations, courageously threw in his lot with the little band of Whig lawyers who, then and for many years more doomed to almost complete professional proscription, were destined ultimately to confer unfading lustre on the Scottish bar. At the outset of his career, he tells us that he was esteemed a fortunate youth in being noticed by Adam Rolland, a pedantic old lawyer, who is said to have sat to Scott for the portrait of Pleydell, in “Guy Mannering;” but little came of this, except the sapient advice to eschew all reading except Scots and civil law, the first volume of Blackstone, and a modicum of constitutional history, and a caution against philosophy, which was “the vice of the age”—a piece of advice which the recipient very effectually disregarded, for he became a very great lover and reader of books. Of his early circuit experience he has left us some interesting accounts, which throw a good deal of light on the social habits of the time. One of these related to a circuit dinner at Stirling, where Lord Hermand, whose glorification of the virtues of the bottle appears in



many a pleasant anecdote, presided. The dinner was characterized by the usual predominance of sack, and, ere long, young Cockburn observed that the social circle became gradually thinner and thinner, yet nobody was seen to go out at the door. His companions, he found, had disappeared below the table; he took the hint and also retired beneath the mahogany, and there he lay till morning, when, as he tells us, the judge and some others equally accustomed to deep potations coolly walked upstairs, washed their hands and faces, came down to breakfast, and resumed their places in court, apparently none the worse for their night's debauch.

In 1807, much to his own surprise, he was, while on a visit to London, sent for by his uncle Lord Melville and Robert Dundas, the Lord Chief Baron, and offered the post of Advocate-depute. There are four Advocates-depute, who assist the Lord Advocate and Solicitor-General in the criminal courts; their duties are similar to those performed by the junior counsel for the Treasury with us, but there is this difference in their position—they go out of office with their political party. Cockburn had serious misgivings about accepting the post, as, his political views not being in accord with those of the Dundases, it might be considered that he had been bought over. He was assured, however, that he was not expected to renounce his Whig opinions, and that the offer was made solely on the ground of the family connection. With this assurance he entered on the office, to which it may be said a salary of between £300 and £400 was then attached, and he continued to perform its duties till 1810, when he “had the honor of being dismissed by the Lord Advocate from being one of his deputies.” Retaining the independence he had stipulated for on accepting office, he had voted against the Lord Advocate at a meeting of the Faculty a few days before his dismissal, and this brought matters to a climax. The Lord Advocate, who had not had anything to do with the appointment, had never taken kindly to the novel position of having a depute who differed from him, and this active opposition of Cockburn's was seized upon as an excuse for bringing the connection to an end. It then appeared that the young advocate's scruples in 1807 had been considered as “a mere youthful fervor” which would speedily vanish on his tasting the sweets of office. It is much to Cockburn's credit that his principles stood the test so thoroughly.

To Cockburn, as to Jeffrey and Moncrieff, the establishment of the jury court in 1816 opened up a fertile field. Till then trial by jury in civil causes was unknown north of the Tweed, and the new tribunal excited a good deal of interest. Being modeled on the English system, unanimous verdicts were a feature of the new court, and this

aroused great opposition. Cockburn tells us that the grounds of opposition to it were various, but “the religious objection which resolved into the perjury (as it was called) of the minority, sacrificing its conscience to the conscience of the majority, was the one that made the deepest impression on the Scotch mind.” He himself did not regard this feature with favor, and, experience not in the least diminishing the objections felt to it by the majority of Scotch practitioners, it had to be abandoned, and now a majority verdict is permitted if the jury have been deliberating for three hours. In this new court Cockburn won many triumphs. His power over juries was immense; as great, although in a different line, as Jeffrey's. Jeffrey luxuriated in an ornate style which Cockburn never attempted. Cockburn's speeches were clothed in what, in comparison with Jeffrey's, was the plainest language; they were uttered with a strong Scotch accent, slowly and deliberately, and, being plentifully interspersed with allusions to matters with which his audience were quite familiar, they produced a telling effect. For the narration of a simple story with true pathos, Cockburn was far before Jeffrey and his other rivals; he could touch the hearts of the jury where Jeffrey, with his dazzling oratory, could only excite wonder. “Of all the great pleaders of the Scottish Bar,” wrote Lockhart, “he is the only one who is capable of touching, with a bold and assured hand, the chords of feeling; who can, by one plain word and one plain look, convey the whole soul of tenderness, or appeal with the authority of a true prophet, to a yet higher class of feelings.” In the criminal courts, too, he was even more effective and successful. He appeared in several important trials, notably in that of Stuart of Duncarn (to which reference was made in the sketch of Jeffrey), and in that of Burke and Macdougall, the “resurrectionists.” In the former of these cases he made a remarkably able speech, which called forth this encomium from Sir James Mackintosh in the House of Commons: “The admirable speech of Mr. Cockburn, in the case of Mr. Stuart, had not been surpassed by any effort in the whole range of ancient or modern forensic eloquence. It was a speech characterized by calm and forcible reasoning, by chaste and classical diction, by the utmost skill, delicacy, and address in the management of the most difficult topics, and by a rare combination of zeal and ability in the cause of his client, with respect to the feelings of all the parties concerned, and a reverence for the rules of law and the austere decorum of a court of justice. It was a speech, in short, which, as a specimen of forensic eloquence, considered with reference to the peculiar difficulties with which the advocate had to contend, was unrivalled by any similar effort in ancient or modern

times." In the other case, Cockburn was leading counsel for the woman Macdougall, the associate of Burke and Hare in their hideous crimes. Well aware of the tremendous weight of prejudice against which he had to fight, he made a very impressive appeal to the jury to discard from their minds all that they had heard of the case and to devote their attention solely to the evidence given. The appeal was successfully made; the woman got off on a verdict of not proven. In connection with this case it was stated in a book by a Quaker, dealing with the principles of morality, that Cockburn, in addressing the jury, whispered to his colleagues, "Infernal hag!" — "the gudgeons swallow it" — and this was, of course, severely animadverted upon as a piece of professional fraud. The astounding statement has merely to be stated to be refuted. Regarding it, Cockburn said: "It is utterly untrue. No one could be more honestly convinced of anything than I was, and am, that there was not sufficient legal evidence to warrant a conviction of Helen Macdougall. Therefore no such expressions or sentiment could be uttered. At any rate, none such, and none of that tendency, were uttered."

In 1830 Cockburn became solicitor-general, and remained in that post till 1834. He never entered Parliament, but he was kept busy in connection with the important questions which then engaged the attention of the Legislature. The Scotch Reform bill was drafted by him, and on the cognate question of burgh reform he also did much to put an end to the maladministration of Scotch municipal affairs which had so long been rampant.

In 1834 he became a judge, with the title of Lord Cockburn. Among the notable judgments to which he was a party were the Auchterarder case, the action against the *soi-disant* Earl of Stirling, in which the claims of the pseudo-Earl were very forcibly demolished, and the Glasgow Cotton Spinner's case, where he clearly and emphatically laid down the law on the question of trade conspiracies. In these, as indeed in all the cases which came before him, his judgments were characterized by great clearness and force. He was considered not to be so strong in his law as some of his colleagues, but he had frequently the satisfaction of finding his judgments, after being reversed in the Inner House, restored in the House of Lords.

In his "Circuit Journeys," which contains a record of his judicial perambulations, he tells many amusing stories regarding the cases which came before him. Speaking of the trial of several women, he mentions that he was greatly diverted by over-hearing the opinion entertained by one of the accused of himself and his learned colleague. The virago remarked to one of her associates in the dock: "Twa d——d auld grey-headed blackguards. They

gie us plenty o' their law, but deevilish little joostice." In the same volume he also records an amusing retort of a jurymen to a medical witness. A woman was being tried for the murder of her child. It appeared that the child had been found with its throat crammed full of pieces of coal, and with the marks of a thumb and two fingers on the neck. All these, says Cockburn, had little effect on the medical gentlemen called for the defense, who stated that these marks, however they might startle the ignorant, were of little consequence in the eyes of a medical man; he had himself seen hundreds of children born with similar marks on the neck. "Ay, but Doctor," remarked a country jurymen, "did ye ever see ony o' them born wi' coals i' their mooth?" The whole book, like his "Memorials," is full of good things, and can be read with pleasure over and over again. Cockburn, however, was not a mere chronicler of the good things uttered by other people; he had a genuine vein of humor himself. He had been detained one day in court much beyond the usual hour by the dull prosing of a dry advocate. A friend meeting the judge afterwards, said that Mr. ——— was certainly inclined to be tedious. "Tedious!" exclaimed Cockburn, "he not only exhausts time, but encroaches on eternity!"

He sat on the bench till within a week or two of his death, which occurred on the 26th April, 1854, at his country seat of Bonaly, a charming house nestling at the northern base of the Pentlands. Carlyle wrote of him as "a bright, cheery-voiced, hazel-eyed man; a Scotch dialect with plenty of good logic in it, and of practical sagacity. A gentleman, I should say, and perfectly in the Scotch type, perhaps the very last of that peculiar species." He was a thoroughly excellent man, and one of whom his country was justly proud.

His writings, besides several contributions, chiefly on legal subjects, to the *Edinburgh Review*, consisted of his "Memorials of His Own Time;" "The Life of Jeffrey," which, though a fine tribute to the memory of his friend, is hardly so interesting as the "Memorials;" his "Circuit Journeys," "Journal," and "Sedition Trials." The "Memorials" was a good deal criticised in the *Law Review* on their appearance, but their accuracy was maintained with much force in an interesting article in the *Edinburgh Review*.

One other characteristic of his deserves mention — that was his continued protest against the acts of vandalism, under the guise of "improvements," which were always being perpetrated in his beloved Edinburgh. His efforts did much to preserve the natural beauty of the northern metropolis, and after his death a society, called after him the "Cockburn Society," was founded, and still exists, for the purpose of continuing his labors in this direction. — *Law Times*.

## Abstracts of Recent Decisions.

### FRAUDS, STATUTE OF—VENDOR AND PURCHASER.

—Where an agent, who was orally appointed by a married woman with her husband's sanction, purchased land at auction, and the auctioneer made a memorandum in his book of the purchaser's name and terms of sale, the purchase is binding on the woman, as the transaction is not within the statute of frauds. (*Moore v. Taylor* [Md.] 32 Atl. Rep. 320.)

**INJUNCTION — OBSTRUCTION OF SIDEWALK.**—An action cannot be maintained, at the suit of a private party, to enjoin an obstruction or other nuisance in a public street or highway, where he has not suffered any special or peculiar damages to himself, his property or business, but his damages are the same in kind as those sustained by the public in common with himself. (*Gundlach v. Hamm* [Minn.], 64 N. W. Rep. 50.)

**INSURANCE — PROOFS OF LOSS — WAIVER.**—An insurance adjuster, by telling assured that as to her household furniture everything was satisfactory, but that he wanted to get bills as far as possible of her store goods, and that as soon as she notified him about getting things ready he would meet her, did not waive conditions in the policy requiring assured to make and keep an inventory of her stock, and in case of fire to furnish certain proofs of loss, where, long before the expiration of the time for filing proofs, assured was notified that the company would insist on the performance of the terms of the policy, and she sued on the policy several months before the time for filing the proofs had expired. (*Allen v. Milwaukee Mechanics' Ins. Co.* [Mich.], 64 N. W. Rep. 15.)

**NATIONAL BANKS — INSOLVENCY — DISSOLUTION.** The appointment of a receiver for an insolvent national bank, under Act Cong. June 30, 1876, § 1, which authorizes the comptroller, when satisfied of the insolvency of a banking association, to appoint a receiver, "who shall proceed to close up such association, and enforce the personal liability of the shareholders," does not dissolve the corporation. (*Chemical Nat. Bank of Chicago v. Hartford Deposit Co.* [Ill.], 41 N. E. Rep. 225.)

**PLEADING—REVIEW ON APPEAL.** — It is error to render a judgment for the plaintiff upon a petition which does not state a cause of action in his favor. The error, being apparent from the record and inherent in the judgment, may be taken advantage of on appeal, without exceptions or motion for new trial in the District Court. (*Oakland Home Ins. Co. v. Allen*, [Kans.], 40 Pac. Rep. 928.)

**RAILROAD COMPANIES—STOCKHOLDERS' BILL FOR RECEIVER.**—Where a stockholders' bill asks for the

appointment of a railroad receiver, not with a view to enforcing any lien or debt, but merely to secure a better management of the property until arrangements can be made for discharging its debts, the mere filing of the bill and service of process do not draw the property of the company into the possession of the court, so as to prevent the company, prior to the appointment of a receiver, from surrendering steel rails lying along its right of way, but not yet attached to its road, to the creditor from whom they were purchased, as part of a larger lot, in partial extinguishment of debt for the purchase price. (*Illinois Steel Co. v. Putnam*, U. S. C. of App., 68 Fed. Rep. 515.)

## New Books and New Editions.

### AMERICAN STATE REPORTS, VOL. XLIII.

This last volume of the reports is published with its usual good arrangement and excellent index and continues the series of this practical and valuable work. It may not be superfluous to say that the selection of cases excellently made by the editor gives a series of reports of all the States of the most important and valuable decisions. This volume contains parts of the following reports: Arkansas 59, California 104, Florida 34, Houston 9, Illinois 152, Indiana 136, Iowa 87, Michigan 100, Minnesota 55, Mississippi 122, Montana 14, Nebraska 41, New York 144, Pennsylvania Statutes 163, Washington 9 and Wisconsin 88. Published by Bancroft, Whitney & Co., San Francisco, Cal.

### HISTORY OF THE AUSTRALIAN COLONIES.

The history of the Australasian Colonies by Edward Jenks, M. A., Professor of Law in University College, Liverpool, and formerly dean in the faculty of law in Melbourne.

This is a most interesting and excellent history touching on many new and interesting bits of events of Australia and the surrounding islands and gives, perhaps, a clearer idea of the founding of the different colonies of Australia, New Zealand and the other governments than any previous work. The first few chapters deal with the founding of the colonies of New Zealand, New South Wales, Western Australia, South Australia and their developments. The subsequent chapters are of practical value to the lawyer and deal with the responsible government and modern constitutions. This is followed by chapters on internal explorations of Australia; the Maori wars in New Zealand and present day questions, including an exposition of politics and the federation question and the Tongan question. Price \$1.60. Published by MacMillan & Co., 66 5th avenue, New York city.

# The Albany Law Journal.

ALBANY, OCTOBER 5, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE matter of code revision has aroused great interest among the lawyers of the State, and the act of last winter, providing for the appointment of counsel to examine into the Practice Acts in this and other countries as a basis for a report upon that subject, met with very general approval.

The editorial from the American Lawyer, which we quote below, makes an exceedingly vigorous protest against any action not based upon a careful study of the subject by men who are specially interested in it, and who have already devoted attention to it.

This criticism arises out of the appointment of the present Commissioners of Statutory Revision to perform the work, and an apprehension that instead of making a careful, painstaking and scholarly examination of the matter, they will be disposed to put before the profession a piece of work lacking careful consideration, and which will not be the mature product of thorough inquiry into and complete mastery of the subject of Legal Procedure.

We entirely agree with the article in its criticism of a careless, imperfect and hasty revision. It is a task requiring the attention of the best minds and the most careful consideration. Neither time nor pains should be spared in such a revision, nor is the item of expense to the State a controlling one. The profession can afford to wait for good work, and the State can, if necessary, well afford a fair compensation to the persons engaged in it.

The question for decision by the bar is, practically, can the Commissioners of Statutory Revision perform this work in the manner required, with reference to their other duties in revising the General Laws and drafting bills for members of the Legislature, and are they best fitted for it of all the lawyers in the State by reason of experience, skill and knowledge.

We have the highest respect for Governor

Morton in matters relative to affairs with which he is familiar. How far his judgment may have been at fault in this case, remains to be determined by results. If Messrs. Lincoln, Johnson and Northrup shall develop a thorough acquaintance with the methods of practice in vogue in other States and in England, and so extensive a knowledge of both the theory on which the present practice is based and the practical results attained, and shall add to this, capacity as draftsmen of a procedure act demanded in modern legislation of this importance, they will be abundantly justified in undertaking the work left incomplete by David Dudley Field, and the selection of Governor Morton will indicate that he was discreet and sagacious in his action.

In view, however, of the agitation on this question, it would doubtless be wise for the commissioners to refrain from the preparation of a revision until they have given the profession the report required by the statute to be distributed by December first relative to an examination of the codes of other States and of England, and their views as to the basis of a proposed revision. If this report indicates the degree of research and investigation, as well as the thorough knowledge of the subject required for the work, they will doubtless receive the approval of the bar in proceeding further; otherwise the preparation of a revision by them will be a serious embarrassment to the cause of law reform. Are these gentlemen men possessed of such general culture, broad attainments, scholarly instincts, natural ability and legal education, united with facility of expression, as to qualify them for the task, and are they sufficiently well known to enjoy the confidence of the bar of the State? However this may be answered, we are clear now as always that it would be better that no report should ever be made than that after the adoption of the work or after its rejection, this important question should remain unsettled and the Code still continue to be called the driftwood of legal procedure, muddled with many topics and statutes which have no relation whatever to the main subject. The article which we have referred to, and which seems to take issue with the wisdom of the appointments made by Governor Morton, is as follows:

## GOVERNOR MORTON'S MISTAKE.

The act passed by the Legislature of New York during the last session, relative to revision of the Code of Procedure, contains these provisions:

First — "The Governor shall appoint three members of the bar of this State, who shall examine the Code of Procedure of this State and the codes of procedures and practice acts in force in other States and countries, and the rules of court adopted in connection therewith, and report thereon to the next Legislature in what respect the civil procedure in the courts of this State can be revised, condensed and simplified."

Second—That the expenses and disbursements incurred in the performance of the work shall be paid by the State, but no compensation is allowed to the commissioners.

Third — That the necessary printing in connection with the work shall be done by the State Printer, and copies of the report distributed to the judges and members of the bar by December 1, 1895.

This bill is the outcome of an agitation on this subject, commenced by the New York State Bar Association some two or three years since, and carried on by this journal and other periodicals, as well as by articles and memorandum presented to the State Bar Association from time to time by J. Newton Fiero, chairman of its Committee on Law Reform, and by Austin Abbott, also a member of that committee, and of the Committee on Amendment of the Law, of the Association of the Bar of the City of New York, and by reports of committees of bar association from time to time. The Bar Associations of Rochester, Brooklyn and Syracuse united with the State Association and the Association of the City of New York in recommending and urging the passage of the bill, it having been approved by the State Bar Association at its annual meeting and a committee appointed charged with the duty of presenting it to the Legislature. The leading lawyers of the State, including Elihu Root, William B. Hornblower, Wheeler H. Peckham, and others of note, took an active interest in the matter, and strongly favored the passage of the bill. The bar and the public are to be congratulated that although, after long and persist-

ent effort on the part of the lawyers of the State, proper provision is made by this bill for the revision of the complicated and intricate Code of Procedure which has been in operation since 1877. Up to this point, the associations of the members of the bar, and the individual lawyers who interested themselves in the matter, seemed to have performed their duty well and faithfully. With the passage of the bill, however, these eminent lawyers seem to have regarded their work as accomplished, and to have made no effort to provide for the manner in which it should be carried on and completed. The bar associations and their members, as well as the members of the bar generally throughout the State, have been guilty of gross *laches* in this respect, since we are confident it was never contemplated in the bill that this work should be placed in the hands of the Commissioners of Statutory Revision, who have been designated by Governor Morton to discharge the duties imposed by the act.

In the first place, it was not at all necessary that the Legislature should have acted upon the matter at all, or passed a bill providing for the appointment of lawyers to perform this work, if it were to be delegated to the Commissioners of Statutory Revision. That body is already in existence, duly organized, salaried for the purpose of performing certain work provided by statute, and a mere reference of this matter to them would have accomplished all the purposes of the bill.

Again, the Commissioners of Statutory Revision were appointed for the express purpose of revising the general laws of the State. They have been engaged upon that work for some five or six years, and it is not yet accomplished. The result is that the statutes are in a state of confusion which is disgraceful to the State, and the only remedy is prompt action by way of a revision of those that remain, so that they may be incorporated in the general laws and complete the system as a consistent whole. To place upon this body the duty of revising the practice of the State is to bring about the state of affairs precisely similar to that which existed when the commission which manufactured the present Code left the work for which it was appointed, and which was that of the revision of statutes, and embarked upon the labor of

tinkering with practice and procedure. The result is too well known to need to be recalled. The work of statutory revision was not performed at all, while the work of revision of the Code of Procedure was performed in such a manner as that it might very much better have been left undone.

Finally, the bill calls for an examination of the procedure of this State, and the practice acts and procedure in other States and countries, as well as the rules of court which are adopted in connection with these regulations, involving not only a very large amount of labor, but very much of experience, and requiring the services of men who have made a study of the special matter in hand, and have devoted some time and attention to questions of procedure and the rules of the adjective law, or the law relating to procedure, as well as a thorough acquaintance with the substantive law, or what is ordinarily called the municipal law.

The work to be done requires lawyers, not only well versed in the law, but thoroughly acquainted with matters of practice and apt as draftsmen, with a facility for absorbing and using what is best in the rules and practice in other jurisdictions. We make no reflection upon the three members of the Commission on Statutory Revision in questioning whether they have any special adaptability or experience to qualify them for this class of work. We confess to very great disappointment in not finding named as commissioners for the purpose of revision of the Code the names of men well known to the profession as those who have made a study of this matter, and have special adaptation to the work in hand. Of such men there is no lack throughout the length and breadth of the State. Judge David Rumsey is the author of three volumes upon practice, which indicate that he has made the method of procedure in the State a matter of careful investigation. Edwin Bayles, in his works devoted to practice under the Code, has shown an acquaintance with Code methods and Code remedies which would eminently qualify him for the work. The authors of the annotated Code, both Bliss and Stover, from the character of the work done by them, must be deemed eminently fit for an examination of questions of this character. In addition to these authors,

and to the two lawyers previously named, who were active in the movement in favor of Code revision, and who have treated the subject in works on Practice and Pleading, the names of men like Adelbert Moot of Buffalo, Robert F. Wilkinson of Poughkeepsie, John J. Linson of Kingston, Charles A. Collin of Ithaca, and numerous others who have been heartily interested in the movement and active in pressing it forward at once, suggest themselves as thoroughly familiar with and competent for the performance of the work.

We presume that Governor Morton consulted some members of the bar in the matter of his appointment, but his advisers certainly failed in their duty if they neglected to suggest to him the names of proper persons to take up this difficult and troublesome question. If the Governor neglected to take the advice of the bar on the subject, he has taken upon himself as a layman a very grave and unnecessary responsibility in making appointments of so such grave importance to the lawyers of the State without taking the utmost pains to ascertain the requirements for the position, and acting in accordance with the views of the profession.

A revision of the Code, such as was made by the Throop Commission, which went into operation in 1877 and 1880, would be not only a misfortune, but if adopted by the Legislature but little short of a calamity. That commission was appointed for an entirely different purpose, and composed of men with no special fitness by education, study or experience for the work; and, after the lapse of fifteen years, we find the Code drafted by them so great a failure that the profession almost unanimously prefer all the troubles and ills to flow from a revision rather than to continue under such a procedure. If, on the other hand, a revision should be recommended and fail of adoption because not prepared so as to fully blend the practical and scientific side of the practice, it would put back the work of revision in procedure very many years, and the result of the agitation and labor on the subject for three years past would be entirely lost. We cannot, therefore, regard the action of Governor Morton in this matter other than unfortunate; and while giving the Executive credit for the best possible motives, feel that he was illy advised; and that if the advice

he has seemed to follow came from those who were most interested in the bill, namely, the lawyers of the State, they failed at a critical moment in the performance of their duty to the great body of the bar. On the other hand, if the appointments were made upon the Governor's personal knowledge of what was required, without taking the opinion of the leading members of the bar of the State, it places upon him the responsibility for what, under the circumstances, is most likely to be an unfortunate issue.

The Lawyer speaks earnestly on this subject, as it has labored zealously with others for two years to arouse interest in this subject, and to bring about the consummation so gravely needed, and just when the work seemed largely accomplished, it cannot but regret the present outcome by which the desired fruition is imperilled. The only hope for a successful termination of the matter seems to lie in the members of the commission devoting their entire time and attention up to December—when their report must be published—to the study of methods of procedure, the examination of forms of practice, and the drafting of well-formulated methods in a manner conforming to modern demands. This will necessarily involve the abandonment for the year of the revision of the general laws, which cannot be done without great detriment to the interests of the public. And even should this course be taken, it is not easy to see how the commissioners can qualify themselves for the work in hand so that it can be performed in the thorough, systematic and satisfactory manner that it might have been done if placed in the hands of men thoroughly familiar with the subject in the first instance.

The New York Tribune, in an article of recent date in its "Bench and Bar" column, in which it is wont to discourse on legal topics with much fairness and ability, says with reference to the report made by the committee on law reporting at the recent Detroit meeting:

"One of the most important subjects discussed at the recent meeting of the American Bar Association was the needed improvement in the system of reporting in the United States. The report of J. Newton Fiero and his associates has just been printed in form accessible to

lawyers in this State who are not members of the association. Mr. Fiero is so strongly in favor of the methods now in use in this State that his recommendations would lead to the general adoption of some system similar to that in use here. The sentiment among New York lawyers seems to be, however, averse to some details of the New York system. The delays are needlessly great, the indexing is extremely imperfect and the official series by no means fulfils expectations founded on the promises of the publishers. The publication of the session laws, for instance, is so slow as practically to be useless except in the earlier days of the legislative session. Some of the judicial opinions are published promptly, but the printing of others is delayed for months. The expense of purchasing a full set of reports is not unduly great, but the manner of publication is far from satisfactory to New York lawyers. Mr. Fiero's suggestion as to an improvement in the method of indexing the reports touches the point where almost every law reporter entirely fails. In the writing of head notes, also, there is little discretion shown by the reporters in some of the States. Frank C. Smith has made a careful collection of statistics as to the present system of law reporting in several States. He finds that the greatest diversity exists in the methods which are followed. Mr. Smith has made a careful examination of the cases reported from all the courts for the period of a year, and finds that about one-half of all the precedents cited are from previous decisions of the courts in which the citations are made. He suggests that if the courts have already decided the points at issue the opinions might be shortened by a simple reference to previous decisions without reiterating the arguments previously used.

We do not understand Mr. Fiero or any of the members of the Committee to recommend the adoption of the New York system in all its details or to in any wise claim that it is free from imperfections or but that it is susceptible of improvement. The point made in the report is to the effect that it is the most complete system yet adopted in any State or country, and so far as its general features are concerned it fulfills the object sought by the provision, namely, the prompt publication of the decisions of the courts in inexpensive form readily

accessible to the members of the profession. We understand the New York plan was received with much favor by the members of the Association at Detroit, and elicited very favorable comment. We are by no means prepared to say, nor does the report go to the extent of even suggesting that all the opinions are published so promptly as is possible to do, however we incline to the opinion that this criticism is probably directed toward the publication of the opinions of the Supreme Court. If so, it would scarcely seem to be practicable for the reporter to properly prepare the head notes of cases, have them revised, and enable the publisher to put them out more rapidly than is done at present. It will be borne in mind that some eight volumes are now issued of the reports of the Supreme Court by Mr. Hun during each year, and that it is therefore impossible to publish immediately upon promulgation the reports of any one of the general terms.

We should be inclined to think from our observation and examination that the official reports are quite as prompt and certainly more correct than any other reports of the same court now published. It would, however, be in order for any one interested in the subject to suggest any improvement which could be made in the present manner of publication, and the profession would no doubt insist upon any improvement which might be suggested which would be at all practicable.

The subject is one which is receiving very much attention, as is evident from the manner in which the report of the Committee was received by the American Association, and it is to be hoped the agitation will result very beneficially to the profession.

A very peculiar case has recently been decided most properly and in a common sense manner, in Westchester county, in the matter of the probate of the will of Harriet L. Losee. The main question involved was whether the attesting witness, who was blind, was competent under the statute. It appears that upon the witness-stand, when the will was offered for probate, the witness endeavored to point out the signature, but held the paper upside down and actually pointed to the body of the instru-

ment as the place where the names of the decedent's alleged witnesses were. The surrogate in his decision says: In the case of a will, a witness must have knowledge that the paper is a will by the declaration of the testator that it has been signed, by either seeing the signature written or by seeing the signature with an accompanying acknowledgment by the testator that it is his or her signature: *Lewis v. Lewis*, 11 N. Y. 220; *Mitchell v. Mitchell*, 16 Hun. 97; *In re Mackey*, 110 N. Y. 611, 18 N. E. 433; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Willis v. Mott*, 36 N. Y. 486; *In re Van Geison*, 47 Hun. 8; *In re Bernsee*, 141 N. Y. 389; 36 N. E. 314. In the *Mackey* case, Earl, J., in writing the opinion, says: "Subscribing witnesses to a will are required by law for the purpose of attesting and identifying the signature of the testator, and that they can not do unless, at the time of the attestation, they see it." And, in the case of *Bernsee*, Andrews, C. J., cites the *Mackey* case, and says: "It is essential to the due publication of a will, either that the witnesses should see the testator sign the will, or that such signature should have been affixed at some prior time and be open to their inspection."

The loss of the sense of sight does not disqualify a person as a witness in many transactions, where they obtain knowledge of the transaction through the other senses than that of sight. By the sense of hearing, a witness can testify to the sound of the voice; by the sense of feeling, to the question of shape; through the sense of smell, to the matter of odors. But without the sense of sight a person is incompetent and can not be an attesting witness to a will. There must be an identification of the instrument by one who has seen the signature written or has seen the signature which has been acknowledged by the testator as his or hers. The paper propounded is identified only by the testator as his or hers. The paper propounded is identified only by the witness Lefurgy. She is the only one who saw the signature of the decedent at the time of the execution, and can swear that it is the paper which the decedent signed and which she signed as a witness. It is true that the statute permits the proof of the handwriting of the decedent and of the subscribing witness or



witnesses where the subscribing witness or witnesses are dead or absent from the State, and their testimony can not be obtained; but the statute applies only where there have been two attesting witnesses who have signed their name as such.

The statute was passed to allow the probate of wills that had been executed with all the formalities required by law. The difficulty in this case is that there was but one witness, and the formalities prescribed by the statute were not fulfilled. Mrs. Brown was not a witness, because she could not see at the time of the alleged execution. If she had been able to see then, and subsequently lost her sight, the case might be different. Such was the case of *Cheaney v. Arnold*, 18 Barb. 434, relied upon by the proponent. In that case, a subscribing witness who had signed the will had become blind by reason of great age. The case was decided upon the well established legal principle that, where the witnesses are dead, or by lapse of time do not remember the circumstances attending the execution, the law, after diligent production of all the evidence existing, if there are no circumstances of suspicion, will presume a proper execution of the will, particularly when the attestation clause is full. The statute prescribing the necessary formalities for the due execution of a will was passed to provide against fraud and imposition, and the protection given by it cannot be repealed by the court. Its wisdom needs no argument to sustain it, even though in isolated cases injustice is done and the wishes of the dead are thwarted.

One of the most reasonable and common sense opinions which we have noticed of late is that of *Cassius M. Howe v. Minneapolis, St. Paul and S. S. Marie R'y Co.*, in which the subject of contributory negligence is most fully and completely discussed in relation to a person crossing a railroad track and as to his duty to take care and give attention to the approach of coming trains. This question of contributory negligence is one which has been decided in many ways in the different States, but the decision in the above mentioned case represents to us more nearly the true exposition of the theory of contributory negligence under such circumstances. The plaintiff was, at the invita-

tion of the owner of the vehicle, riding along a highway and approached the tracks of the defendant. The defendant's train, running at a high and dangerous rate of speed, and without warning to the occupants of the carriage, struck the wagon in which the plaintiff was riding and severely injured the plaintiff. It appeared in the evidence on the trial that the plaintiff had no control or management over driver or over the horses at the time of the accident. There was no possible relation of master and servant or principal and agent between the plaintiff and the driver, nor were they engaged in any enterprise of a joint nature which compelled both their attendance on such a journey. The evidence was to the effect that the plaintiff did not know that the driver was incompetent, and was not aware that the driver was not keeping a sharp lookout for trains when approaching the railroad crossing. On the trial a verdict of twenty thousand dollars was found for the plaintiff, and on the appeal to the Supreme Court of Minnesota, the decision of which we have above spoken was made. The Supreme Court held that the plaintiff's negligence was a question for the jury, notwithstanding the fact that it appeared that if he had exercised any degree of vigilance and caution in the control and management of the team he would have discovered the approaching train in time to have avoided injury. The Supreme Court further held that the verdict was not so disproportionate to the nature of the accident to the plaintiff as to justify setting it aside as excessive, though, with the plaintiff's consent, it was reduced to \$14,500. As we have already remarked, this question of contributory negligence has been decided in different ways in the court of last resort of the various States, but this decision seems the most rational, proper, equitable and common sense rule of the law that has been laid down by any court on this important and oft-recurring subject.

The case of *Mullen v. St. John et al*, 57 N. Y. 567, which has been followed by other similar cases, such as *Engle v. Eureka Club*, 137 N. Y. 100, has been the precedent, we might say, in the case of *Ryder v. Kinsey*, recently decided in the Supreme Court of Min-

nesota, and reported in 64 N. W. R. 94. This principal of law is of general interest and the question of the liability of the owner of a building for injury suffered through the falling of a wall is often to be met with. In the case of *Mullen v. St. John et al (supra)* the plaintiff was injured by the falling into the street of the wall owned by the defendant. It appeared that the defendant had not built the wall himself, but had purchased the building twelve years after its construction. No evidence was given on behalf of the owner of the reason for the falling of the wall, and the Court of Appeals, in affirming the judgment, held that from the happening of such an accident in the absence of explanatory circumstances negligence will be presumed, and the burden is upon the owner to show ordinary care. In *Ryder v. Kinsey*, above mentioned, the case deals with the question of explanation by the owner as a defense. As in the case in this State the owner did not build the house, though a part of the wall fell into the street, injuring the plaintiff's minor son. On the trial it was shown that the cause of the accident was the defective construction of the wall, and that improper workmanship could not have been discovered except by the exercise of extraordinary care in inspecting the building by making an opening in the sheeting or wall to discover whether or not the wall was properly supported. The court held that the presumption of negligence arising from the mere fact that the wall fell was rebutted by the explanatory circumstances disclosed by the evidence showing the cause of the fall, and that the defect was a latent one; that the absence of any evidence disclosing any fact from which it might reasonably be inferred that such defect could be discovered by the exercise of ordinary care on the part of the defendant, the question of negligence is not one admitting of fair doubt; and that the jury was correctly instructed to return a verdict for him. Any other rule would probably make the owners of buildings insurers of their safety. The effect of the case it to hold that:

"Where a building falls without any apparent cause, and in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing that he exercised ordinary care to

keep it in a safe condition; but where it appears from such explanatory circumstances that the cause of the fall of the building was a latent defect in its construction, and there is no evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to show that such cause might have been discovered and removed before the accident by the exercise of ordinary care on the part of the owner."

The distinction between this case and the one where the owner constructed the wall is very apparent, as a party would be held chargeable with the knowledge of the defects, both patent and latent. (*Morris v. The Stroebel & Wilkin Co.*, 81 Hun, 1.) In the case last referred to the decision of the General Term was to the effect that a sign on the building of the defendant falling upon a person and injuring him, where the building is owned by the party sued, the duty of the said party is to secure the same so that it will not only be able to withstand the ordinary vicissitudes of the weather, but will also be able to stand the force of gales which experience has shown will be liable to occur. The distinction in these cases very wisely, it seems to us, makes the owner of property chargeable with negligence where he can obtain or has a full and complete knowledge of the condition, construction and repair of the property which causes the injury.

We publish in this issue of the LAW JOURNAL a most clever, interesting and practical article on the New Constitution of New York in Relation to Prison Labor, which was read before the American Social Science Association, at Saratoga Springs, on September 3d, 1895. The author of the paper is the well-known and distinguished lawyer, W. P. Prentice, Esq., of New York, who has been recognized as one of the leading legal writers of the time, as well as an active practitioner of high talents. His most recent work was from the press of Banks & Brothers, entitled "Police Powers Arising Under the Law of Over-ruling Necessity," and is a book which from the very first was recognized as an able and reliable text-book. It is, therefore, with great pleasure that we are able to publish this paper of Mr. Prentice.

## THE NEW CONSTITUTION OF NEW YORK IN RELATION TO PRISON LABOR.

(A paper read before the American Social Science Association,  
Saratoga, September 3, 1895.)

THE framework of government is seen in the Constitution. From another point of view it is the organic or fundamental law, as opposed to ordinary legislation.<sup>1</sup> Beyond it is still the unwritten law, which eminent jurists have maintained, "underlies all free government, and must be respected whether embodied in constitutions or not."<sup>2</sup> According to the famous phrases of our Declaration of Independence, "governments are instituted to secure the inalienable rights of men," and again, "prudence dictates that their form be not changed for light and transient causes." Permanence is expected of it, and, least of all, are we prepared to see, in any important particular, sudden changes of the law of the State. A recent decision of the Court of Appeals affirms that "the Constitution, which underlies and sustains the social structure of the State, must be beyond being shaken or affected by unnecessary construction or the refinements of legal reasoning. We may be compelled to have resort to such in the presence of contradictions, or of meaningless clauses, but not otherwise."<sup>3</sup> Guided by reflections of so great weight, and by the axioms oft repeated in judicial utterances entitled to most respect, that "an amended Constitution is to be read as a whole, and as if every part had been adopted at the same time, and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part,"<sup>4</sup> and further that "a statute is never to be construed against the plain and obvious dictates of reason,"<sup>5</sup> we take up the examination of the 29th section of the III article of the new Constitution and observe in the first place its salient features; that it is wholly new; that an interval until January 1, 1897, is provided before its enforcement; that the mandate in the first clause to the legislature is of ordinary, perfunctory and continuous duty which knows no interval; that it is contradicted and rendered impossible by the prohibitions of the concluding clauses, if ever they were to be enforced; and that it is opposed to other parts of this and former Constitutions, and to the letter and spirit of preceding laws. The rest of the Constitution has earlier effect; but with the ample provision the instrument contains for amendment,

<sup>1</sup> Mr. Justice Miller in *Loan Ass'n v. Topeka*, 20 Wal. 663.

<sup>2</sup> Black. Com. 244.

<sup>3</sup> *People v. Rathbone*, 145 N. Y. 438.

<sup>4</sup> *People v. Angle*, 109 N. Y. 564.

<sup>5</sup> *Daviess v. Fairbairn*, 3 How. (U. S.) 636; *Mongeon v. People*, 55 N. Y. 617.

already availed of, and one proposed and adopted for this article by the last Legislature, the intervening period and the question of its best use, engage serious attention.

The Constitution is itself an amendment and revision of that of 1846. Under it we had the prison reform, whose light for more than twenty years has been growing stronger upon the darkened paths, both of the prisoner and his keeper; and never certainly since the law of 1889 have the interests of labor, in any wise considered, been injured.<sup>6</sup> By an amendment of 1876 it created, and this Constitution in the same terms preserves, the office of the superintendent of State prisons, with "the superintendence, management and control of State prisons, subject to such laws as now exist or may hereafter be enacted." Throughout, the power and duty of the Legislature to provide for the changing necessities of the times is preserved. To it there is no limit save by the Constitution itself, and it has been often held and well said, it belongs to no Constitution to prevent its amendment, and no Legislature can curtail the power of its successors to make such laws as they deem wise.<sup>7</sup> No Legislature can declare the effect of subsequent legislation nor forestall legislation. "No Legislature," says the Supreme Court of the United States, "can bargain away the public health and the public morals. The people themselves cannot do it, much less their servants." "There is little reason," says Mr. Justice Andrews in *People v. Budd*, "under our system of government to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest. In the traditions of the English speaking race is a prevailing public sentiment which is quick to prevent any encroachments. In no country is the force of public opinion so direct and imperative as in this." The change introduced by the new Constitution not only restricts the province of the Legislature, but is a sudden return to an abandoned experiment, which it had recently made. The scheme was tried under the Yates law of 1888, repealed in 1889. In the latter year was adopted the celebrated and successful law regulating the whole subject, which has remained in force until the present time without essential modification.<sup>8</sup> Four

<sup>6</sup> Const. Art. V, § 4.

<sup>7</sup> *Stone v. Mississippi*, 101 U. S. 818, 819; *Met. B'd. Exercise v. Barrie*, 34 N. Y. 657; *Mongeon v. People*, 55 N. Y. 613; *People v. Long Is. R. R.*, 9 Abb. N. C. 181.

<sup>8</sup> L. 1888, Ch. 586.

<sup>9</sup> See Ch. 482, L. 1889; sec. 105 *id.*; Ch. 130, 1892; Ch. 737, 1894. N. Y. Supt. Prison's Report

years thereafter the annual report of the superintendent of State prisons portrays the consequences as they have been found in practical administration under such laws, and proven by the figures and facts submitted, in the course of his official duty, to the Legislature. He says: "By the law of 1888 all prison industries were abolished. The result was necessary idleness and the evils which always attend such a state among imprisoned men. Hence, in 1889, a new prison system was established under a law which aimed to afford employment to the prisoners, while it was framed to reduce the competition of the labor of the prisoners with free labor to as low a point as possible. The results of the business carried on under this law, since 1888, have been consolidated, and the superintendent is gratified at the satisfactory report presented in the following tables." The approved system avoids all unreasonable and cruel punishments, but still is hampered with restrictions to please that minority, always most clamorous, who claim the support, and speak in behalf of, manual labor. Contract work was prevented. In certain industries not more than 100 prisoners could be employed, and in none more than five per centum of the free labor engaged therein. It is observable that this is further reduced by the estimate that three convicts do not do one free man's work. In fact, not one per centum of competition has been found by statistics. Such a system, after five years of proof without cavil, seemed free from open attack. Nevertheless, coupled with the wise, but in such place unnecessary and perfunctory, exordium, that, "the Legislature shall by law provide for the occupation and employment of prisoners sentenced to the several State prisons, penitentiaries, jails and reformatories in the State," the new Constitution adds a prohibition to take effect after two years, and in the cautious language of the annual report, "*radically limits, after the date named therein, the field for the employment of the prison population.*" Prison reports, the world over, show that this practically sweeps away safe productive labor. The injunction, moreover, is futile and useless until we return, as in England, to the treadmill. This and similar purely punitive labor should be, if at all, under a law similar to that of England classifying the prisoners, and the classes of hard labor should be designated by legislative enactment.

1893, p. 10. In Pennsylvania and Rhode Island no power had been reserved by charter or Constitution for amendment, but such power was held to be inherent in the people of the State. In the latter State the question arose under the charter granted by Charles II in 1663, but the Amended Constitution was adopted in 1843.

Unwilling to proceed in this direction, or to continue in the way which reminds us of the bronze horses of Berlin, each arrested and thrown back by the head, christened by the stolid wits of that capital "Advance backwards," "Forwards retreat," the Legislature of 1895 sought to restore the law by the amendment above referred to, which, adopted in due course by concurrent resolution of the Senate and Assembly,<sup>10</sup> now awaits the session of 1896 and, as it is hoped, final submission to the people before January, 1897. It is a prudent and praiseworthy measure to be supported by every well-wisher to prison reform, because it is the only practical means in the limited interval which remains before this part of the Constitution shall take effect. We could have wished, a more signal return to the beneficial results of the constitution of 1846 and the law of 1889, and that in the course of that progress of prison reform, which has been marked by stately and confident steps for the last twenty years, the power of the Legislature over prison labor had been left untrammelled, and that the constitutional office of the Superintendent of State Prisons, the same in terms under both Constitutions, had been enlarged in discretionary authority and proportionate responsibility. Yet as by precedent we are bound to presume the wisdom of constitution makers, and the amendment follows the method they themselves have provided, we may assume this article with its contradictory and meaningless clauses, if they be construed together, was left for deliberation, and to be amended as indicated above. If of doubtful purpose, the new article should not be permitted to rule by omission or accident. It is not paradoxical to say that the amendment is necessary to maintain the law, but to leave the new Constitution without amendment is to change the organic law.

Organic law touches the rights of men, protected both by written and unwritten law, as Blackstone in his commentaries says of latent powers of society "which no climate, no time, no constitution, no contract can ever destroy or diminish." Such are involved in prison reform. Moral and economic reasons bring to this side of the argument the interests of the majority of citizens, while on the other side the cry of the prisoner, wearing the semblance and form of man, is not lost in the oubliette and dungeon of a past age. There are ears to hear and hands to help him, if the law permits and if he be one who can possibly be restored to usefulness and safety. We claim for him a right to labor so long as it is his right to live; and that in a rational way, to some reasonable end, to some relief of society as well as of himself. It is as necessary to the development of sound life in a man, as air to

<sup>10</sup> 1 N. Y. L. 1895, p. 1011. Assembly, April 24, 1895. Senate, May 14, 1895.

breathe, and the elements of food. In idleness his mind rots as does his body.

The proper mode of punishment is a problem of State wherein the moral predominate over the economic questions. Yet the latter have a double bearing. Our State maintains three prisons at a cost of over half a million dollars, for which under the new Constitution there would practically be, with the increased expense, no return. They were self-sustaining not long ago. What, however, if it be a failure of another sort? "The prison," say many writers, "is a manufactory of the phthisical, the insane and the criminal." Undoubtedly without occupation for the prisoner such is its tendency. A forcible writer speaks thus of the English system of 1879 and his words are a warning even to our own day.<sup>11</sup> "Nothing could be more clumsy and inefficient, except for evil. Then there is the expense of the system, which does not reform nor get rid of the thief; in old days gaol fever did the latter when the halter failed; ours merely hoards him up for awhile to turn him loose on society more wolfish than ever. As we deal with the thief he is our most costly national luxury." In France and on the Continent the ruin of convicted men and the chief cause of recidivism has been found by the courts and the inspectors-general of prisons in the prison and its regime.<sup>12</sup> The gaols of Ohio, with half a dozen exceptions, have been called by an important committee of investigation in that State, moral pest houses and schools of crime. Emile Gautier speaks of the prison as a hot house for poisonous plants. Like reports come from many countries and States, that prisons seem to increase rather than diminish the number of habitual criminals against whom society must ever be on its guard, and for whom it so liberally provides, that the prisons are preferred to work-houses. Proverbs and popular songs describe the folly of any other opinion than this that, "He who says the prison punishes, he is deceived," and we recall the judgment and saying of Lacassagne that "every society has the criminals it deserves." This refers less to the origin, than to such parts of their lives as the State is in a measure responsible for, after its

grasp has seized them, and the stamp of its treatment is made. Their baneful influence is to be excluded, if crime, which is a greater object than the criminal, is to be repressed.

Another example may serve. Mark amid lovely scenery on our river's bank the site of a chemical factory. Upon the foliage of adjacent hills in a long and distinct line is seen the path of its poisonous gases swept away by the wind, destructive of leaves, of twigs and growing vegetation. Within its walls is wrought out a product, safely, because skillfully treated, needful to the arts, and profitable, yet vengeful enough when mishandled. Thus we may picture the State prison as a factory, its materials men, its laboratories for some advantageous use.

Our State Prison Report of 1891 maintains the position that for such physical, mental and moral well-being, as is attainable in prison, the continuous employment at labor of the prisoners is necessary. It adds, "the economical question is not referred to at all. Continued employment of some description is absolutely essential." The reasons are many for this rule and no writer of importance, no enlightened prison management fails to insist upon its adoption wherever possible in any way. Their experience unites in the conclusions, warranted by the facts in our own State under the law of 1888, until it was repealed, that "Nothing can be more cruel and inhuman than to keep prisoners in idleness;" "indolence made obligatory by law is the worst feature of the jails;" "without productive labor there can be no reformation of criminals."

Arrived again at our starting point, the first sentence of the 29th section of the third article of the Constitution, we find it not abrogated by the proposed amendment, but it may be held to contain the settled and deliberative judgment of our State. This proposal is, that "*All prisoners sentenced to the several State prisons, penitentiaries, jails and reformatories of the State shall be kept occupied and employed at labor.*" Such is the language of the amendment now before the people.

"What shall be that labor?" asks the Superintendent of State Prisons in his report of 1894, and the same question was heard from many a side at the meeting of the National Prison Association at St. Paul, 1894. No State in the Union has completely answered it and yet in most the restrictions are fewer than in our own. In England and on the Continent the principle prevails in the words of the English act<sup>13</sup> "that the expense of maintaining in prisons prisoners who have been convicted of crime should in part be defrayed by their labor during the period

<sup>11</sup> Sketches from Shady Places, Thor Fredur (1879), 306-7.

<sup>12</sup> Ellis Criminal, pp. 249, 253. Enquête Parliementaire V, pp. 345, 381, 542. Dr. Strachan, Westchester Rev., June, 1895, says the majority of recidivists are instinctive criminals and consequently are "incapable of keeping within the law while free agents. Their will power is weak or altogether absent and their instincts are strong. Being thus constituted they fall at the slightest temptation whatever the threatened punishment may be."

<sup>13</sup> Report of Commissioners of Prisons, 1894, pp. 28, 106.

of their imprisonment." Yet success has not been fully attained, and the last report of the English Commissioners of Prisons<sup>14</sup> shows that with the greatest variety, fifty-nine employments in fifty-seven prisons, besides those of the first class of hard labor, "consisting of work at the tread-wheel, shot-drill, crank-capstan, stonebreaking, or such other like description of hard labor as may be appointed," etc., embarrassment occurs "in finding suitable industrial labor for prisoners who know no trade which can be carried on in prison, and whose sentences are not long enough to admit of their being taught one." The warden of Michigan prison reported that out of 850 convicts in one prison, 200 were not employed and with most half time, and work on alternate days had to be pursued. Superintendent Scott, of Massachusetts, in his able address last year at St. Paul, had this to say that "if prison discipline is simply to be maintained, many forms of unproductive labor could be introduced, and the crank and tread-mill would be preferable to idleness, and the question might be solved through unproductive labor." The opinion that "this can be accomplished by the introduction of instructive labor at the sacrifice of remuneration, and at a somewhat additional increased expense" is given, but he adds: "Probably since industries were first started in prisons they were never in greater peril than now owing to existing legislation in New York and Ohio and pending legislation in Massachusetts and Kentucky."

It is, alas, a true bill of indictment, and unless relief comes, the judgment will be, that we return to the tread-mill. We go back to September 23, 1822, for the first operation of this instrument in the New York penitentiary, and its titles in the literature of the day, and also in the argot of criminals, sound strange to us now; in thieves' slang, "The everlasting stairs," "The wheel of life," "The care-grinder," officially known as "The Stepping or Discipline Mill" or Tread-mill, in England Tread-wheel, with its substitute for use in the cells, the crank. The London Society for the Improvement of Prison Discipline seems to have published the first description and recommendation of it that we had in our State, but it was earlier used in Hartford, and speedily sought for in Albany and Maryland. It was worked either by men or women in groups of from thirty to fifty on a wheel, and as in England now, it did service then as power to grind corn or pump water for prison use. The daily task is recommended in the last report of the English commission\* to be equivalent to raising the weight

of the body 9,000 feet per day, a merely animal function, but as the early report of Auburn prison states, fifty convicts can be more easily governed at work than ten in idleness, and one of the committee to investigate its working, whose report was published in 1828, finds its chief recommendation in the discipline; that the convicts sleep better after its use, and that they are less given to idle talk. Small attention was given to the herding of the prisoners in this work of gangs, or that with the care of the prisoners, all individuality, all ideals, all hope, all progress towards reformation were ground away.

Labor is ennobled when we read that "Manual qualification is the strongest safeguard against crime, and one of the most potent influences in the reformation of the criminal;" when we think of it as an educator, as well as preventive of evil habits and evil thoughts, and men taught, as they feel their powers grow, to rise in the plane of human activity, and become independent beings, with some information of responsibility. But labor is debased, even to the eye of a convict, in the tread-mill, and certainly it is to all its apostles who guard free labor so jealously, when in this age of the triumphs of intelligence and genius, when steam and electricity multiply as we will all brute power, we reduce labor to a mere feeble animal process, to a service not equal to that of a dog or a mule.

The opposite and pleasant extreme we see in the State prison of Japan, where prisoners who are worthy are engaged in works of art, in cloisonné work, in wood carving, pottery, fan, umbrella and basket making, and descend through their grades of capacity to stone breaking as the last, to which only thirty out of two thousand convicts are left.<sup>15</sup>

The usefulness of interesting labor was exhibited, and a pathetic picture was drawn, when the warden of Clinton prison reported in 1891, that "the moroseness and sullenness of idle men when the shirt industry was suspended required tact and patience to avert unpleasant consequences."

1828 are interesting. Messrs. Isaac Collins, Stephen Grollet and Thomas Eddy, of the Society of Friends, were most instrumental in securing the necessary attention in 1822 to the disciplinary advantages of the tread-mill and furnished illustrations, some of which are published with the report of the mayor, October 28, 1822. The commissioners of prisons, England, instituted medical inquiries in 1893 upon the requisite amount of labor, and their conclusions are given with some detail in their report of 1894. They have discontinued the shot drill.

<sup>15</sup> Tokyo letter of H. Norman to Pall Mall Gazette, Oct. 18, 1888. Ellis, p. 273, note.

<sup>14</sup> Id. p. 14.

\* The reports on the Stepping or Discipline Mill published by the common council of New York in

With one further reflection on the State's responsibility to the young we shall leave this subject. Boys from ten to eighteen years of age fill the reformatories of the different States; in one prison of California four hundred prisoners were under twenty-five years of age; of the entire prison population of our State last year over fifty per cent were less than twenty-seven years of age. In England by the last report fifty-five per cent of youthful criminals had been previously convicted from once to eight or ten times; and it is supposed the same ratio would prevail here. Survey from what quarter you will the field of crime, you find the roots and the blossom and the flower of poisonous plants overspreading it, and to an alarming extent. It is the devil's harvest that is constantly gathered in. In 1850 the criminal was one in 3,442 of population, in 1860 one in 1,647, in 1870 one in 1,171, in 1880 one in 855, in 1890 one in 757. Even from the Utilitarian point of view, society is to be protected by the law, and its burdens grow less if one out of 1,000 convicts can be turned from habits of crime. We know that with the best prison methods of this decade in many countries the ratio of reclamations has been encouraging, and in many instances has been large. At all events such humanizing endeavors are in the right direction. Any correct rule for prison labor will be for something more than discipline, and for the prevention of the sources and causes of crime.

The inscription of Pope Clement XI teaches the correct lesson: "It is of little use to restrain criminals by punishment unless you reform them by education," and I would add, teach them of honest and ennobling labor.\*

W. P. PRENTICE.

NEW YORK, September 3, 1895.

#### SELECTED TITLES FROM THE DIGEST.

Translated by Charles F. MacLean, Lecturer on Criminal Law in the University of New York.

##### DE PRIVATIS DELICTIS. D. 47. 1.

**U**LPIAN. It is a principle of the civil law that heirs are not holden in penal actions, and other successors as little; accordingly they cannot

\*In France the tide of criminality has risen several hundred per cent; so also in Germany for many serious crimes, and in Italy and Belgium, in fact over the civilized world, it is the same appalling story. During this century in Spain the sentences to perpetual imprisonment nearly doubled between 1870 and 1883, and however the statistics are analyzed the increase in crime seems real. "The Criminal" Havelock Ellis, Nat. Prison A. Rep. 1894, p. 14.

be called to account for theft. But although they be not chargeable in an action on theft, they must be liable in an action to produce, if they be in possession or have fraudulently brought it about that they be not in possession; and so after the production of the article, they will be liable in a vindication (a). A condiction likewise lies against them. It is equally conceded that an heir may sue in an action on theft; for the prosecution of certain wrongs is given to heirs; so, too, the heir has the action of the Aquilian law (b). But the action on outrages does not belong to the heir. It is held not only as to that on theft, but also as to the other actions, whether civil or honorary, which arise from wrongs, that the mischief follows the person.

**U**LPIAN. Several wrongs concurring never bring it about that impunity is given to one; for one wrong does not diminish the penalty of another wrong. One, therefore, who has stolen and killed a man is liable in the action on theft because he has stolen; in the Aquilian because he has killed; and neither one of these actions extinguishes the other. The same is to be said if he has robbed and killed; for he will be liable both in the action for robbery and in the Aquilian. It has been queried whether if a condition have been brought on account of the theft, an action can be brought nevertheless by virtue of the Aquilian law? And Pomponius has written that the action could be brought because the action under the Aquilian law is for one valuation, the condiction on account of theft for another; for the Aquilian takes valuation for the highest at which it was during the year, but the condiction on account of theft does not go back of the time of joining issue. But if it be a slave who has committed these, in whatever action he has been surrendered for amends, the other action is barred. In like manner, if one have beaten a stolen [slave] with a stick, he is liable in the two actions, on theft and on outrages; and forsooth if by chance he have killed this same person, he will be chargeable in three actions. In like manner, if one have stolen

(a) § 15 I. *de actionibus* (IV. 6): We term actions *in rem* vindications; actions *in personam*, in which it is contended that [some one] ought to convey or to perform, condicions. *Condicere*, in ancient language, is to give notice; now, however, we call the action *in personam* whereby the moving party claims [something] ought to be conveyed to himself by misuse, a condiction; for nowadays no notice is given in that name.

(b) L. 1. D. *ad legem Aquilianam* (IX. 2). The Aquilian law annulled all laws which prior to it related to unlawful injury, those of the XII. tables as well as others, § 1. The Aquilian law is a plebiscitum, in that Aquilius, tribune of the people, obtained for it the approval of the populace.

and abused another's female slave, he will be chargeable in each of two actions; for the action for damaging a slave may be brought against him as well as that on theft. Likewise, if one have wounded a slave whom he has stolen, there will be occasion similarly for two actions—that of the Aquilian law and that on theft.

ULPIAN. When one wishes to prosecute an action which arises from wrongdoing, he will be remitted to the ordinary procedure if he wishes to sue for pecuniary damages, and he will not be compelled to subscribe a criminal accusation; but if he wishes to have punishment of the affair prosecuted extraordinarily, he will needs subscribe a criminal accusation.

### CHRONIC ANTIMONIAL POISONING.

TWO CASES WHICH FIGURED IN THE COURTS COMPARED BY PROF. DOREMUS.

[Abstract from paper read before the Medico-Legal Congress in New York city.]

IT would be difficult to find in the annals of medico-legal literature two cases more worthy of detailed study than those to which your attention is called for a few minutes this morning.

They present in some respects such marked contrasts and in others such confirmations that they form for the jurist, the toxicologist, and the physician a rare opportunity of judging of the methods of conducting criminal causes, of the limitations of expert medical testimony, of our knowledge or our lack of it regarding the effects of certain poisons, and the value and necessity of chemical research on occasions where it would apparently be valueless.

The very titles of the cases arrest our attention at first glance. "The People Against the Rev. George B. Vosburgh," "The People Against Henry Meyer, alias William Reuter, alias Henry Meyers, alias Hugo Mayer, jointly indicted with Maria Meyer, alias Emilie Bauer, alias Maria Meyers."

The records of antimonial poisoning, except in a few accidental cases, show that it has been resorted to by persons in the better walks of life and possessing more than the average intelligence. These cases follow the rule. The reverend gentleman who was brought to the bar, was not so unfamiliar with toxic agents as would appear from his testimony, as was shown, unfortunately, subsequent to his acquittal. Meyer was possessed of considerable medical knowledge, though his practice was irregular—he was known as Dr. Meyer. Vosburgh, from his calling, could not have bought or kept poison about him without exciting suspicion; Meyer, on the other hand, was entitled to have and use poisons.

Had the prosecution in the Vosburgh case been able to produce the evidence they obtained just after the case was closed, of his having purloined the tartar emetic from the store of a druggist friend, and with whom he had had desultory talks on the subject of poisons, the defendant never would have sworn that "I have never had tartar emetic in my hands, until I passed a powder of it over the table in this courtroom." Though acquitted by the jury, the druggist's disclosure brought from the public so strong and general a verdict of guilty, that the pastor speedily departed for regions where his true character was unknown.

Meyer was one of a party of rascals leagued together to defraud life insurance companies, and one of his pals turned State's evidence and declared that Meyer had shown him a paper in which was "brechweinstein" (tartar emetic), and that he had witnessed the use thereof on the food given the poor deceived wretch who was party to the plot, but lost his life through the treachery of those he thought his friends.

It is of paramount importance, in prosecuting a case of alleged homicide by poison, to prove the purchase or possession of the poison. The cause of the people against Vosburgh met one of its greatest obstacles in not being able to prove the former at the time of the trial. Every effort was made through detectives and the evidence of druggists who had sold tartar emetic, both in Jersey City and New York, to secure this important evidence.

Most of the druggists questioned had not sold any antimonial preparations, even the one to whom Vosburgh went, and he never dreamed that his store of tartar emetic had been depleted until, by some inexplicable impulse, he was led to look at the bottle on his shelf, when the whole question of where Vosburgh got his supply became clear. About an ounce of tartar emetic was missing from the bottle.

The defense in the Vosburgh case was conducted along remarkable lines. They made no opening. They put the defendant on the witness stand, but not the wife. Nor did the wife appear for the people. Poor, frail, delicate and over-wrought creature, she wavered between substantiating the averments of her family in accusing her husband and her affection for him, with perhaps an added fear of disclosures concerning their married life, which might be brought to light under cross-examination by the defense. During the trial she ran away, fearing she might be compelled to take the witness stand.

While the defense did not deny that antimony had been discovered by chemical tests in medicine,



food and wine, they made a bold attack on the experts for the prosecution, tried to get up a personal altercation between them and their own experts, and to thus weaken the scientific value of the evidence. They then made all sorts of insinuations as to how the poison could have gotten into the specimens, and practically charged nearly every witness for the prosecution with collusion in a scheme to defame the Rev. Mr. Vosburgh.

But in no one line of procedure were the prisoner's counsel more effective than in that of beclouding the minds and exhausting the jury by the mass of medical testimony they forced into the case. Physician after physician was questioned and cross-questioned by each side regarding the woman's symptoms, condition, recovery, etc., as well as on the general pathology and symptomology of chronic antimonial poisoning and "rheumatoid gout," which the defense claimed was the cause of Mrs. Vosburgh's illness.

Only two of the many physicians who appeared as witnesses had ever of their own experience had an opportunity to observe cases of chronic antimonial poisoning.

The rarity of chronic antimonial poisoning was equally revealed in the Meyer case, where no physician could be found who could testify from his own observations of the symptoms developed in persons suffering from the effects of antimony partaken during a considerable period.

The records of about sixty cases were collected by the writer, at the direction of the district attorney in the Vosburgh case, and a resumé of symptoms compiled therefrom. While the defense tried to belittle this testimony, the disclosure on the part of the other physicians of lack of experience in chronic cases made his deductions fully as competent as theirs. It was necessary to bring the symptomology of chronic antimonial poisoning before the jury in some way, and this seemed about the only way.

Very little can be said concerning the lines along which Meyer was defended. The opening address by counsel in the first trial substantially admitted a conspiracy, of which Brandt was a party; they denied, however, that the body exhumed was that of either Brandt or Baum, and at any rate that any toxicologist could ascertain that the antimony and arsenic found had not been introduced after death. At the first trial only a few witnesses were examined regarding these issues. A more extended case was developed along the same lines at the second trial. Meyer was not asked to take the stand, for obvious reasons.

Many of the arguments brought forward by the defense in the Vosburgh trial meet with complete

refutation in the Meyer case. Thus, it was questioned whether there could be "tolerance" to antimony; whether the doses found in the tea, water, etc., if partaken would not have produced immediate death; whether when elimination began it would not proceed regularly until none remained in the system. Indeed, one of the medical witnesses for Vosburgh went into an elaborate arithmetical calculation regarding the elimination and the amount of antimony that might exist in Mrs. Vosburgh's body.

The record of the chemical analysis in the Meyer case has just been published in the journal of the American Chemical Society, being a paper read by me at the May meeting of the New York section. Very considerable quantities of antimony and arsenic were found in the alimentary canal. The antimony extracted and weighed would in the form of tartar emetic have weighed 6.64 grains. The arsenic extracted and weighed, if calculated to arsenious oxide, would have weighed 5.92 grains.

While drawing conclusions of a scientific character from the testimony presented in murder trials has grave disadvantages, many of the most vital facts to the forming of opinions being wholly wanting, yet we feel warranted in the belief from the results of the analysis of Brandt's kidneys that at or about the time of his death only small quantities of antimony would have been found in the urine, probably a greater amount of arsenic. This would show that the elimination was defective, notwithstanding the large quantity of antimony existing in the body.

Such a state of things would fully accord with what authors on these topics state in regard to experiments on elimination of poison, and with the records of actual cases of poisoning.

The finding of arsenic along with antimony in Brandt's body introduces another element that adds to the unique character of the case. Diligent search at the time of the trial and since has failed to bring to light a case where these two poisons were used as toxic agents. Arsenic has been detected where antimony was the cause of death, but it existed as an impurity in the antimony. Not so in this case. The testimony of Muller is borne out by the distribution of the two poisons as shown by the analysis of the various organs.

Brandt, like Mrs. Vosburgh, was slow to die. Having been reduced almost to the point of death, the *coup de grace* came through the administration of arsenic. Taylor, in a monograph on poisoning by tartarized antimony, cites similar cases, where the deceptive symptoms produced by tartar emetics paved the way for a demise effected through a second poison to remain unsuspected by the attending physicians.

## Abstracts of Recent Decisions.

**ATTORNEY—AUTHORITY.**—Where the record fails to show that an attorney had no express authority to enter a consent decree, by which a definite fee was given him, the objection that an attorney cannot have implied authority to consent to such decree cannot be urged. (*Schmidt v. Oregon Gold Mining Co.* [Oreg.], 40 Pac. Rep. 1014.)

**CHAMPERTY.**—Upon the trial of a suit for infringement of a patent, it appeared that the suit was brought by an assignee, to whom the patent had been assigned, fourteen years after its issue, and when it was known to have been infringed, under an agreement that such assignee should prosecute suits against infringers, at his own expense, and divide the recoveries with the patentee: *Held*, that such agreement constituted champerty, and that the bill should be dismissed. (*Kieper v. Miller* [U. S. C. C., Penn.], 68 Fed. Rep. 627.)

**CONSTITUTIONAL LAW — SPECIAL LAWS.**—An act by which the general assembly attempts to exempt counties from the operation of general laws on account of trivial differences in population is not of uniform operation throughout the State. (*State v. Bargas* [Ohio], 41 N. E. Rep. 245.)

**CORPORATIONS — RECEIVER'S CERTIFICATES.**—A court of equity has no power, without the consent of all lien creditors to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to issue certificates which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchise. (*Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co.*, U. S. C. C. [Va.], 68 Fed. Rep. 623.)

**DECEIT — FRAUDULENT SALE OF CORPORATE STOCK.**—Where one, by fraudulent representations, induces another to purchase corporate stock as an investment, the loss which the purchaser suffers by retaining the stock under the belief that the representations are true is chargeable against the wrongdoer, such loss being presumptively within his contemplation at the time of committing the fraud. (*Duffy v. Smith*, [N. J.], 32 Atl. Rep. 371.)

**EMINENT DOMAIN—CONSTRUCTION OF RAILROAD.**—In an action against a railroad company for damages from the construction of its road across town lots, the jarring, smoke, noise and dust of passing trains incident to the ordinary operations of the road and the proximity of the road to buildings on the property, are properly considered by the jury in estimating the damages. (*Comstock v. Clearfield & M. Ry. Co.* [Pa.], 32 Atl. Rep. 431.)

**INSURANCE—INSURABLE INTEREST—ESTOPPEL.**—Where plaintiff, who sold land on which was a building covered by an insurance policy, took back a judgment for part of the price, and under the advice of the secretary of the insurance company, who knew the circumstances, delivered the deed to the purchaser without transferring the policy, and paid the assessments under the policy for three years, up to the time of a loss, the company is estopped from asserting that the policy was void for want of an insurance interest in plaintiff. (*Light v. Countrymen's Mutual Fire Ins. Co. of Lebanon County* [Penn.], 32 Atl. Rep. 439.)

**MUNICIPAL CORPORATIONS—CONTROL OF STREETS —CHANGE OF GRADE.**—A city has the supreme control over the streets, pavements, etc., and determines, in the exercise of its functions, everything in connection with their grading, paving, and condition according to its best judgment; and where it chooses to grade its streets so as to leave only a two inch depth of gutter, instead of six, it may do so without being subject to any control of the courts. (*McHale v. Easton & B. Transit Co.* [Penn.], 32 Atl. Rep. 461.)

**RECEIVERS — EXEMPTION FROM GARNISHMENT.**—Though a receiver appointed by a court of equity is by statute exempt from garnishment in his own State the federal courts of another State will not refuse to entertain garnishment against him on a petition properly presented by citizens within the jurisdiction, when no objection to the jurisdiction on other grounds exists. (*Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.* U. S. C. C. [Tenn.], 68 Fed. Rep. 685.)

**TRADE-MARK — UNFAIR COMPETITION — SIMULATION OF LABELS.**—When a defendant has been enjoined from using a label almost identical with that of complainant, he will also be enjoined from resorting to another label, differing in detail from complainant's, but so like it in general appearance as to deceive consumers, if not trade experts. (*Cuervo v. Owl Cigar Co.*, U. S. C. C. [N. Y.], 68 Fed. Rep. 541.)

## New Books and New Editions.

**Law of Naturalization in the United States of America and of other countries.** By Prentiss Webster, author of "The Law of Citizenship in the United States."

The value of such a work, not alone in its application to this country, but also as a comparison of the laws of different States which can be used as a guide in framing new and better laws, cannot be over-estimated. Our form of government tends to

give the utmost freedom to those who desire to live here and to become a part of the State, and the best development of the country demands that not only should immigration be properly restricted, but that naturalization should also be kept within well-defined and proper limitations. Moreover the benefits of naturalization in this country to a person who is temporarily abroad is recognized and commented upon, and the value of this work is proportionate to all these considerations. The book is not divided into chapters, but begins with a general discussion on the importance of naturalization and then gives definitions with citations showing a reference for each. Quite a little attention is given to the distinction between aliens who may and who may not become citizens. The statutes of the different nations on this subject are then given in order and the application of the American statutes to each follows. All the kindred subjects are grouped with good taste and propriety through the work, which also contains parts of the constitutions of different Republics and States on this subject, and concludes with forms for use under our statutes. The general index is comprehensive of the entire work and is carefully arranged and prepared, and the whole book is much more practical and exhaustive than any former work. Published by Little, Brown & Co., Boston, Mass.

A treatise on the construction of the Statute of Frauds as in force in England and the United States. Fifth edition, by James A. Bailey, Jr., with the co-operation of the author, Causten Browne.

The desirability of the fifth edition of this work is evident when we comprehend that over 1,900 cases have been added to the text-book since the last edition, while the entire text has been carefully revised to conform to many of the decisions which have thus been made. The number of cases cited in this work is tremendous, the table of cases alone filling over sixty pages. The work is divided into twenty chapters, among which are chapters on Formalities, for Conveying Estates and Land, Loans Recovered by Statute, Wills Excepted from the Statute, Assignment and Surrender, Conveyance by Approbation of Law, Trusts Implied by Law, Express Trusts, Verbal Contracts — how far valid, Contracts in Part Within Statute, Guarantees, Agreements — not to be performed within a year, Sales of Goods, Acceptance and Receipt, Earnest and Part Payment, The Form of the Memorandum, The Contents of the Memorandum, Verbal Contracts Enforced in Equity and Pleading.

The reviews on the first four editions of this work have, without exception, spoken of its high value as a text-book and we can but echo the statements which have been made about the first four editions

when we review the fifth. No work on this subject has received such general favor from the practising lawyer, and it is generally recognized as an authority on this subject. The present work has none of the appearance of an earlier edition which has simply been added to, but is a complete and new work and one which will again receive the favorable approbation of the bar. It is published by Little, Brown & Co., Boston, Mass.

The Law Relating to Electricity. By Simon G. Crosswell, formerly of the law department of the Thomson-Houston Electric Co. and the General Electric Co., and author of a treatise relating to executors and administrators, and "A Collection of Patent Cases."

As is most properly stated by the author, the rapid development and application of electricity to various commercial uses has produced a corresponding growth of statutes and adjudged cases until there has been formed a considerable branch of law devoted wholly to those subjects. This idea is well known, as is apparent from the publication of a series of reports devoted wholly to the subject of electricity. The increased application of electricity to commercial purposes has been more rapid than the practical development of laws on this subject, and we have noted with great interest the eagerness of members of the bar to obtain works on this interesting and useful subject. This text-book, therefore, which we are reviewing comes in good season to meet the apparent desire of the members of the legal profession and will undoubtedly be received with the measure of success which its value merits. Not only will the book be of service to those who are practicing law, but its worth will be considerable to the layman who desires to obtain a comprehensive view of the general principles applicable to electricity. The work is divided into thirty-three chapters, the most important of which are, Incorporation, Contracts as Affected by Franchise, Prohibition of Discrimination, The Duties of Telegraph Companies as to Transmission and Delivery, Duties as to Telegrams and Other Matter, Nature of the Liability of Telegraph Company as to Negligence, Special Agreement, Limitation of Time for the Presentation of Claim, Measure of Damages, Telegraphic and Telephonic Communications as Evidence, Contracts by Telegram and Other Matters, Telephone and Electric Light Operation, Electric Railway Operation, and Taxation. This last chapter is one which will be of valuable service and interest to counsels for corporations. The work contains not only a table of cases cited, but also a table of contents and of statutes arranged according to different States.

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# The Albany Law Journal.

ALBANY, OCTOBER 12, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

A CASE which has attracted much attention throughout the State has been finally decided by the Court of Appeals, and is the case of the People v. Shea, which grew out of a murder at the municipal election in the city of Troy, N. Y., a year and a half ago. The defendant was indicted for murder in the first degree and was convicted as charged in the indictment at an extraordinary term of the Oyer and Terminer, over which Governor Flower appointed Mr. Justice Pardon C. Williams, of Watertown, to preside. Assistant District Attorney Fagan and Hon. George Raines, who was appointed to assist, appeared for the People, while the defendant had as his attorneys John T. Norton, Esq., of Troy, and Galen R. Hitt, Esq., of Albany. The opinion of the Court of Appeals affirming the judgment of the trial court is written by Judge Peckham, and aside from the well-known literary ability of Judge Peckham, which is displayed in the opinion, it is worthy of comment in other respects as involving many new and novel points, which at least have not been decided in this State. It appears that previous to the trial circulars were distributed to the grand jurors reminding them of the great importance of their duties and stating some of their powers as evidenced by citations from the statutes and offering further to advise them, if they would call at the headquarters of the committee of safety, of the way by which each grand juror could do effective work. It was established that the methods of the committee were not for political or sectarian effect, as it was composed of people of all religions and of different political beliefs. Judge Peckham, in discussing this point, says:

The defendant having been convicted of the crime of murder in the first degree at an extraordinary term of a court of Oyer and Terminer, held in the city of Troy, has by appeal brought the record of his trial before this court

for review, pursuant to subdivision 8 of section 485 and sections 517 and 528 of the Code of Criminal Procedure.

There has been imposed by the sections of the Criminal Code above mentioned a very arduous duty upon this court. We act not only in the capacity of an ordinary appellate tribunal reviewing errors of law pointed out by exceptions duly taken, but if satisfied that the verdict is against the weight of evidence or that justice requires a new trial, it is the duty of the court to grant it, whether any exception shall have been taken or not in the court below. The duty imposed upon us is that of reading the whole evidence in the case of every conviction of murder in the first degree. The Code provides (subdivision 8 of section 485) that the case and exceptions shall consist, among other things, of a copy of the stenographer's minutes of the trial, the result of which provision is, that a large mass of evidence frequently upon points not really disputed or disputable, is returned, all of which must be perused before this court can properly come to a conclusion in a case. It seems to us that a practice might be provided by the Legislature which, while retaining all that is now sought for in an appeal to this court, would yet restrain within some reasonable limits the printing of a vast mass of prolonged examinations and cross-examination filled with repetitions and immaterial matter, and set forth by question and answer.

The case now before us is an apt illustration of the vice of this kind of practice. Ten thousand folios, embracing 2,000 printed pages of evidence, compose the record, exclusive of some 300 pages of examinations of jurors, no question in regard to whom was raised or argued in this court. Taking all this mass of evidence and printing it by question and answer, with its innumerable and everlasting repetition of the same thing stated in the same way, does no good to any one, and at the same time makes the reading a burden which ought not to be imposed upon the court. The evidence should, as it seems to us, be placed in the record and the case settled by the trial judge, as in other cases, and not more than the material evidence ought to be returned, and, except in special cases, the evidence should be in narrative form.

Notwithstanding this great mass of evidence returned, as the present law provides, the whole record has been examined and deliberated upon with that degree of care and attention which the interests at stake would naturally call for.

Continuing, Judge Peckham discusses the merits of the case and the facts, which are too numerous to mention here, and states that the Court cannot listen, with complacency, to the arming of citizens of the State for the purpose of going through the forms of holding an election, and to be ready to protect themselves in case of an attack. It is an appeal to the force of arms instead of to the protection of the law, and such an appeal is one which the courts cannot be expected to look upon with the least patience or tolerance. Still, when the whole case is surveyed, the criticism comes in bad form from the defendant, and there is nothing in the evidence which justifies him or mitigates the character of his act.

Judge Peckham then distinguishes between acts done in furtherance of an unlawful purpose and in violation of the criminal law, and other acts which are done by private citizens in order to obstruct the accomplishment of that purpose. On this subject he says:

Up to the time the defendant and his companions appeared, it is not pretended that the least disorder had prevailed at the polling place, although it may be assumed that there were men belonging to all parties there present. The trouble commenced upon the arrival of the defendant and friends, and the fighting was precipitated by them. While condemning in unmeasured terms, the general practice of carrying weapons, we can in this case admit that the deceased or his companions ought to be defended as violators of the public peace, because of their conduct on this occasion. Court cannot and must not recognize the claim of right to take the law into their own hands by citizens under any circumstances, but at the same time they can see the difference and make the proper distinction between acts done in furtherance of an unlawful purpose and in violation of the criminal law, and those acts which are done by private citizens in order to obstruct the accomplishment of that purpose and to prevent such violation. The citizen must not himself be guilty of a violation of law in his efforts

to prevent its violation by others, but the intent with which an act is performed is the important fact which characterizes and gives point and force to the act itself. We think the action of the deceased and his friends cannot properly be said to have led to this catastrophe.

In discussing the objections of the defendant to the admission of evidence in regard to repeating Judge Peckham says:

The counsel for the defendant challenge the correctness of the rulings of the trial court in admitting evidence of the repeating in the presence and under the supervision and direction of defendant at the different polls as stated in the point last discussed. Proper exceptions were taken to the decisions of the court in that regard, and the question has been argued before us at great length. The objection taken is that the evidence was immaterial and had no proper or legitimate bearing upon the issues joined for trial, and that it simply tended to show the defendant guilty of some other separate and different crime from that for which he was indicted and then on trial and to greatly prejudice him in his defense. The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and constantly maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for judicial investigating of crime, and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and in fact, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another and, so far as the accused is concerned, a much more merciful doctrine. By that law the criminal is presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of twelve men. In order to prove his guilt it is not per-

mitted to show his former character, or to prove his guilt of other crimes merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question. In *People v. Sharpe*, 107 N. Y. 427, the doctrine is dwelt upon and the cases cited upon the subject collected.

In the Department of Experimental Psychology at the recent meeting of the Medico-Legal Congress a number of interesting papers were read by distinguished authors on the subject of Hypnotism, which to-day is receiving more attention from lawyers, as well as from the public, than any other subject connected with the medical and legal sciences. Judge Abram H. Dailey, of Brooklyn, read a paper on "The Hypnotic Power, What it is," and Clark Bell, Esq., who was later on elected president of the Medico-Legal Society, read a paper on "Hypnotism and Crime;" while Mrs. Sophia McClellan read a paper which had for its subject, "Psyche-Physiological Mechanism." Judge A. L. Palmer, of the Province of New Jersey, presided over the deliberations of this department of the congress, and Professor W. X. Sadduth, formerly Dean of the University of Minnesota, and now living in Chicago, read a paper on "Hypnotism and Crime." His paper was, in part, as follows:

The wide difference of opinion regarding the relationship of hypnotism and crime existing in this country and Europe has long been a matter of comment. Prominent authorities on each side of the water, with but few exceptions, reject the idea of the possibility of successful criminal suggestions under ordinary circumstances, while many European writers freely admit and deplore the supposed possible misuse of this new-old force for criminal ends, although they cite no well-authenticated cases to prove their fears.

In order to intelligently discuss the subject, it is essential that we first inquire briefly into the nature of hypnosis. In its simpler manifestation it is a modified form of natural sleep, artificially induced, but in its more complete form it compares to the abnormal condition of natural sleep known as somnambulism. It is also the natural precursor of ordinary sleep. This is proved by the fact that subjects, after being

thoroughly hypnotized, if left to themselves, even for a brief space of time, will pass into a natural sleep, from which they awaken as from a nap, with all the expressions of drowsiness and temporary loss of memory as to surroundings and events that are evidenced by persons who have slept under ordinary circumstances. This fact necessitates that, in order to keep in touch with this subject, the operator must keep up a continual line of suggestions, otherwise he loses control of the subject.

Notwithstanding his apparent loss of consciousness, a person in the hypnotic state is perfectly conscious of his condition. He is possessed of what is termed a double or dual, consciousness. He knows full well that he is doing the bid of another, but so long as the suggested acts do not shock his sense of propriety and come within the bounds of physical possibility, he will attempt their performance because he realizes that he is playing a part in an experiment, and is anxious to add his mite to the sum total of knowledge upon the subject. Nevertheless he is as free a moral agent to follow the dictates of conscience as he is in the waking state. He obeys only in so far as the suggested acts do not antagonize the moral standard he set up for himself; any suggestions that seriously affront his moral nature, if persisted in, will cause him to awaken.

Criminal or immoral suggestions made to a moral subject meet the auto-suggestion arising from his own conscience, and confusion is created in his mind. His indecision is only too apparent in the helpless expression on his face and his incapacity to organize any line of procedure in the premises and simply remains passive, that is, does nothing.

While it is true that post-hypnotic suggestions can be given to a susceptible subject in the hypnotic state to be carried out at some future time, yet the suggested act or acts must be in harmony with his own idea at the time they are given, as any suggestion given in the hypnotic state that would be repugnant to the subject in the waking state would invariably fail of consummation.

The question of successful hypnotic criminal suggestion turns, therefore, on a point of morals, even as it does in the waking state, and with a lessened possibility of success, for the reason

that in the hypnotic state a subject seems to lose to a greater or less degree his sense of material relationship, and cupidity and passions are less usually appealed to. The mind is passive, not active, and the operator must supply the motive and the physical incentive as well.

The tendency to pass into a condition of natural sleep is ever present, and the close relationship to natural sleep is a point of great interest. Prof. James of Harvard says that "we all probably pass through the hypnotic state in going to sleep every night."

To define hypnotism simply as "induced sleep" is, however, to limit the condition; it is that and more. It is a condition in which the individual is oblivious to outward surroundings, in the main, but quickened in power of susceptibility to suggestions from the hypnotizer. It is a concentration of the mind of the individual upon some one line of thought or phenomena to the exclusion of all others. It is not essential that the subject should present all phenomena of sleep; the eyes may remain open, and the person be in a complete hypnotic state, and obey all direct commands with decision, and yet be wholly unconscious as to what has happened when he is roused to consciousness. The mind may be compared to an automatic, self-registering machine that receives ideas, tabulates and carries out motor impulses that are suggested to it through the senses for the sensorium to receive and apply the suggestion; however, the latter must be of a character that is within the understanding of the individual. To give command in foreign tongue is to invite failure, and the suggestion of thoughts to a hypnotic subject, foreign to his ideas of right and wrong, will meet with equally negative results.

Constant repetition may, as in all things, educate the individual in the premises, but, as we have said before, it is very difficult to overcome preconceived ideas. The personality of the individual is not materially altered in hypnosis; it is only modified, partially dominated, if you please, by the will of another for the time being, but only so far as his own ideas will break the relationship and arouse the individual from the hypnotic state. Faith in the ability and the good intentions of the operator is an essential element in hypnotism, and the

sensational stories that go the rounds of cheap literature regarding theft, arson, and murder committed in the hypnotic state are the creations of diseased or ignorant minds.

In considering this subject it must be remembered that there are people in this world who are negatively honest, virtuous, and generally well-behaved — people who are good because they have never been tempted to be bad. Such persons tempted either in the waking or hypnotic state might or would fall simply because they had no indwelling force of character. Such persons are only safe in a cloister or behind prison bars.

Many years' experience with use of hypnotism in laboratory and clinic, upon widely differing classes of subjects, makes me feel safe in saying that under all conditions when the subject is capable of carrying out a criminal suggestion he is sufficiently conscious of his own volition to decide whether he will carry out the suggestions or not. This being the case, he goes ahead law of intent and becomes a "*particeps criminis*," law of intent and becomes a "*party criminis*," an "accessory before and after the fact," and should be held equally guilty with the instigator of the crime. A criminal he surely is, but hardly a "criminal character" in the sense in which I have been accustomed to use the term.

Dr. William Lee Howard of Baltimore, says that "in his experiments he has drawn the line at arson and murder." I have gone one step further and repeatedly attempted to induce subjects to make felonious attacks on persons under the most aggravating circumstances without securing the least indication of obedience.

For instance, while my subjects would stab right and left with paper daggers, yet when a real dagger was placed within their hands they have invariably refused to use it, even when suffering the greatest provocation. I account for this on the ground that a person in the active hypnotic state possesses a dual existence, and is perfectly conscious of what he is doing. In most cases he will carry out the expressed wish of the operator, provided it does not affront his sense of propriety or seriously cross his ideas of right and wrong.

For several years I have made use of hypnotism in surgical practice, and my experience

in this direction leads me to the conclusion that hypnosis is a mental state rather than a physical condition, such, for instance, as ether and chloroform narcosis. Time and again have I had patients who responded to all the tests of hypnotic anaesthesia before the operation, when called upon to face the actual ordeal came out of the hypnotic state, the fear of the operation being a stronger suggestion than that of the operator, consequently the subject awakened, obedient to the law of self-preservation, which is never set aside, even in the profoundest hypnotic state.

In conclusion, let me reiterate my basal proposition: Given a criminal or immoral subject and a hypnotist of like character, and criminal or immoral results may be obtained. But shall a natural force of greater potency be condemned simply because it may be occasionally misused?

Many comments have been made by us in relation to the matter of international copyright which has been largely discussed during the past year, and which is a matter that becomes of more and more interest yearly to publishers and lawyers in the United States. A very excellent article appears in the *LAW JOURNAL* to the following effect:

The issue presented to the imperial government in connection with Canadian copyright is not merely of constitutional but also of international importance. It affects the relations of the imperial government to the United States in an especial manner, and to all the powers signatory to the Berne convention generally, though less directly. Nevertheless, the Canadian Minister of Justice presents the question of Canadian copyright as if it were merely one of constitutional law and practice, as between the local Legislature of Canada and the imperial ministry. Canadians, the minister said, must know whether the unanimous will of the Dominion House of Commons was to be respected by Her Majesty's officers in London.

The Canadian Copyright Bill of 1889, from which the assent of the imperial government has hitherto been withheld, proposes in effect to abrogate the Berne convention of 1885, so far as Canada is concerned. The purpose of that convention, to which Canada formally adhered, is to secure copyright in all the States

to an author who has already obtained copyright in one. The Canadian bill proposes to enact that unless the author registers the book at Ottawa on its first publication, and reprints it in Canada within one month, he forfeits his property in the product of his brain. Any Canadian publisher is then entitled by this bill to print the author's book without his consent, to publish it in any form and at any price. An illusory tribute to the right of the despoiled author is tendered in the shape of a ten per cent royalty on sales. The practical effect of this would merely be that the author would have a right to sue a Canadian publisher, as no sum of money need be paid before publication.

Setting aside, for the moment, consideration of the rights of the author implied in the transactions contemplated by the bill, it will be seen that by no constitutional fiction can the imperial government escape international responsibility for its assent. Its assent must be given, and the Imperial Copyright Act of 1866, which applied the Berne Convention to British dominions, must be repeated as far as Canada is concerned. Once this step were taken, the United States would be obviously within its right in denouncing the copyright agreement with Great Britain. For that agreement was made on the assumption that the *status quo* on the British side was to be maintained unimpaired. If the imperial government is now to sanction a reversion to the state of free piracy in books on the part of the only serious rival to the United States in the publishing trade, then the United States can, and most probably will, declare that an essential condition of the copyright agreement has been violated. That this is no imaginary result may be seen from the emphatic declarations of the American press.

As regards the Powers signatory to the Berne convention, they certainly would be entitled to regard the authority of that international compact as weakened should the British government, which played so great a part in its negotiation, now declare in effect that the principles invoked to secure adhesions to the convention are to be set at naught on behalf of the trade interests of Canadian printers. The case is worse, as regards the Canadian share in this transaction, from the fact that a protocol of the Berne convention gave Canada and other



British colonies twelve months within which to signify a wish not to be parties. Canada, far from denouncing, formally adhered to the convention; and by that adherence has placed the imperial government in the position of being obliged to take part in any Canadian repudiation of the international duties imposed by the convention on all British communities.

The constitutional arguments adduced on the side of the Canadian bill, and on which the advocates of the bill take their stand, hardly require a moment's consideration. It is said that as the British North America Act of 1867 conferred on the Dominion Parliament powers of legislating on Canadian copyright, therefore, the bill of 1889 should be sanctioned by the imperial government without demur. To this be it sufficient to reply that the Colonial Laws Validity Act of 1865, while enabling colonial legislatures to pass laws contrary to the common law of England, expressly reserved the authority of an imperial statute to override local legislation; and this, of course, has always been the constitutional theory. The imperial statute of 1886, therefore, presents an inseparable bar to the validity of the Canadian bill. But, apart from this, the Canadian government, by a deliberate act, accepted the Berne convention, and so has entailed on the imperial government the responsibility of sanctioning an act of which it disapproves, should Canada be allowed to impair the British acceptance of the convention.

To the constitutional argument recently put forward by a Canadian minister — that Canadians are entitled, if they choose, to misgovern themselves — it is enough to point out that no theory of home rule can sustain the proposition that Canada has a right, not merely to misgovern itself, but to involve the imperial government and British citizens generally in international responsibility.

The judges of the Court of Appeals appointed Edmund H. Smith, of Albany, as State reporter, to succeed the late Hiram E. Sickles. The salary of the office is \$5,000, and the perquisites are said to be equally as large.

Mr. Smith is the son of Judge John C. Smith, of Canandaigua, and was born in 1848. He was educated in Canandaigua academy, Hobart

college, and Columbia college law school. He was admitted to the bar in New York city in 1872, and was thereafter an assistant United States attorney for the southern district of New York under Colonel George Bliss, district attorney. Since then Mr. Smith has had an extensive experience in law reporting, especially as editor of the *Central Reporter*.

During the existence of the second division of the Court of Appeals Mr. Smith filled the office of remittitur clerk, and since the dissolution of that body has been connected with the office of the clerk of the Court of Appeals.

Mr. Smith's appointment gives great pleasure to the many persons who are thrown into daily contact with him. He vacates a \$2,000 position in the clerk's office upon assuming his new duties.

It is a matter of more than passing interest to contrast the amount of legislation passed by the recent Parliament in England with that of the New York Legislature of 1895. It may be surprising to know that only fifty statutes were turned out by the two parliaments in England in 1895, while 1045 were passed by the Legislature of 1895 and signed by the Executive, and many more prevented from becoming laws by the action of the governor at the close of the session. "Amongst the forty-four (passed by the old Parliament) the more important are the Factories and Workshops Act, the Summary Jurisdiction Act, the Married Women Act, the Mortgagees' Legal Costs Act (materially affecting solicitors), the Friendly Societies Act, the Law of Distress Amendment Act, the Judicial Committee Act (which chiefly concerns the colonies), the Shop Hours Act, and the Market Gardeners' Compensation Act. Both Parliaments have happily refrained from passing as local and personal acts statutes which ought to have been passed as public general acts, as was so notably the case last year in the passing of the London Building Act and the Thames Conservancy Act." No act of Parliament of 1895 is of more interest to American lawyers than the Mortgagees' Legal Costs Act, which allows a solicitor advancing money to his client on mortgage to charge for the preparation of the mortgage as if he were not his client's solicitor. The cases which necessitated this act will be found noticed by Mr. Justice Kekewich in

*Eyre v. Wynn-Mackenzie*, 63 L. Jour. Rep. Chanc. 239. 'It is now well settled' said the learned judge in that case, 'that a solicitor-mortgagee cannot charge profit costs as against his client for business done in connection with the mortgage, and I need not refer in detail to the cases which were cited in argument.' Settled or not settled, the rule was, we believe, a comparatively recent one, and is one of the most unjust instances of judge-made law which has come under our notice. The new act, which came into operation on July 6 last, the date of the royal assent, is partly retrospective and partly not. Section 1, which provides that a solicitor-mortgagee may recover his charges just as if he were not a solicitor, applies only to mortgages made after the commencement of the act. Section 2, which provides that a solicitor-mortgagee may recover costs for subsequent business in relation to the mortgage, is very properly retrospective."

#### JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT, DESIGNATED BY GOV. MORTON.

First Department.—Presiding justice, Charles H. Van Brunt; associate justices, George C. Barrett, George L. Ingraham, Edward Patterson, Morgan J. O'Brien, Charles C. Dwight, Pardon C. Williams.

Second Department.—Presiding justice, Charles E. Brown; associate justices, Edgar M. Cullen, Willard Bartlett, Calvin E. Pratt.

Third Department, which includes Albany.—Presiding justice, Charles E. Parker; associate justices, D. Cady Herrick, Judson S. Landon, John R. Putnam.

Fourth Department.—Presiding justice, George A. Hardin; associate justices, William Rumsey, David L. Follett, William H. Adams, Manly C. Green.

#### PRIVATE CORPORATIONS.

By HON. WARNER M. BATEMAN.

[A Paper read before the State Bar Association of Ohio.]

THE subject that has been assigned to me for discussion to-day is that of "Private Corporations." I am too entirely mindful of its magnitude and complexity to attempt a discussion of all, or even a very considerable portion, of the topics the subject suggests. They involve the management of the greater portion of the business of the country, and the most difficult questions of public policy which our people to-day have to solve. I can only hope to make some suggestions that may possibly

afford some aid in solving some of the problems as to legislation on the subject of corporations, and changes that are pressingly needed in the law regulating them.

This is an age of corporations. It is estimated that there is to-day four-fifths of the entire wealth of this country in their hands. They have become the instrumentalities of almost all business enterprises, not merely in the department of transportation and the operations of public uses, but in agriculture, in land-holdings, and in ordinary mechanical, manufacturing and mercantile business.

Legislation began, under the Constitution, with a careful specification of the purposes for which corporations should be organized. These were steadily increased, until by Act of April 6, 1894, section 3235 was amended so as to authorize corporations for all purposes, except for carrying on professional business, but limiting corporations for buying and selling real estate to twenty-five years. Under this authority, there is no conceivable business purpose, from the manufacture of a pin to the construction of a transcontinental railway, from the sale of Ayer's Pectoral or Thompson's eye water to the largest mercantile establishment in the world, from putting in use the patent of the "hump hook and eye" to an ocean steamer, from a flour mill at home to a mine in South Africa or a plantation in the Sandwich Islands. They are used for every purpose and in all lands, and indeed upon all seas. It would be a curious inquiry to examine the variety of corporation certificates on file in the office of the Secretary of State.

Along with this rapid development of corporations in every business use have grown up abuses that the interests of society imperatively demand shall be reformed; and the measures that may be required for this purpose call for the most careful examination with the view to preserve what may be useful, as well as to correct what may be mischievous, in the use of corporations.

The laws of this State, enacted since the adoption of the Constitution of 1815, have been, in a great degree, acts provided from time to time to meet new emergencies, or to answer special demands, and, as a consequence of such fragmentary work, the legislation, as it now stands, is an insufficient and unharmonious patch-work; a mottled and ill-assorted accumulation of laws and amendments, made without reference to previous legislation, with out care or guard against abuses, devised to promote some new business scheme, or to escape some inconvenient restrictions. One interest only has been consulted in their passage—that of the special project to be served. No plan has been pursued, no principle has been followed, and, in a large measure, the general interest of society has been disregarded.

Every observer is quite familiar with the ordinary course and origin of legislation. Bills are introduced with reference to special cases, and, generally, laws are amended to meet the need of somebody's claim or remedy, or to provide for somebody's business job; and in this manner the harmony of laws is destroyed.

This is especially the case where business projects are involved and the furious passion for money-making is to be gratified. No aid to these is so generally effective as the corporate franchise. The wildest, as well as the most dishonest, scheme of speculation or fraud may be carried on by its means, without responsibility on the part of the manager, and with risk only for the public.

Before the adoption of the Constitution of 1851, the usual mode of creating corporations was by special law. The people, in their anxiety to promote improvements and aid business enterprises, stimulated, rather than checked, the abuses of legislation in this form; which was rendered much more mischievous by the ruling in the Dartmouth College case, which, holding that a charter is a contract, and, when once granted, could not be revoked by subsequent legislation without the consent of the grantee of the charter, made the abuses of such legislation irrevocable. The consequences of that decision could hardly have been fully contemplated at the time it was rendered. Parliament had possessed the power of changing franchises and privileges granted of this character, whenever the interests of the public called for it. There had been no question raised as to similar authority among the States before the adoption of the Constitution; nor afterwards, until this decision was rendered. But, under this rule, the evil of bad legislation and the mischief of ill-regulated corporate power became irremediable.

Whatever may now be thought as to the wisdom or justice of it, it is established as a settled constitutional rule, and will stand. It has been assailed with great ability, but without effect. The eminence of the great lawyer to whose matchless logic and eloquence its result is credited, and of the great jurist who decided it, has imparted to the case a sacredness and authority that makes it almost impiety to question it. In my judgment, the judicial history of the English-speaking race presents no equal work of trial and decision, of eloquence and learning, to this, and it will stand like other great creations of art and literature.

But, however sound the law of that decision may be, the judgment of our American community has been against its policy and justice, especially as to all corporations intended for profit, and the uses of general business. Soon after its rendition States began to provide, by general law, for the organiza-

tion of corporations, and, by constitutional provisions for making all corporate franchises in the future, subject to amendment or repeal. These provisions are now found in nearly all State constitutions. With a view to limit the operation of the rule of that case, many State constitutions provide that all charters not acted on at the time of the adoption of such constitutions should be annulled, and that no corporation previously organized should have the benefit of any future legislation, special or general, without becoming subject to the general laws of the State, and to the privilege of repeal and amendment.

Our own Constitution provides that no special privileges or immunities shall be granted that the General Assembly may not alter, revoke or repeal; and our statutes provide that all corporations created before the adoption of the Constitution, that shall have acted under the provisions of the general laws since, shall thereby be deemed to have consented to have and exercise their franchise, subject to the Constitution and laws. Like legislation has been adopted in other States, and, practically, the country has thus, in the main, relieved itself of the restrictions upon its powers over corporations imposed by the rulings in the Dartmouth College case.

But this class of legislation aims at other kinds of corporations than that involved in the celebrated case referred to. The founders of the Dartmouth College gave their property for charitable uses forever, without reserving any benefit therein to themselves. Any change in the charter, which was substantially a declaration of trust, would have been a legislative alteration of the conditions of the trust without the donors' consent; and a repeal thereof, if it was attempted after a lapse of time, would render it difficult and perhaps impossible to distribute the property donated to those equitably entitled to it. But these difficulties do not apply to private corporations organized solely for the benefit of those who contribute its property and who become its constituent members. They are the real owners, are perpetually represented in its management, and their several interests are exactly defined by their stock. If they are not satisfied with the conditions the State may impose as to the use of the corporate franchise, they may surrender it, and, in their own right, take possession of their business and property for future management, as shall best serve their own interest. The like is also the case when the State revokes the charter. The property is always for the use of those who give it and reverts to them, whether it be a factory, store or farm. The State gives the franchise, not for its own benefit, or that of the general public, but for the sole use of the incorporators and at their solicitation. It receives no consideration therefor, and the incorporators give

none. There is no element of contract, but a mere gratuity in the grant of corporate privileges. The repeal of its charter involves only the question, as to whether the property shall be held and the business conducted in the corporate name, or in the name of the owners themselves and upon their personal responsibility to creditors.

It has indeed been strenuously urged that corporate franchises should never be granted for private use and profit; that, as a power of government, it should never be used for private purposes; that it assists to aggregate wealth and create monopoly; that it tends to withdraw property from circulation and place it in mortmain; that it places at disadvantage individual enterprise and smaller capital, in that lesser and distributed management that constitutes the great nursery of the business training and independence of our people. There is great force in this objection, but the policy of granting such franchises for such purposes is so firmly fixed in the legislation of the country that it cannot be readily disturbed. So far as it may aid legitimate private business, without danger to society, I do not propose any interference. But the regulation of such franchises is first subject to the control of the public interest; private convenience should be served only after the general safety and interest of society shall have been secured.

To some of the special dangers and abuses that have developed themselves in the management of corporations I wish to call your attention. The Constitutional Convention in 1851 recognized the need of careful restriction upon the grant of corporate franchises in the provisions I have referred to.

But of more practical value than these, is the third section of the thirteenth article, which provides that the "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him owned, and any amount paid thereon, to a further sum at least equal in amount to such stock."

This charges upon the Legislature a specific duty which has in it several important elements:

1. It contemplates at the outset and requires that a capital should be provided.
2. It requires that the stockholders should be made liable also, in addition to stock subscribed and constituting the capital of the corporation, for a further equal amount.
3. In addition to the capital and the further liability so provided, it requires that the debts of the corporation "shall be secured" generally by a liability of stockholders "and such other means as may be prescribed by law."

The idea underlying this section is, that the debts

of the corporation, in any event, "shall be secured." The Legislature shall provide a substantial capital, and, in addition, an adequate security for the sure payment of the debts. The duty thus imposed has been essentially and disastrously neglected. No adequate provisions for a capital have been made; the remedy for enforcing the additional liability is crude and ill-defined, and no laws exist to further secure the creditor, while there has been given, on the other hand, ample authority for the issuing of bonds and incurring of debt. In this condition of legislation, the State has equipped its irresponsible creatures and sent them out clothed with an imposing, though false, appearance of substance, with authority to trade and contract debt among its citizens.

I feel confident no one means, active in the business conduct of this country, during the past forty years, has been so productive of loss and fraud to the community at large, and has transferred of their substance so much to the pockets of those who have been permitted to use these ill-advised franchises, without consideration. It has stimulated unscrupulous adventure, and furnished a lawful cover for scandalous rascality. Let us look at the matter with some detail.

Sec. 3244 of the Revision of the Corporation Laws, in 1878, aiming to correct the confusion then existing, as to subscription and payment of stock, required that fifty per cent of the capital stock should be subscribed, and that ten per cent should be paid before the corporation should be organized. This restriction was not permitted to stand long. By the Act of April 5th, 1880, it was amended so as to require a subscription of merely ten per cent of the capital stock, without the payment of any portion of it, as a condition of organization. Upon making a certificate that such subscription had been made, and filing the same with the Secretary of State, the corporation is authorized to organize, and upon its organization is fully equipped for its work. Without a dollar in the treasury, or a dollar paid upon its subscriptions, it engages in business and begins contracting debts and issuing bonds.

The mode of manipulating these corporations varies according to the circumstances and conditions of the business or enterprise in which they shall engage. But in all cases they have the two elements; little or no capital, and business at the risk of their creditors. It is now common in this country to find corporations, every dollar of whose means is furnished by creditors, and every dollar of whose stock actually represents no assets, with the management of their affairs in the hands of those who have no pecuniary investment in them, and with the actual investor excluded from all voice in their operation.

Many corporations have been organized for the construction of works, such as railways, water-works and others for public use; bonds and stocks have been issued and manipulated by the promoters and managers of the corporation, so that the one is sold at par or a discount, and the other held as a bonus in such sale, without other consideration. The company is thus represented by stock not representing a copper of capital, and its money received from the sale of bonds, which represent the whole investment, and often considerably exceed it. If the venture proves successful, the bonds are paid, or made good, and the profits realized by the holder of the stock, for which nothing is paid.

The mischief arising from these enterprises is obvious. The profits of the corporation are derived from charges or rates paid by the public for the uses such corporation furnish. The amount of stock issued and bonds outstanding with the amount of dividends, which, it must be conceded, honest stock is fairly entitled to, and the amount of interest which bonds, representing real loans, are entitled to claim, constitute the basis upon which fair rates are calculated.

And, on this pretense, the public are required, in such cases, to pay greatly more than fair rates for the services rendered, and if complaints are made of such charges, the dividends upon the pretended capital and the payment of interest upon bonds that may have been sold at a discount, become the excuse or justification. Indeed the situation becomes such that it is difficult to resist, by fair reasoning, the claim for sufficient rates to pay such interests and dividends. The bonds are held, finally, by innocent purchasers. The purchaser may well say to the State — "You have authorized or enabled this corporation to issue its stock without the payment of any money for it, we have bought it and paid full consideration, and if there is any fraud for which any one should suffer, it should be the public, who have authorized the issue of stock and enabled it to be done without the investment of a copper by the original stockholders, and you should not destroy our dividends, which we are entitled to receive, by the unfair reduction of rates."

On the other hand, the stockholders of the corporation meet the appeal for the advance of wages, on the part of the employe, or enforce reduction against them, with the same plea — that the business is not paying sufficient to afford an adequate dividend to the stockholders, and to pay the interest upon its indebtedness; and thus this fictitious stock becomes the necessity for extorting from the public, on one hand, and oppressing the wage-earner, on the other. The projectors of this scheme, which legislative neglect renders practicable, are the only ones that profit by the situation, and society suffers

without remedy, unless it shall throw the loss upon the innocent purchasers of such stock who may have paid full consideration therefor. The fair rate which the public should be called upon to pay should be that, only, which may be necessary, after the payment of reasonable expenses, to afford a just and reasonable return to the investor, for the use of the capital actually invested in the work.

If the scheme fails, we have another aspect of its evils. With no capital, with its property mortgaged as an insufficient security for the payment of its bonds, and a general indebtedness, without any security, the deceived creditors find themselves bearing the sole burden of the loss. This is usually attended with great distress, such as commonly follows great failures. The laborer and his family are stinted or starved with the loss of his wages, the contractor broken up and bankrupted, and trusts of every description, for charities, schools, widows, helpless age and infancy alike are impaired or wrecked by bonds issued by these corporations with little or no security to uphold them. The broker's skill is found equal to the work of foisting them upon the inexperienced and simple. The secrecy and mystery of corporate management renders investigation fruitless and gives full scope to the bond broker's doubtful arts and plausible inducements. And thus we have disaster after disaster visited upon the suffering communities of the country, who receive and endure them much as they do the devastation of wind or fire, as visitations of God with which they are classed. The author of this waste with such of the plunder as he can save, may now address himself to such new venture as he may devise.

Stock liability is inadequate or wholly worthless as a security for the creditor. In some cases the stock is manipulated in the name of an irresponsible "dummy." In others, stockbooks disappear, and I have known cases of the pursuit of them, with the aid of secret agents, from one city to another in an eventful search, chiefly useful as disclosing the ways of concealment, and mode of escaping liability. And where the ownership can be traced it is often found that, by transfers of stock and novation of corporate indebtedness, the responsible stockholder has been released and in his place substituted an irresponsible one who has received the stock as a gift or pretended sale. Protection is found against the claim upon the bonds by inserting in them, as a part of their conditions, the release of statutory liability.

Indeed, I think the experience of the profession will bear me out in the statement that, as each new catastrophe comes to these forms of business venture, and these managers grow in experience and skill in their manipulations, less and less is got by creditors out of the statutory liability of stockholders. When

the end approaches, the managers of the scheme disappear; a wreck follows; the captain and his associates, at a safe distance, may look on without anxiety, but with, it is to be hoped, a decent sympathy for the distress and disaster in which the passengers and crew are involved.

Another case of a corporation, with large capital stock, but little or no capital, is found in the organization of a bankrupt partnership into a corporation, or a bankrupt corporation sold out and reorganized. I know of no method, except discharge in bankruptcy, more effective than that which has been occasionally used by insolvent firms, to relieve their members of the loss or ruin resulting from unsuccessful business.

Take an example: A and B are partners in an insolvent concern. They organize a corporation, fix its capital at a large sum, subscribe for the stock, giving clerks and employes a share each to make up a board of directors, and upon a stuffed invoice, partly fictitious and excessively overvalued, they transfer the firm business to the new corporation, in satisfaction of their stock subscription, the corporation assuming the indebtedness of the partnership. The first step then begins. The obligations of the corporation are substituted for those of the partners, and in time their liability as such is discharged. The second step then follows. The stock taken by the partners is transferred to a clerk for a consideration that is never paid or expected to be paid, and then another change of indebtedness takes place and the partners are thus relieved of their statutory liability to their creditors.

Usually it takes some money and a little time to carry through these processes, and in one case coming under my observation, the partners, advancing the necessary funds for this purpose, after having secured their release from their debt as partners, and their liability as stockholders, took a mortgage upon the assets that were left to secure to them the repayment of the money they had been compelled to advance to support the corporation while their scheme was in process. Upon foreclosure, they take the proceeds of corporate property, and leave their creditors, the victims of their schemes, to bear the whole loss. In this case there was a semblance of an adequate capital at the outset, and also of an adequate security to creditors in responsible stockholders, but the capital is a sham, and the escape from statutory liability easy and entirely practicable, under existing legislation.

While it is true that corporations may, with entire propriety, take needed property such as may be necessary for corporate purposes, in payment of stock subscriptions, they should be permitted to take nothing else than such necessary property.

So it may be entirely proper to organize an existing business carried on by individuals, or partnerships, into a corporation. But the assets of such business should not be transferred upon a valuation fixed by the owner, in payment of stock subscriptions, but such assets should be valued by disinterested appraisers, under the direction of an impartial and competent public authority, as is provided in the laws of some of the most careful and conservative States.

In the case I have just described, the owners of the property acted as both buyer and seller, as trustees for the corporation and representatives of their own interests, and the corporation was made substantially the administrator of the business of a worthless partnership, for the real purpose and with the real result of relieving the partners from liability and throwing the loss upon the creditors.

The same result is achieved in the reorganization of bankrupt corporations, including especially railroad companies and other corporations for operating a public use. These enterprises begin with inadequate capital, with the utmost use of credit, resulting in contracting a large debt with an unfinished work. In the process of foreclosure it is sold for a small sum. Under the laws of this State, which have been from time to time amended, and especially under the act of April 24, 1890, a syndicate of persons are authorized to become the purchaser of both the property and franchise. Upon filing deed therefor with the secretary of State they become a corporation with full capacity to maintain and operate such road. They are not required to pay a dollar in any subscription to capital stock, but are authorized to provide for the purchase price of the property, by the issue of capital stock, and bonds secured by mortgage, in whatever amount the incorporators may have agreed on, which stock and bonds so issued shall be valid, and taken as fully paid for, by the transfer to the corporation of such property. It imposes no limit upon the amount of bonds and stock with reference to the value of the property purchased, or the amount of security which shall be afforded for the payment of such bonds.

We have thus provided by express legislation the legalized means of perpetrating the abuses and frauds to which I have referred. Many such properties are fit only for gambling uses, consisting of railroads that answer no public need, or are many years in advance of the public necessity.

Our statute provides, likewise, for what is called "capitalization" of debt and stock of railroad companies that have become embarrassed, by an agreement between the stockholders, bondholders, and general creditors; and upon sale of the railroad, in pursuance of such agreement, they are authorized

to reorganize the corporation, and to issue capital stock and bonds therefor, of such amount as they may deem proper, and may fix by agreement, without any reference to the actual value of the property so capitalized.

In other cases, stock dividends are made. By general provision, our statute authorizes corporations for profit to increase their capital stock. It prescribes no limit and defines no purpose for which the stock may be issued, nor does it control in any manner the authority of the corporation as to its disposition.

It has been estimated that in water-works property alone, in the United States, there is outstanding \$150,000,000 of stock wholly fictitious, or, in other words, to use the general phrase, "wholly watered." The Interstate Commerce Commission says: "It is believed that cases are now comparatively rare in which the capital stock of our railroad companies, as the same now exist, was actually issued for cash to *bona fide* investors."

A few years ago the Western Union Telegraph Company declared a stock dividend of \$15,000,000, which the Court of Appeals of New York held to be legal. In 1868 the New York Central made a stock dividend of \$23,036,000, being eighty per cent of the capital stock then existing. This device of Vanderbilt was adopted in order to apparently reduce the great percentage of dividend upon stock earned by the remarkable growth and prosperity of his road, instead of reducing his rate of freight and fares.

What is true of the corporations named, is also an index to that which is true with respect to nearly all classes of the great corporations of the country, whose profits are derived from the rates and charges made to the public. These companies, being of a semi-public character, in the exercise and performance of the public use, and accountable to the people and the State, are compelled to guard against legislative interference with their charges, by expedients of that description. The charges, especially by gas, water, and railway companies, have been the subject of frequent examination and criticism, and also of legislative action. The "watering" process, with respect to their stock, becomes, in a considerable measure, a matter of necessity to enable them to maintain their rates as against the public demand for a reduction.

Justice Brown, in *Handley v. Stutz*, 139 U. S., thus describes the uses of stock certificates:

"The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property. To the extent to which it fails to represent such value, it is either a deception or a fraud upon the

public, or an evidence that the original value of the corporate property has become depreciated. If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual value, or substituted value in corporation assets, there is, apparently, no limit to the extent to which the original stock may be watered, except the caprice of stockholders."

I cannot believe that it is necessary to legitimate and prosperous business, under the conduct of corporations, that their stock books should be made, substantially "lies," and its stock and bonds the juggler's scheme for deceiving the public. There is no doubt of the usefulness of railroads and the necessity for all legitimate encouragement for their construction and operation, but surely that, like all other business, may be done honestly. Their stock may represent actual values, and their bonds real credit and consideration. Or, must it needs be that the false pretense and deceit that sends the vulgar criminal, who obtains money from the confiding countryman on our city streets, to the station house and police court, must be tolerated as a necessary rule of business, in the conduct of the great business corporations of the country?

What would be thought of issuing warehouse receipts for definite amounts of grain to represent a less holding in the elevator; or executing deeds for a specific quantity of land, there being much less to answer the description; or the use of a yardstick of indefinite length, or of a dollar of fluctuating value? Safe and honest business requires the elimination of every element of uncertainty that is practicable. Gambling thrives amid confusion of prices, or values, or quantities. The grain pit and the pool room live upon the element of mere chance, and the railroad wrecker upon the mystery and confusion of railroad values and conditions.

It is true that these abuses are not all allowed by legislation, nor indeed sanctioned by judicial decision, but where they are without authority of law the remedy is inadequate.

It is greatly to be regretted, in my judgment, that the Supreme Court of the United States has gone so far in three decisions, reported in 139 U. S., in legalizing the sale of unissued stock, or in giving it away, without receiving payment therefor of its actual amount. It is not questioned by that court, or any court that I know of, that a corporation cannot issue its certificates of stock, in the first instance, at its inception without full payment of the whole value thereof, and that, by no device, can the payment for such stock then issued be avoided by any arrangement between the corporation and its stockholders, as against the claim of creditors. But it is really difficult to comprehend the distinction in

policy and justice, between shares of stock issued upon subscription at its organization, and those that may afterwards be issued. The public is as much abused by it.

The court, in the cases referred to, urged the convenience of the corporation and its needs in the transaction of its business, in behalf of its right to throw its stock in as a gratuity, on the sale of its bonds, or to settle liability incurred by the sale of stock newly issued, at a small percentage of its nominal value. But do not the considerations apply as strongly to corporations about to be organized, as it does to those already in operation? I know of instances in which promoters of a corporation procured the issuing of its bonds for the construction of its works at a discount, and a gift of the whole of its stock as a bonus. They could not construct the works without the aid of such issue of stock, and are not the needs of the citizens about to engage in business as much to be respected as those already engaged in it? Is not the evil of fictitious stock, issued after the corporation begins, as great as that of the fictitious stock issued at its beginning? Under our law it may begin upon a mere subscription of ten per cent without even payment of that amount, and then upon the contract of large obligations, embarrassment begins at once. Its subsequent issues of stock then come within the rule of convenience and necessity which is urged by the Supreme Court in support of the validity of the issues in the cases referred to.

It is true the court does not fail to give its condemnation of "watered" stock, but what is watered stock? It is stock for which the corporation has not received an equivalent value, and which is, therefore, fictitious, in whole or in part, and certifies an interest in capital which does not exist. In one case, a corporation that was at the time embarrassed, issued certificates for new stock for the amount of \$350,000 in satisfaction of a claim against it for \$70,000, and received therefor in payment about twenty per cent of the stock sold. The court, on the ground of convenience to the corporation, in settlement of its obligation under the particular circumstances of that case, is compelled to set aside the fundamental rule, as stated by Justice Brown in the quotation given, that a certificate of stock not truly representing actual capital paid, was a fraud and a deceit. If the corporation had thereafter proceeded in the conduct of its business incurring new obligations, claiming and securing additional and new credit, would not the additional stock have operated in such transaction to aid in securing such credit, under the assumption that there had been acquired an addition to the capital of \$350,000? The corporation subsequently failed

and became insolvent, and the losses of the creditors were sought to be, in part, recovered by enforcing a claim for unpaid stock subscription against the person to whom the new stock had been issued. How far does the decision of the court aid the continuing corporation to commit the fraud which I have described, upon future creditors?

Again, suppose the corporation had been finally successful, would it not have been very unequal and unjust that a new stockholder should receive a dividend upon \$350,000 of stock for which he had paid twenty cents on the dollar; whilst the remaining stockholders would receive no greater dividend upon stock for which they had paid dollar for dollar? It destroys the equality of stockholders, and gives to the favored stockholder five times the dividend upon the actual capital invested that it does to the other. Whilst the case thus violates the most important rules governing the issue of stock and accumulation of capital on one hand, it also destroys the just equality among stockholders, on the other. On the other hand, if the corporation was, at the time, insolvent, or in such troubles, as in that case, to produce insolvency finally, then without securing any advantage to the creditor, but, on the other hand, changing his position from a creditor to a debtor, and making him liable as a stockholder under the statute, the decision introduced a serious element of confusion as to the principal upon which the adjustment of accounts between him and the other stockholders and other creditors may be made.

The real duty of relief is with the State. It is to be borne in mind that these corporations are creatures of its law. Without capital they are absolutely myths without substance, with neither body nor soul. The stockholders may, in the name of the corporation, manage their own business, buy, borrow, and contract, break their contracts, repudiate their debts, refuse to pay their loans, without incurring any personal liability either in person or property, to the creditors who must bear the losses. This condition of things is both a reproach and danger to the people of the State.

The incorporators should be required to provide, at the outset an adequate capital by stock subscriptions for the full amount of the capital fixed in the certificate, and a sufficient percentage thereof required to be paid before the corporation shall be permitted to organize, and, in the absence of such subscription and payment, if any organization is attempted, those engaging in it should be held liable as partners. The right to receive property in payment of subscriptions should be strictly limited to such as is needed for the actual uses of the corporation, to be valued in the mode prescribed by law. Where corporations are organized by the owners of



running concerns, the property conveyed should be valued by disinterested appraisers, and should be transferred without incumbrance of partnership indebtedness, and should exclude partnership claims, so that the creditors of the new corporation should have *bona fide* and real capital as the security for the credit given to it, to the amount of the capital certified in the certificate of incorporation. Padded invoices, worthless bills, and bad debts, as a false pretense for the real responsibility in the corporation, should be carefully prevented.

As it is but decent justice to the public that this fictitious person should be provided with sufficient means to secure the debts to be contracted in its name, so it should be incumbent on the officers and stockholders of such corporation to keep and maintain that fund, holding it in trust and keeping it substantially intact, for the purposes for which it was provided. And whenever that capital becomes so impaired as to no longer furnish security for the payment of corporate debts, every debt thereafter contracted should be personally chargeable against the officers and stockholders of the corporation, having notice of such condition. In some legislation it is provided that all indebtedness incurred or contracted in excess of the assets of the corporation should be enforced as a liability against the stockholders.

In its very nature this capital is a trust and should be held as such by the corporation. Our Supreme Court, in *Taylor v. The Miami Exporting Company*, states the principal as follows:

"It is very clear, upon general principles, as well as the legislative intention, that the capital stock of corporations is to be deemed a pledge or trust fund for the payment of the debts contracted by them. The public, as well as the Legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the corporation in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock instead." It is greatly to be regretted that the principal so declared by the courts of this and other States should have been so much qualified by some modern decisions.

Indeed, it is difficult to understand why, in fairness as to corporations for the conduct of strictly private business, the stockholders or owners thereof should not be chargeable with the whole of the indebtedness of the corporation. Why should they enjoy exemptions that cannot be held by the individual transacting business in his own name? The franchise is granted for their convenience alone; the business is to be conducted in their interest and for their profit alone; the public derives no benefit or gain from it; and why should any portion of the

risk of such business, or any liability for any of the losses which may result, be thrown upon the public, any more than in business by the owners in their own proper name?

There is a clear distinction, as it appears to me, between the policy to be pursued with respect to corporations created for the public use and those created for private enterprise. In what way, and how far, the public may be called upon to bear portions of the risk incurred by undertakings for public use, is a matter of fair debate. Having assumed the exercise of a franchise for the public use, there are duties imposed upon such corporations that do not apply to private; they are under obligations to carry on and operate them, from which they cannot discharge themselves. But that cannot justify a departure from honest and safe business methods, or dispensing with honest and safe securities to creditors. Watered stock, excessive issue of bonds, beginning of corporations on inadequate capital are no more justified with them, than it is with private corporations.

There is no doubt but that corporate franchise is very useful and convenient for very much business. In large enterprises it saves to the incorporators the inconvenience and embarrassment arising from succession of interests by death, transfers, bankruptcies of particular partners, and so on. But this is a convenience to the owners. It should not be made the means of escape from fair and just responsibility for the indebtedness incurred in the name of the corporation for their use.

The Legislature has gone no further in imposing a liability upon stockholders for the debts of the corporation than the Constitution itself imperatively requires, and has provided scarcely any machinery for the enforcement of even that liability. But we now have a further expedient for escaping even this liability, by having a large portion of our domestic industries organized under the laws of other States, and as corporations of such States. It is true that these corporations can only carry on business in Ohio by the permission of the State, but, with the exception of insurance companies, we have imposed little or no restriction upon them and practically they exercise and possess all the rights in Ohio that domestic corporations have. While at the same time they secure to their stockholders, citizens of Ohio, all the exemption from liability allowed by the laws of the State under which such corporations are organized. This is a fraud upon our own laws and Constitution. It is permitting our own citizens to import into the State, for their own government and their own exemption, the laws of other States to govern them and fix their liability in the transaction of their business. It not only defeats the protection which the Constitution intended to give to the com-

munity as against the improper use of a corporate franchise, but it subjects those citizens to all the inconveniences of remedy, to that limitation of relief which arises from the fact that it is a foreign corporation governed by foreign laws, and can only be reached and called to an account as to the use of its charter, the remedies of dissolution and other proceedings against it, in the State under whose laws it is organized.

The mere statement of the situation sufficiently shows the necessity, on part of the Legislature, with respect to foreign corporations, of vindicating the State policy. The organization of State industries into corporations, by its own citizens, under foreign laws, should be prohibited. It should be prohibited, also, for reasons beyond the considerations which I have urged, as affecting taxation of property legitimately within the jurisdiction of the State and subject rightfully to the operation of its tax laws. But these are matters beyond the scope of the discussion in which I intended to indulge.

The legislation that I should suggest, in view of the topics I have presented, is:

*First.* That no corporation for profit should be permitted to organize until not less than fifty per cent of the capital had been subscribed and twenty-five per cent thereof paid, where the corporation was to operate a public use; and that all of the capital should be subscribed and paid, as to all other corporations.

*Second.* That no shares of stock should be issued upon said subscription, or otherwise sold, without full payment of the par value of such stock in money or in property necessary to the use of the corporation, of full equivalent money value.

*Third.* That no running business shall be organized into a corporation, or purchased by a corporation, at other than the value thereof, which shall be ascertained by appropriate public authority.

*Fourth.* That the stockholders of all corporations for profit organized for the conduct of private business, in the sole interests of the stockholders, shall be liable for the whole amount of its indebtedness, over and above its capital and assets.

*Fifth.* That all assignments of stock made in the contemplation of the insolvency of a corporation for profit, or with intent to evade liability, as stockholder, shall be void.

*Sixth.* That no bonds shall be issued in excess of the amount of capital actually paid.

These provisions look only to the security of the creditors and to the public dealing with the corporation.

I have not attempted to consider or discuss the question as to the rights of stockholders, as against the corporation or its officers, nor as to their rights among themselves. The creditors and those deal-

ing with the corporation are interested in the question as to who are stockholders and as to the changes of stockholdings made from time to time, inasmuch as that is a part of the security which the State guarantees to them in dealing with it. If they have a legal or equitable interest in the capital of the corporation so as to entitle them to inquiry as to its condition, they may also be entitled to know, from time to time, in periodical statements, as to how far that capital has been impaired so as to effect the security for the payment of their claims. But, the limit prescribed for myself does not permit further consideration of these matters.

### Abstracts of Recent Decisions.

**ACCORD AND SATISFACTION—FAILURE TO PERFORM.**—Where, in the course of performance of a contract, disputes and mutual recriminations arose, and afterwards a new and modified contract was made by way of accord, but nothing was ever done under it: *Held*, that there was no satisfaction, and that the original contract remained in force, and an action for damages could be maintained for breach thereof. (*Crow v. Kimball Lumber Co.* [U. S. C. of App.], 69 Fed. Rep. 61.)

**CARRIERS OF GOODS—CONTRACT.**—A local station agent, as such, has no power, without further authorization, express or implied, to bind his company by a contract to transport freight beyond its line. It is, however, entirely competent for a carrier to contract to carry freight beyond its own line, and if it does so indicate, such contract is binding upon it. (*Page v. Chicago, etc., Ry. Co.* [S. Dak.], 64 N. Y. Rep. 137.)

**CORPORATIONS—INSOLVENT CORPORATION—PREFERENCE.**—To entitle one to a preference on a claim for services as manager of an insolvent corporation for two months preceding its insolvency, he must prove the services actually rendered by him. (*Duryee v. United States Credit System Co.* [N. J.], 32 Atl. Rep. 690.)

**FRAUDS, STATUTE OF—CONTRACT.**—The value of work and labor supplied under a contract void by the statute of frauds, is recoverable upon the theory that a benefit has been recovered, from which springs an implied undertaking to pay the value of such work and labor. (*Banker v. Henderson* [N. J.], 32 Atl. Rep. 700.)

**MECHANICS' LIENS—RAILROAD CONTRACTORS.**—The Florida statute of June 3, 1887, which gives a superior lien to any persons "who shall perform any labor upon or for the benefit of any railroad," etc., is to be construed as extending its benefits to a railroad contractor who has furnished work and

labor for construction, as well as to those actually performing labor. (*Couper v. Gaboury* [U. S. C. C. of App.], 69 Fed. Rep. 7.)

**MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS.**—*Held*, following the decision of the Supreme Court of Pennsylvania, that the language of article 9, § 8, of the Constitution of that State, limiting the debt of cities to 7 per cent of the assessed valuation of taxable property therein, means the valuation fixed by the city authorities for city taxation, not made by county officers for county purposes. (*Dupont v. City of Pittsburgh* [U. S. C. C., Penn.], 69 Fed. Rep. 13.)

**PRINCIPAL AND AGENT—AUTHORITY.**—An agent who is authorized to sell standing timber has no implied authority to accept a note of the purchaser as part payment, made payable in three months, to the order of the agent individually, and in no manner disclosing his agency; and in such case the principal will be sustained in asking for a rescission of the contract. (*McGrath v. Vanaman* [N. J.], 32 Alt. Rep. 686.)

**RAILROAD COMPANY—MORTGAGE—FORECLOSURE—RECEIVERSHIP.**—A court of equity has no power, upon a bill for the foreclosure of a railroad mortgage, to take into its custody or control, through a receiver or otherwise, property not covered by the mortgage, nor to make any order that will hinder or delay creditors in subjecting property not covered by the mortgage to the payment of their debts. (*Scott v. Farmers' Loan & Trust Co.* [U. S. C. C. of App.], 69 Fed. Rep. 17.)

**SALES—WHEN TITLE PASSES.**—In a contract for the sale of personal property, where no agreement is made as to credit, the law presumes that the parties intended to make the payment of the purchase price and the delivery of possession concurrent conditions. The vendor has the right to perform his part of the contract, or, if the goods have been delivered with the expectation of immediate payment, and this condition is not performed, the vendor may retake possession of the same. (*George W. Merrill Furniture Co. v. Hill* [Me.], 32 Alt. Rep. 712.)

**WILL—DEVISE OF SURVIVORS.**—Testator devised his residuary estate to his executors, to be equally divided among his five children, the shares of the sons to be paid them when they attained twenty-one years of age, the daughters to receive the interest on their shares yearly during their lives; but if either of them die without issue her share is to go to her surviving brothers and sister equally to be divided among them." *Held*, that on the death of a brother who left children, such children were not entitled to any part of the daughter's share. (*Ashhurst v. Potter* [N. J.], 32 Alt. Rep. 698.)

## New Books and New Editions.

Schouler's Domestic Relations, 5th edition, by James Schouler, LL. D., professor in the Boston University of Law and author of treatises on the Law of Personal Property, Bailments, including Carriers, Wills, etc.

The desirability of a new edition of this able work on this most important subject is easily seen by the tremendous number of decisions which have been made on this subject since the appearance of the last edition. It will be but necessary to mention that the law of Husband and Wife is changing yearly on account of the fresh enactments by the different Legislatures and is, at present, in a most pitiable and chaotic condition. This embarrassment to the lawyer to discover the true interpretation of the law is to a great extent obviated by the appearance of this work which is most comprehensive in its scope and complete in every part. We realize that too often the public are deceived by an enthusiastic review of some work which is not in accord with the merits which it deserves, but we feel justified in highly recommending this work as a substantial treatise and valuable text-book on this important subject of domestic relations. The table of cases cited shows a tremendous amount of research on the part of the author and that all the recent decisions are embodied in the work. The work is divided into six parts, each having one or more chapters on the different parts of the subject discussed in each sub-division. The first part deals with a general discussion of the law of Domestic Relations and is divided into eleven paragraphs, while the second part deals with Husband and Wife and is divided into seventeen chapters. The third part is on Parent and Child, The Right of Parents and Duties and Right of Children with reference to Parents, Legitimate Children and Illegitimate Children, and is comprised within six chapters. The fourth part deals with Guardian and Ward and is subdivided into nine chapters on Guardians in General, Appointment of Guardians, Termination of Guardian's Authority, Nature of the Guardian's Office, Rights and Duties of the Guardian concerning the Ward's Person, Rights and Duties of the Guardian as to the Ward's Estate, Sales of the Ward's Real Estate, The Guardian's Bond, Inventory and Accounts, and the Rights and Liabilities of the Ward. The fifth part deals with Infancy, General Disabilities of Infants, Acts Void and Voidable, Acts Binding upon Infant, Injuries and Frauds of Infants, Ratification and Avoidance of Infants' Acts and Contracts, and Actions by and against Infants. The sixth part deals with Master and Servant, Nature of the Relation, Mutual Obligations of Master and Servant, Rights and Liabilities of the Servant as to Third Persons, and General Rights and Liabilities of the Master. The index might, perhaps, be more elaborate, but is in the main satisfactory, while the foot-notes on each page make the work really practical and convenient in form. Published by Little, Brown & Co., Boston, Mass.

# The Albany Law Journal.

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## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE abuse of process by an officer and the liability of the plaintiff in process is thoroughly discussed in the case of *Wurmser v. Stone*, 40 Pac. Rep. 993, in which it was held by the Court of Appeals of Kansas that an officer forfeits the protection which the proper execution of legal process affords, and becomes a trespasser *ab initio*, when he is guilty of such an improper and illegal exercise of authority under it as warrants the conclusion that he intended from the first to use his legal authority as a cover for his illegal conduct; that a plaintiff in replevin, who does not direct or participate in a malicious abuse of the writ of replevin by the officer in whose hands it is placed for service, is not liable for the damages sustained by reason of the unlawful acts of the officer; and that in an action of trespass, in which the alleged trespass consists of an abuse of legal process, subsequent irregularities in the action in which the process is issued, for which the party proceeded against is not responsible, cannot be considered for the purpose of characterizing the previous act. On this important point the court in the action writes as follows:

It is well to observe the difference between a malicious use and a malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice and without just cause, but only its regular execution is contemplated. There is a malicious abuse of process where a party, under process legally and properly issued, employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect. *Wood v. Graves*, 144 Mass. 366, 11 N. E. Rep. 567. The malicious use of process, either civil or criminal, is reached by an action for malicious prosecution; but such action cannot be commenced until after the maliciously prosecuted action has terminated in favor of the defendant therein. *Plummer v.*

*Dennett*, 6 Greenl. 421; *Hayden v. Shed*, 11 Mass. 500; *Marbourg v. Smith*, 11 Kan. 554, *Schippel v. Norton*, 38 Kan. 567, 16 Pac. Rep. 804. Where an officer acting under process is guilty of such an improper and illegal exercise of authority under it, as will warrant the conclusion that he intended from the first to use his legal authority as a cover for his illegal conduct, he becomes a trespasser *ab initio*, and is liable for the same as if he had acted without process. *Barrett v. White*, 3 N. H. 210; *Breck v. Blanchard*, 20 N. H. 323; *Grafton v. Carmichael*, 48 Wis. 660, 4 N. W. Rep. 1079; *Ross v. Philbrick*, 39 Me. 29; *Stoughton v. Mott*, 25 Vt. 668. If goods are taken by an unlawful breaking into a dwelling house, legal process is no justification. *Ilsey v. Nichols*, 12 Pick. 270; *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. Rep. 327; *People v. Hubbard*, 24 Wend. 369; *Freem. Ex'ns*, § 256; *State v. Becker* (Ind. Sup.), 31 N. E. Rep. 950. The rigor of the common law is changed, in respect to breaking into a dwelling house, by the statute which authorizes an officer to break open any building for the purpose of seizing the property called for by a writ of replevin, after he has demanded entrance into the building, and delivery of the property, and the same has been refused. Gen. St. 1889, § 4918. What constitutes a legal demand for entrance will depend upon the circumstances of each case.

It is not every irregularity in the execution of process that will deprive the officer of its protection. To have that effect, it must be an act of such gross delinquency as to clearly point to the wrong intent. *Taylor v. Jones*, 42 N. H. 25. If there was no abuse of the process at the taking, subsequent irregularities in the proceedings in the replevin action could not affect the previous taking so as to make it a trespass. *Gardner v. Campbell*, 15 Johns. 402; *Grafton v. Carmichael*, 48 Wis. 660; 4 N. W. Rep. 1079. Conceding that the conduct of the constable was such as to make him a trespasser *ab initio*, and therefore liable in a proper action for damages, yet before the plaintiff in that action can be made liable for the same acts, it must appear that he controlled, directed, or counseled the unlawful use of the process. There is no legal presumption that one concurs in the unlawful act of another.

Snydacker v. Broose, 51 Ill. 357; Abbott v. Kimball, 19 Vt. 551; Welsh v. Cochran, 63 N. Y. 181; Hyde v. Cooper, 26 Vt. 552. In the case last cited, Redfield, C. J., in rendering the opinion of the court, said: "When the party does not direct or control the course of the officer, but requires him to proceed at the peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it." There is an entire absence of competent testimony in this case to show that the plaintiff in error authorized, or had knowledge of, any improper conduct of the officer, if there was any, and, therefore, nothing upon which to base a verdict against him for damages for any trespass then committed. Before he can be so held, it must appear (1) that there was such an abuse of the process, by the constable, as to make him a trespasser, and to forfeit all protection which his writ otherwise would give; and (2) that plaintiff in error either directed or counseled such wrongful conduct, or thereafter consented thereto by accepting the benefits resulting therefrom, with full knowledge of the facts. The instructions which were given by the court at the special instances of the defendant in error, ignored these principles, which lie at the foundation of the liability of the plaintiff in error, and are erroneous.

We publish in this issue of the LAW JOURNAL the reply of Jacob Spahn, Esq., of Rochester, N. Y., to the general letter sent by the Commissioners on Statutory Revision to different members of the bar in relation to the amendment to the Code of Civil Procedure. There may be also found a special letter from Mr. Spahn urging the reasons for the change which he proposes and which in fact is to allow either party to an action to take a general exception to the charge of the trial judge. We recognize the importance and weight of the suggestions which Mr. Spahn makes and we believe that such an amendment would work to the further-

ance of justice and would prevent many of the difficulties and dangers of the charge of the trial judge which now exist. But we protest that an exception should be taken by either party after the trial in a reasonable time and to specific parts of the charge of the judge, not to the charge in general, for we cannot and do not consider that any practice which will materially increase the work of the appellate courts is desirable, and it is most important that there should be less matter come up before the appellate court and that appeals should be restricted. It is very easy for the practitioner to form a short bill of exceptions, after the trial, to the charge of the judge, though we consider that either party should be allowed to except at the time of the trial before the case goes to the jury as well as to make requests to charge which are most proper for the just trial of any cause. It is, therefore, with great pleasure that we recommend the suggestions of Mr. Spahn in so far as they allow exceptions to be taken to specific parts of the judge's charge during the time allowed for an appeal.

During the last few weeks two judges have recommended changes which, on account of the importance of the reforms and the distinguished character and great learning of the judges, entitle them to profound consideration and respect from the bar. Last week we had occasion to comment on the case of the People v. Shea, which was recently decided by the Court of Appeals. Judge Peckham, who has had wide experience as an active practitioner, trial judge, and as a member of the court of last resort, calls the attention of the public as well as of the bar to the unfortunate, unnecessary, unreasonable and improper rules of practice which allow a mass of worthless facts and immaterial testimony to come before the appellate court of last resort. The great care which the judges of the Court of Appeals take with their opinions and with their work, and the literary quality of the opinions, not to speak of their great legal worth, are too well-known to here comment upon. Does it not seem ridiculous and like loading a faithful public servant down to send before him for review ten thousand printed folios embracing two thousand printed pages of record, exclu-

sive of some three hundred pages of questions put to jurymen, which came before the court in the case of the *People v. Shea*? There has been so much said within the last year and a half in regard to limiting appeals to the court of last resort that we really believed that some practical benefit would accrue to the court. But, seemingly, this relief to the court has disappeared in the vociferous flagellations of the discordant notes of code reformers. Something should be done; but it is most humiliating to the bar that the suggestion should have to come from the judges of the court that must be relieved. It is most proper that every benefit should be accorded to a man who is accused of murder, but from a practical standpoint we think it is almost prejudicial to the accused to go before the court of last resort, with such an unwieldy mass of absolute nothingness. A few well chosen points, such as exceptions to the charge of the trial judge, the admission of testimony which can be easily picked out and attacked, and which are clearly fixed in the mind of the counsel for defense, would practically give the court a better opportunity to judge of the merits of the case, while it would be absolutely impossible for the minds of any court to comprehend such a mass of testimony as we have referred to. But these suggestions of Judge Peckham do not stand alone as the only reminder to the members of our profession that our procedure is not in accord with business principles. It has been a favorite theory of this journal that too many appeals involve unnecessary delay, which is most prejudicial to the rights of suitors. Reforms cannot proceed along business lines without comprehending the broad principles of the law. Judge Brewer, of the United States Supreme Court, in his address to the American Bar Association, most clearly discussed this subject, and said:

"The administration of justice would soon be considered a mockery if first impressions controlled every case. But greater expedition can be obtained without detracting from fullest examination and consideration. Shorten the time of process. Curtail the right of continuances. When once a case has been commenced, deny to every other court the right to interfere or take jurisdiction of any matter that can be brought by either party into the pending litiga-

tion. Limit the right of review. Terminate all review in one appellate court. Reverse the rule of decision in appellate courts, and instead of assuming that injury was done, if error is shown, require the party complaining of a judgment or decree, to show affirmatively not merely that some error was committed in the trial court, but also that if that error had not been committed the result must necessarily have been different. It may be said that this would make reversals very difficult to obtain. They should be difficult. The end of litigation should be almost always in the trial court. Business men understand that it is best that the decisions of their committees of arbitration should be final and without any review. While some of our profession seem to think that justice is more likely to be secured, if by repeated reviews in successive courts, even to the highest in the nation, the fees of counsel can be made to equal, if not exceed, the amount in controversy between the clients. In criminal cases there should be no appeal. I say it with reluctance, but the truth is that you can trust a jury to do justice to the accused with more safety than you can an appellate court to secure protection to the public by the speedy punishment of a criminal. To guard against any possible wrong to an accused, a board of review and pardons might be created, with power to set aside a conviction or reduce the punishment, if on the full record it appears not that a technical error has been committed, but that the defendant is not guilty, or has been excessively punished.

"The truth of it is, brethren, that in our desire to perfect a system of administration, one which shall finally extract from confused masses of facts and fiction the absolute and ultimate verities, we forget that tardy justice is often gross injustice. We are putting too heavy burdens on our clients, as well as exhausting the patience of the public. Better an occasional blunder on the part of a jury or a justice of the peace, than the habit of protracted litigation.

"The idea of home rule and local self-government is growing in favor. Thoughtful men more and more see that the wise thing is to cast upon each community full responsibility for the management of its local affairs, and that the great danger to free government is in the

centralization of power. Is it not in line with this thought that as far as possible the final settlement of all controversies which are in themselves local shall be by the immediate friends and neighbors of the litigants? Was not that the underlying thought of the jury as first established? And while we boast that the jury system is the great bulwark of our liberties, are we not in danger of undermining its strength and impairing its influence by the freedom of appeal? Is not the implication therein that the jury and the trial judge cannot be trusted, and is not the sense of responsibility taken away from both when they understand that no matter what they may decide, some superior and supposed wiser tribunal is going to review their decisions and correct whatever of mistakes they may make?"

We publish in this issue of the LAW JOURNAL an article written by Hon. Horatio Seymour, Jr., formerly State engineer and surveyor, one of the most earnest advocates of the improvement of the canal provided for in the bill to be submitted in the form of a referendum at the next election. Mr. Seymour was formerly State engineer and surveyor, and although this plan was first originally suggested by the late Samuel J. Tilden, it has since been taken up and warmly advocated by Mr. Seymour, who at present resides at Marquette, Mich. It can readily be seen that he is anxious still for the success of the canal improvement project. Although the subject is not strictly legal, yet it involves important interests which are akin to our profession, and we must for a moment turn aside from the strict consideration of legal principles to the consideration of vital interests of the State and country.

After the adjournment of the American Bar Association at Detroit, the Rev. Lyman Abbott, successor to the Rev. Henry Ward Beecher as pastor of Plymouth Church, delivered before the members of the Association a most interesting and cultured address. In giving his definition of law, he said:

Law is not a command addressed from a superior to an inferior. It is the corporate will of the nation addressed to the individual. A comparison of the nation to the individual is

as old as Plato. The nation is an individual and when it has decided puts itself in position to enforce that decision. Law is the "I will" of the American people. Law is to transmute half formed purpose into resolute purpose; it is to convert aspiration into life. The nation has its body which must be fed; its mind; its emotions; its will which must be carried out.

The different forces that administer to the corporate individual were eloquently cited. The man whose body is fed and whose intellect is brightened is unavailing—unless he has a definite purpose and pursues that purpose with definite resolution. It is the same with the nation if it means to accomplish anything. The nation is what its executed laws are—no more, no higher, no better.

Not long ago the Populists in Kansas decided not to have any more lawyers in the Legislature. More than fifty per cent. of the legislators in Congress have been lawyers. It ought so to be. They are fitted to shape the national will, to give it definite resolve. We need continuous sessions of the law. The legislature represents the superficial will of the people, the whims of partisan feeling or prejudice. The courts are to represent the deeper purpose of the nation. They understand and interpret the trend of national life. By way of illustration, the great waterways of the nation were given to the nation, the great railways were subject to federal jurisdiction and protection, the great lakes are also under federal jurisdiction. No act of the Legislature has produced the effect of Lincoln's signing the document that set slaves free. The hand of the people held the pen.

The lawyer is not merely one to settle disputes or to prevent them. Beyond is the function he performs in the American commonwealth. He converts creed into deed. We are measured by what we do far more than by what we think. Deed is the measure of the creed. The threads out of which the pattern is to be woven are living threads. The lawyer works them into the national fabric. Blackstone is right; there is an analogy between laws of nature and laws of jurisprudence. Laws of right and wrong exist; they are. Webster said it was useless to re-enact the laws of God. The temporary and the human laws will not stand

opposed to divine principle. Deep in the heart are written the principles of truth, justice, honor. It is not true we want dishonest money; we want honest money; and the question is, What is honest money? The education of the lawyer can not be too broad or too deep. The great principles of our national jurisprudence run back to the time of the great Mosaic period. The lawyer must discern the principles of social life. He must trace the trend of history to see what the future holds. The religions of the world are two classes. Pagan religions picture God as an angry God. The Hebrews showed He was a just God. Then came the belief that He was a merciful God. Our prisons are reformatory. It is ours to present the highest ideals, said the speaker, referring to his own calling. The function of the minister is to hold up the highest pictures. It is the duty of the lawyer to shape the aspiration into a living, determined and powerful resolution.

In the English letter to the *Green Bag* appears a most comprehensive distinction between solicitors and barristers, a subject which is rather hazy and uncertain to many Americans. It appears that the distinction is gradually disappearing from various causes, and especially for the reason that English practice is coming more and more to allow the solicitors to practice in some of the inferior courts, while barristers in many instances have done away with the services of solicitors in the arrangement of the case and the preparation of evidence in the cause. The letter is well worth printing, and is as follows:

The line which divides the barrister from the solicitor in the English practice is so shadowy in some respects, although so distinct in others, that it is hardly to be wondered at that confusion exists on the subject in America. In fact there are a good many professional men in England who would be puzzled to know where the function of the solicitor stops and the practice of the barrister begins. An American who was recently called to the bar desired to retain a copy of a letter on private and personal business, which, therefore, he had taken pains to write in copying ink. He handed it, with a letter-press copying book, to

the clerk of his chambers. The latter understood that a copy was required, but he failed to see what the copying book had to do with it. At last, when it dawned upon him, he said, with much disdain: "I am sorry, sir, but there is no copying press in the temple. Solicitors take letter-press copies of their letters, but barristers have their opinions written out in fair hand." In other words, the clerk plainly intimated that barristers had no connection with business, that was an affair of solicitors only. He was, in the main, correct. Solicitors do what in America is known as "chamber work." They see the client, and act for him in every possible way, performing services in this respect which an American lawyer would never dream of consenting to do, and charging therefore fee of "six-and-eight pence" and "thirteen-and-four pence," and other small sums which would be too trivial to figure on the books of your lawyers, as well as larger and more imposing amounts. And now, of recent years, they are encroaching upon the preserves of the barrister to an extent which is most alarming to the latter. They may appear as advocates in the county courts and before referees, masters and judges in chambers. In the county courts they don a gown and wear bands at the neck, and, but for the absence of the wig, would pass in appearance for the barristers. In almost every respect, except in high court work, they are taking the places of those who are popularly spoken of as belonging to the "upper branch" of the profession. But the barrister has exclusively the right of audience in the higher courts.

In addition to this he is called upon by the solicitors to "settle" the pleadings, that is to say, to draft them; and to pass upon all the formalities in a case which is the subject-matter of litigation up to the point where issue is joined. He is also "instructed" to give an opinion upon evidence and such technical questions of law as may arise. This he is supposed to do only upon a "brief" submitted to him by a solicitor. But, fortunately for him, and as a set-off to the encroachments upon his functions by the solicitor, he is now beginning to see the lay client directly, and not solely, as heretofore, through the intervention of the solicitor. When Sir Richard Webster



was attorney-general sometime ago, and therefore the leader of the bar and the custodian of its prerogatives, he decided that a barrister might advise a layman in all matters which were not in litigation or likely to result immediately in litigation. It cannot be said in truth that in consequence of this clients are tumbling over each other in their mad eagerness to get access to the sacred precincts of a barrister's chambers; but it is true that more and more, each year, consultations are being held with those who seek legal advice, and opinions are being written without the intermediary of solicitors' briefs.

Just now both branches of the profession are agitated over matters which affect them most closely. The lord chancellor has brought in a bill to create the office of legal trustee. At present there is no such office. Trustees act independently of all control, and are only answerable, in case of breach of trusts, to their *cestuis que trust*, who must apply to the Chancery Courts for relief. Most of the trustees are solicitors, and all of them serve without compensation.

The idea of fees or commissions is abhorrent to the English courts, and they are never allowed. It is sometimes the case that when solicitors are appointed the instrument creating the trust provides that they shall be allowed to charge for such work as they may professionally perform, but otherwise even such services receive no compensation. Notwithstanding this rule the solicitors make money out of trusts and trustees. A trustee is not simply the holder of a legal title or the administrator of a fund. He is a family friend and confidant, a representative of a deceased father, or a grantor of a marriage settlement. He sympathises with the beneficiary of the trust—but he takes no step without consulting the solicitor, and the solicitor permits no consultation without entering up a charge for it. An aggrieved party stated in one of the newspapers a few days ago that the appointment of an additional trustee of his estate, although there was no opposition, and the proceedings were of the friendliest character, had cost a little over £80. In other words, nearly \$400 had been expended in "consultations," "conferences," "visits," "instructions," and the "fair copying" of formal

documents. It is feared that if an official trustee is appointed he will not allow these charges, and in consequence there will be so much the less business to do. The argument in favor of the official trustee is based upon the fact that he will be an officer of the court and that he will be obliged to give a bond and will be compelled to report at stated intervals to the court the result of his transactions. It is urged that the irresponsibility of trustees under the present system encourages malversations and misappropriations of money. The other day five solicitors were struck off the rolls for wrong-doing. Lord Halsbury, now again the Lord Chancellor, says that no less than seventy-seven solicitors were disqualified during his last administration as Lord Chancellor, and that, in his opinion, the number of breaches by trustees which never come to light is enormous.

On the other hand it is claimed that, as there are more than 15,000 solicitors on the rolls, the proportion of those who are dishonest to the entire number is infinitesimally small. Where the matter would have ended cannot be safely predicted, but it will be hung off for a while, as the recent change in government will suspend legislation on the subject for some time to come. The matter which has interested the other branch of the profession, the bar, concerns its domestic or internal management. A large majority of the barristers, particularly the younger members, are desirous of forming an organization for the purpose of directing, controlling and governing their own affairs; and to this end a general council of the bar was formed. But it cannot get on without funds, and the barristers who before being called are obliged to pay large sums to the already wealthy bodies which are known as the Inns of Court, naturally object to put their hands in their pockets to provide these funds. There are four Inns of Court—the Middle Temple, the Inner Temple, Lincoln's-inn and Gray's-inn. Conjointly they have a revenue approximating \$500,000 a year. Their affairs are administered by a board of governors or managers or trustees, called "Benchers." They make no report of their income or their expenditures. Of course, they are men of integrity and high character, and no one questions the honesty of the administration of the funds they handle. There is simply the feel-

ing that they might do more to advance the interests and the professional success of the men for whom they administer the big trust. They have offered to subscribe something towards the Bar Council but the amount is small, and the conditions which accompany the offer render it almost impossible of acceptance. However, there is a general desire for peace and compromise, and the difficulty may be solved. If so, I will have great pleasure in telling you later on in what manner a revolution or strike of the largest professional trades union the world has ever seen has been accomplished, and what results have been attained.

The Supreme Court of Illinois, in the recent case of *Wright v. Hutchinson*, held that a deed of trust of real property to secure creditors who agree to a compromise of their claims accompanied by a pledge of personal property as additional security, with a provision that any piece of property shall be released to the grantor whenever he shall place in the hands of the trustee its value as fixed and set opposite its description attached to the agreement, does not constitute an assignment for the benefit of creditors. On this point the court said:

"The question then is, do the provisions of the agreement and the pledge as set out in the bill, taken in connection with such a deed of trust, when constructed in the light of the facts alleged in the bill, constitute an assignment for the benefit of creditors? We are clearly of the opinion that this question must be answered in the negative. A defeasible, and not the absolute, title to both the real and personal property is conveyed. The payment of the notes is secured by the deed of trust, and the personal property is pledged as 'additional security.' The provision in the agreement that any piece of property should be released to the grantor or pledgor, whenever he should place in hands of the trustee its value as fixed and set opposite its description attached to the agreement, was a mere provision for a partial redemption, and, so far from converting the writings into an assignment for the benefit of creditors, shows that not only was the equity of redemption retained the grantor, but that he reserved the right to redeem each piece or parcel of property separately, as he might be able."

## IS THERE A FEDERAL COMMON LAW ?

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§ 1. *Preliminary.*—The question whether there is a common law of the United States, as distinct from the common law of each or any particular State, has recently been mooted quite frequently, both in the decisions of the courts and in discussions in the law magazines,<sup>1</sup> and as the subject seems to be of considerable present importance, I venture to present the following extracts from a chapter upon the common law in a work which I am now preparing and in which chapter I am inclined to think that I have reached and stated the correct conclusion upon this interesting question:

§ 2. *Is there a common law of the Federal Union?*—Strangely enough it is said that the Federal Union—the United States as such—has no common law except as it is found in the several States. At least such has been the current doctrine.<sup>2</sup> Of late, however, a new statement of the rule has been made, and, while it is not supposed to change the law, yet in effect it makes what may be regarded as an advance in the Federal jurisprudence in the direction of a general common law of the United States which shall be administered alike by State and Federal tribunals in all matters not of a character local to a particular State.<sup>3</sup>

This may be heresy now, but it is the inevitable orthodoxy of the future, and the author is not of those who see in the fact a sign of danger, although his training has made him in most respects a strict constructionist of the Federal Constitution and a believer in the autonomy of the States within the Union.<sup>4</sup>

The development of a general common law through the Federal Courts is not in conflict with the complete preservation of the right of every

<sup>1</sup> *University Law Review*, vol. II, No. 7; p. 236; *American Law Review*, vol. 27, p. 614; *N. Y. Law Journal*, Sept. 20, 1895, p. 1462; *Swift v. Philadelphia, etc., R. Co.*, 64 Fed. Rep., 59.

<sup>2</sup> *Wheaton v. Peters*, 8 Pet. 591; *Smith v. Alabama*, 124 U. S. 465, 478. But compare 3 *Political Science Quarterly*, 136; art. on State Statute and Common Law.

<sup>3</sup> *Smith v. Alabama*, 124 U. S. 465, 478, 479; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368; *Moore v. United States*, 91 U. S. 270, 273; *Gelpcke v. Dubuque*, 1 Wall. 175, 206; *Murray v. Chicago, etc., R. Co.*, 62 Fed. Rep. 24.

<sup>4</sup> "The Constitution in all its provisions looks to an indestructible Union, composed of indestructible States."—Chase, Chief Justice, in *Texas v. White*, 7 Wall. 700, 725. "The American flag must wave over States—not over provinces."—Rutherford B. Hayes.

State to make its own local laws and administer them as between its own citizens who appeal to its tribunals; and this the Federal Courts fully recognize.<sup>1</sup>

But perhaps the day will come when the same common law will be, in fact as well as in theory, administered by the courts of all the States and by the Federal Courts as well, in all matters not purely local to the several States.<sup>2</sup>

In this way only can the rights of citizens of the United States be adequately protected in every State. It is an anomaly that in adjacent States of our Federal Union, upon states of fact and relations of *status* or of contract exactly alike, an entirely different application of the common law should be made. Yet, as has been pointed out in a recent decision of the Supreme Court of the United States, such a condition of things exists when the common law, as administered in different States, is applied to cases arising out of the relation of master and servant.<sup>3</sup>

§ 3. *The United States Courts and the Common Law.*—That in all the States of the Federal Union, except Louisiana, the common law is the prevailing system has been shown, and why the Federal Courts should have denied that the United States, as such, have any "common law," in the strict sense of the term, as they have always done,<sup>4</sup> while at the same time they hold that the Federal Courts have full equity powers as administered by the English High Court of Chancery,<sup>5</sup> is one of the anomalies of judicial reasoning which must be traced to the peculiar form in which the question at issue was first presented to the Supreme Court of the United States, and to the legislation of Congress regarding the Federal Judiciary.<sup>6</sup>

<sup>1</sup> Railroad Co. v. Georgia, 98 U. S. 359; see, also: 92 U. S. 289; 91 U. S. 452.

<sup>2</sup> See Article: Uniformity of Laws Through National and Inter-State Codification: Leonard A. Jones, 28 Am. Law Rev. 547.

<sup>3</sup> Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368.

<sup>4</sup> Wheaton v. Peters, 8 Pet. 591, 658, 659; United States v. Hudson, 7 Cranch, 32; United States v. Coolidge, 1 Wheat. 415; Bucher v. Cheshire R. Co., 125 U. S., 555, 582; Smith v. Alabama, 124 id. 478; but see 3 *Political Science Quarterly*, 136.

<sup>5</sup> United States v. Howland, 4 Wheat. 108; Neves v. Scott, 13 How. 268; Pennsylvania v. Wheeling Bridge, 13 id. 518; Kirby v. Lake Shore, etc., R. Co., 120 U. S. 130, 137; Curtis on U. S. Cts. 18; Scott v. Neely, 140 U. S. 106; Watts v. Camors, 115 id. 353, 362; Payne v. Hook, 7 Wall. 425, 430.

<sup>6</sup> Wheaton v. Peters, 8 Pet. 591, 658, 659. But consult judiciary act of 1789, containing the clause as to the laws of the several States being regarded

That form and legislation were such that the Supreme Court, reasoning by analogy, held that the United States, as such, deriving all their powers from a written Constitution, could have no common or unwritten law.<sup>7</sup>

§ 4. *The "general" common law.*—That there might be a general common law of the United States which it would be necessary to apply as between individual litigants in the Federal courts, in cases clearly "arising" at common law, does not appear to have been mooted in the early case of *Wheaton v. Peters*. But a little later, in the leading case of *Swift v. Tyson*, the question was raised, and it was cautiously held by the court that the general commercial law or the customs of the law merchant would be applied by the Federal courts without regard to the holdings upon cases calling for its application by the courts of the State in which the controversy arose.<sup>8</sup>

And in later decisions this doctrine has been extended, the court, however, speaking always of the principles of "the general law" as guiding them, but not until very recently plainly declaring that the United States courts, in a certain class of cases, will administer the common law principles as they understand them, without regard to the decisions upon the subject in the State where the controversy arose.<sup>9</sup>

§ 5. *A doctrine necessarily implied.*—The doctrine of these cases, which it has taken the United States Supreme Court about half a century to elaborate through the slow process of successive decisions upon new cases as they have been presented, might have been found clearly implied in the language of

as "rules of decision in trials at common law." It has been held that the decisions of the State courts on questions of common law are not "*laws*" within the meaning of the clause in question. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S., 368, 371.

<sup>7</sup> *Wheaton v. Peters*, 8 Pet. 591, 658; *Bucher v. Cheshire R. Co.*, 125 U. S. 555.

<sup>8</sup> *Swift v. Tyson* 16 Pet. 1; s. c., 1 Am. L. C. 411.

<sup>9</sup> *Watson v. Tarpley*, 18 How. 517, 520, 521; *Gelpcke v. Dubuque*, 1 Wall. 175, 206; *Delmas v. Ins. Co.*, 14 id. 665; *Boyce v. Tabb*, 18 id. 546, 548; *Olcott v. Supervisors*, 16 id. 678, and brief of *Matt. H. Carpenter* therein, 681, 684; *Hough v. Ry. Co.*, 100 U. S. 213, 226; *Carpenter v. Ins. Co.*, 16 Pet. 495, 511; *Jackson v. Chew*, 12 Wheat. 153, 167; *Foxcroft v. Mallett*, 4 How. 353, 379; see generally: *Gould & Tucker's Notes to R. S. U. S.* 194, 195, 196; *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, and cases therein collected; *Smith v. Alabama*, 124 id. 465, 478; *Murray v. Chicago, etc., R. Co.*, 62 Fed. Rep. 24. Compare: *Swift v. Philadelphia, etc., R. Co.*, 64 id. 59.

the Federal Constitution itself, unless the writer mistakes its meaning. The Constitution of the United States, Art. III, § 2, provides that: "The judicial power shall extend to all cases, *in law and equity*, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority." And then the same section proceeds to define the persons and the class of cases of which the Federal courts shall have jurisdiction at law and in equity under the above quoted provision.<sup>1</sup>

Then by the seventh amendment of the Constitution, the right of the Federal courts to apply the rules of the common law is expressly recognized, and in certain cases they are peremptorily required to apply them.<sup>2</sup>

§ 6. *Equity jurisdiction of Federal courts.*—When the question was raised as to the equity powers of the Federal judiciary, it was held, without hesitation, that they were the same as those of the High Court of Chancery in England, and that the principles of equity jurisprudence were to be administered by the Federal courts as an independent judiciary, without regard to the manner of their application or the statement of the doctrines of equity by the courts of any State of the Union.<sup>3</sup>

Doubtless similar would have been the holding regarding the common law and its administration in the Federal courts, but for a section in the Federal judiciary act of 1789, which provides "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply," and also the mistaken notion that the United States could have no common law, because all its laws must be derived from the written Constitution.<sup>4</sup>

This very train of reasoning overlooks the fact that the decisions of the English High Court of Chancery establishing the doctrines of equity, are a part of the *unwritten* law of England, and have

been adopted, as we have seen, as a part of the common law of the several States. It is thus a train of reasoning inconsistent with itself and not in harmony with the language of those provisions of the Federal Constitution which are above quoted upon this subject.<sup>5</sup>

§ 7. *A national common law.* That all the laws of the United States need not be written, and that a common law of the United States as such, is growing up, cannot be longer questioned. Its evidences are found in many recent decisions of the Federal courts, and have been thus stated in an opinion of the Supreme Court of the United States, delivered by the late Mr. Justice Matthews:

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."<sup>6</sup>

§ 8. *The true principle stated.*—The true principle is that the Federal courts have *no common law jurisdiction*; but when a case comes before them based on a state of facts conferring jurisdiction under the Federal Constitution and the acts of Congress and triable as a case at common law, it should be a matter of necessary implication that it is to be tried in accordance with the common law, which the Federal courts must administer in such case, and for which they do not have to look to the courts of the State in which the controversy arose, *unless the question at issue is one of a character local to the State*. When it is of a general character it should be determined by the general common law.<sup>7</sup>

§ 9. *The question one of jurisdiction.*—The jurisdiction of the Federal courts is wholly dependent upon the provisions of the Federal Constitution and

<sup>1</sup> Const. U. S., Art. III, § 2; *Murray v. Chicago*, etc., R. Co., 62 Fed. Rep. 24, 28; 3 *Political Science Quarterly*, 136.

<sup>2</sup> Const. U. S. Amendments, Art. VII; *Root v. Ry. Co.*, 105 U. S. 189, 206; *Ex parte Boyd*, 105 U. S. 647, 656; 1 *Fost Fed. Pract.* (2d ed.), § 4.

<sup>3</sup> *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Howland*, 4 Wheat. 108; *Green v. Creighton*, 23 How. 90; *Payne v. Hook*, 7 Wall. 430; *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130, 137; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205.

<sup>4</sup> *Wheaton v. Peters*, 8 Pet. 591; *Swift v. Philadelphia, etc., R. Co.*, 64 Fed. Rep. 62, 64, 65.

<sup>5</sup> *Ante*, § 5; *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 371.

<sup>6</sup> *Smith v. Alabama*, 124 U. S. 473; *Moore v. United States*, 91 U. S. 270, 273; 3 *Political Science Quarterly*, 136.

<sup>7</sup> See dissenting opinion of Clifford, J., *U. S. v. Cruikshank*, 92 U. S. 564; *Moore v. United States*, 91 U. S. 270, 273; *Smith v. Alabama*, 124 U. S. 465, 478; *Murray v. Chicago, etc., R. Co.*, 62 Fed. Rep. 24; See Article by Leonard A. Jones, 28 *Am. Law Rev.* 547, 552-553.

the laws of Congress pursuant thereto. That is, it is wholly statutory.<sup>1</sup>

"Jurisdiction is the power to hear and determine" a case or controversy. It is "the right to adjudicate concerning the subject matter in a given case."<sup>2</sup>

It is not a rule for the determination upon the merits, of the questions submitted to the tribunal, but it is a right, a power, which the court, by its inherent constitution, has, or has not, to consider and decide the particular controversy between the particular parties before it.<sup>3</sup>

Clearly, therefore, the Federal Courts have no *jurisdiction* conferred upon them by the common law, in the sense that the common law courts of England had.<sup>4</sup>

But just as clearly they have the right, and it is their duty, in cases both at law and in equity, where they have or acquire *jurisdiction* under the express provisions of the Federal Constitution, and which cases are not purely local in character, to apply the rules of the common law, and the doctrines of courts of equity, as such rules and doctrines existed in England when our Declaration of Independence, and successful Revolution made us the United States of America, except in so far as those rules and doctrines are not applicable to our changed conditions and circumstances or are expressly abrogated by Federal or State Constitutions or statutes.<sup>5</sup>

§ 10. *Common law a part of our constitutional system.*—The common law is in fact a part of the unwritten Constitution of the United States. It lies at the foundation of all our institutions. Its principles are the basis of our Federal Constitution and the Constitutions of the several States, and its reason is the reason upon which our judges build and broaden the jurisprudence of our country.<sup>6</sup>

<sup>1</sup> *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 278, 283; *ex parte Smith*, 94 U. S. 455; *Brown on Jurisdiction*, § 88.

<sup>2</sup> *Brown on Jurisdiction*, § 1; *Bishop's Code Practice*, § 116.

<sup>3</sup> *Rhode Island v. Massachusetts*, 12 Pet. 718; *Brown on Jurisdiction*, § 1 & notes.

<sup>4</sup> 1 Bl. Com. (Sharswood's Ed.) Intro. \*68.

<sup>5</sup> In such cases the common law is a rule for the exercise of the jurisdiction which the Constitution or the statute gives. See *Brown on Jurisdiction*, § 88.

<sup>6</sup> *Smith v. Alabama*, 124 U. S. 478; *Moore v. United States*, 91 U. S. 270, 273. The common law existed as such before either the States or the United States existed and: "Both the States and the United States existed before the Constitution;" Chase, Chief Justice, in *Lane v. Oregon*, 7 Wall. 71, 76; cited in *re Debs*, 158 U. S. 564, 578. It clearly

§ 11. *Conclusions regarding the common law.*—From the foregoing discussion of the character, history and origin of the common law and its inheritance by this country from England, we reach the following definite conclusions:

I. The Common Law of England is the basis of our common law.

II. Statutes passed by the English parliament prior to our separation from the mother country, and of such character as to be applicable to our situation and institutions at or prior to the American Revolution, have been recognized, in whole or in part, as forming a part of the common law of this country.

III. The unwritten law as it prevailed in England, whether administered by courts of law, by courts of equity or by courts ecclesiastical, constitutes our common law so far as our courts find it suited to our conditions and in harmony with our institutions.<sup>7</sup>

IV. The common law as it prevails with us has heretofore been held to be such law only for the several States treated as independent sovereignties, and no general common law of the whole country, and no national common law has been recognized. But of late, the tendency is toward a uniform system of law upon all subjects not of a purely local character, and the Federal courts have emphasized this tendency by recent decisions, carrying to its logical conclusion the doctrine of certain early Federal cases that in controversies between citizens of different states, in the Federal courts, the principles of the common law, as understood by those courts, will be applied in all cases where the question is one of general jurisprudence, not of merely local law in the particular State where the controversy arose.

V. It has also come to be recognized that, while there is no national common law in the sense of a "national customary law" distinct from the common law of England, yet the interpretation of the Federal Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. Hence the code of constitutional and statutory construction which is gradually framed by the judgments of the United States Supreme Court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common

follows that: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted;" *Mattox v. United States*, 156 U. S. 237, 243; *De Camp v. Archibald*, 50 Ohio St. 618; S. C. 40 Am. St. Rep. 692.

<sup>7</sup> *Reno Smelting Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 864.

law as may be implied in the subject, and constitutes, to that extent, a common law resting upon national authority.

In a sentence, then, my conclusion is, that the Federal courts are *without common law jurisdiction*, but that in cases involving questions of general common law, which come before those courts *under their constitutional and statutory jurisdiction*, they have the right and it is their duty to declare and apply the common law as they understand it to be.

WM. HEPBURN RUSSELL,  
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#### ROBERT DESTY.

JUDGE ROBERT DESTY, the veteran law editor and author, died at St. Mary's hospital, Rochester, aged 68 years. Judge Desty was born in Canada of parents who were refugees from France, and whose real name was D'Estimauville. The elder D'Estimauville was a wealthy French nobleman who was forced to flee from France during the revolution. He escaped across the English channel in the garb of a priest.

Upon taking up his residence in the United States the younger D'Estimauville altered his aristocratic name, preferring to be called plain Desty. His numerous given names were also put aside for plain Robert.

Judge Desty spent his boyhood in Quebec, where he got the foundation for his education, afterward living in Brooklyn and Philadelphia. In 1849 he went to California in search of gold. He had then been admitted to the bar and there gained such eminence that he was employed by the law publishers, Bancroft, Sumner, Whitney & Co., in preparation of books for publication, which, twenty-five years ago, became standard and known throughout the country.

During his residence in California he was elected to the State Senate on an independent ticket, but his election was contested by the opposing candidate on the ground that Judge Desty ran under an assumed name. The legislative committee appointed to decide the contest learned that Judge Desty had never procured the legal right to change his name, and on that ground unseated him. He was elected a minor court judge soon after going to California.

At the outbreak of the Mexican war Judge Desty enlisted as a volunteer and served throughout the war. He was afterward granted a government pension.

Since that time he devoted his entire attention to

<sup>1</sup>Smith v. Alabama, opinion by Matthew, J., 124 U. S. 478 (1888). Moore v. United States, 91 U. S. 270, 273.

legal literature, and his law works aggregate over twenty volumes and are standard throughout the country. His "Federal Practice" is the handbook of every lawyer and judge in the Federal courts, and the work on "Contracts," upon which he was engaged at the time of his death, was intended by him to be the crowning work of his life.

Judge Desty went to St. Paul and was with the West Publishing Co. a few years up to ten years ago, when he engaged with the Lawyers' Co-operative Publishing Co., of Rochester, N. Y., being a trusted and efficient member of the company's staff till his death occurred.

In 1891 he had an attack of the grip, from the effects of which he had suffered somewhat ever since. Last December he thought that it might be better for him to change climate and he took up his residence in Trenton, N. J. He returned to Rochester a few weeks ago with the intention of remaining to complete his four volume work on "Contracts," upon which he had been engaged in the interest of the Co-operative Publishing Co. for the past four years. The material has been gathered and organized and the work progressed to that extent that the first volume is now in the hands of the printer and the others are nearly complete.

Mr. Desty leaves a wife and adopted son to whom he was much attached, and who are at present in California.

Previous to the election last fall, Justice Desty was reported as being a candidate for member of Congress on an independent ticket. At that time Hon. O. F. Williams, in a published interview, paid Judge Desty the following tribute:

"I have been personally acquainted with Judge Desty for a number of years, and also through his authorship of standard law books, especially 'Desty on Admiralty.' In personal appearance Judge Desty is one of the class identified by President Cleveland as 'plain people,' and he is so ardently an American that he has practically discarded one of the best titled French names of nobility.

"Hundreds of years ago, when the French nobles maintained themselves by the sword, one of Desty's ancestors, and of whom he is a direct descendant, was asked by Francis I, king of France, for the deed of the territory where the city of Havre now stands. Justice Desty's ancestor yielded to the request, but stipulated that there should be a street or rue constructed parallel to the Rue Notre Dame, now known as the Rue De Paris, which should bear forever the name Rue D'Estimauville: also that on the right-hand door post of the Hotel De Ville, the city hall of Havre, should be placed the armorial bearings of the noble house of D'Estmauville. These conditions were carried out so far at least as the street was concerned, and while at Havre I had

the pleasure of making an investigation of the matter as stated.

"French historians believe that during the revolution of a hundred years ago, in the destruction of the Hotel De Ville ended a part of the observance of the contract on the part of the king of France. Judge Desty placed in my hands a large packet of legal documents signed by Henry IV, Francis I and other sovereigns of France, proving beyond question the distinguished character of his ancestral name and family. I took these documents to France with me, and they were examined by the historians and attorneys of France with great interest.

"As an American citizen, Judge Desty has become well known and his services are highly regarded."

### Correspondence.

#### IMPROVEMENT OF THE ERIE CANAL.

At a time of great poverty, the citizens of New York built the Erie Canal. It was an event in its history of which all citizens may be proud, not only for the self-sacrifice of their ancestors, but because it has proved to be such a lasting benefit to the State and the entire Northwest.

Not only did New York build the Erie Canal, but it constructed branches both North and South, which, although they have not proved a financial success, have developed the regions through which they passed. The burden of constructing these lateral canals was borne by the entire State, but chiefly by what are known as the canal counties, because in these counties there existed the greatest wealth. In later days, although the canals have done their part, the State has not maintained the high position which it took in 1819 in regard to its public works. The canals, instead of being improved by science and made the pride of the State, have remained as they were in 1850, except for the deterioration which time has produced. They have greatly filled up, so that to-day, instead of being seven (7) feet deep they are more nearly six (6) feet.

In spite of the neglect of this artery of commerce, through which passes a large amount of the product of the West, it has proved of immense value to the State, and has brought into its lap millions of dollars in actual money, to say nothing of the benefit which it has been to all classes of the community.

By competition with other routes, it has kept down the price of transportation, so that to-day the railroads are forced to give better rates to the farmer than are enjoyed in other States. Not only does it affect points along the canals, but every station on the line of the railroads throughout the State, because these lines of transportation dare

not make a better rate for the canal towns than they do for other places at a like distance from the market.

While the Western part of the Union is aroused for cheap transportation and convention after convention meet for cheap waterways, the State of New York seems to take no interest in the plan to deepen its canals.

Without an effort to sustain them it would allow the railroads to drive this valuable competing route from the field, and like Pennsylvania, become the prey of its enemies, that built up towns like Baltimore, Richmond and other points.

In order to save a few cents in taxes New York State would throw away its chief hold on the commerce of the nation, and that which gives it control over every railroad line from the West.

With every reason why the State should improve its waterways it has done nothing for them for half a century. But while this is going on, and the question of cheap transportation is growing more and more important, it would seem as if nothing should be left undone to improve it.

The friends of the canal are encouraged by those living outside of the State, who have seen the importance of this channel of commerce, and who are building iron boats, fully up to the merits of the times, and who expect to reap a harvest in their use, which those who have been most familiar have neglected. The thing which threatens the usefulness of this venture, so full of importance to the State, is the lack of depth in the canals. The wheel of the propeller and the bottom of the boat are dragging the mud, because the canals are not dug out or not deepened so as to give free passage to the boats. With a foot more depth each boat could carry fifty (50) tons more cargo, an increase that would insure a profit to the venture. But this is not the only advantage of an increased depth. It so expedites the passage of the boats that more trips could be made in a season, and thus a gain could be realized.

While every effort is being made by the friends of the canal to improve their waterways, to increase their depth, and to lengthen their locks, the enemies of the canals are at work to lessen its merits in the eyes of the public.

They talk of a ship canal, and of government control, both of which would be destructive to the interests of New York. It is a well-known fact that ship canals should never be entered into except for short distances from the ocean to connect great seas, or to cut short isthmuses. But even these attempts have not proved successful. The Manchester ship canal, the only one that in any way compares with our water route, has not proved that it can transport merchandise from Liverpool to Man-

chester, its terminus, only thirty-five (35) miles distant, cheaper than the railroads.

This canal, thirty-five and a half (35½) miles long, and only overcoming an elevation of sixty (60) feet, has cost the immense sum of Seventy-five Million Dollars (\$75,000,000) or more than two million (\$2,000,000) a mile. What would it cost to overcome a distance of 352 miles from the ocean to Lake Erie, with a height of five hundred and sixty-eight (568) feet.

But the price is not the most difficult feature of the problem. With the Chicago canal, that is to reduce the water of the great lakes six inches, and perhaps more; with the Niagara Falls canal, that is drawing down the waters for its immense mills, it is suggested that a ship canal either entering Lake Ontario, as proposed by United States engineers, or taking its water by the way of Buffalo and Rochester, in a like manner, shall be constructed.

How long would the interests of the great lakes tolerate this folly, when millions of dollars are being spent to deepen them? When every effort is being made on the one hand to make a twenty (20) foot channel throughout their entire length, it is proposed by a party in one State to take steps which would lessen even the present depth an amount that it would be difficult to calculate.

While New York, with its immense commerce and great wealth, hesitates over the expenditure of nine million dollars (\$9,000,000), it is proposed to enter upon a work that would cost six hundred millions of dollars (\$600,000,000). But where shall this money come from? New York does not propose to spend it—it is to be raised by the general government.

So the enemies of the canals of the State (which have been its crowning glories for almost a century) are to allow them to pass out of its control into the hands of the general government, no longer to be carried on for the benefit of New York, but to suit the whim of Congress, although the State must pay a larger amount than any other both for its construction and maintenance.

Has New York lost its reason, and has it lost its power to look after its own affairs, that it must entrust them to others?

What power would it have with its two Senators and its thirty-four Congressmen against that large body of men composed of representatives from other States in the Senate and the House of Representatives?

The public works of the United States are under the control of the engineering department, a branch of the military service. While they contemplate this route for commerce, they also consider a ship canal to the sea as a war project. Their education

is eminently military. Commerce and war cannot go hand in hand. The route and the method that would promote commercial supremacy of the country cannot afford to be linked with any plan that contemplates war.

Why should New York seek to gratify the vanity of Chicago and Duluth to be seaports to her own disadvantage? The commerce of the country does not demand it.

People are led away with the idea that the majority of our products go abroad; but this is not the case. Only a small amount of what we produce in the most favorable seasons is exported. The balance is used by our own people. There has grown up within the country commercial enterprises that would not be ashamed to stand before the trade of Europe. The products of the West, the corn, the wheat, the flour, the iron and the copper are carried to the lower lake ports and here they are distributed to supply the States of the East, whose people are engaged in manufactory. They meet there coal and supplies which are needed to build up new countries and thousands of tons of iron to carry railroads throughout the West. In this way not only does the East get cheap food and raw material, but the West obtains what it needs at a low figure.

There has grown up upon the lakes a fleet of wonderful vessels, large in size, and expensive in construction. They are the development of years, and are suited to the purposes for which they are constructed. By what reasoning should they be put upon the narrow waters of a canal, where they would compete with the cheap-made barges? They would move a little faster than two miles an hour, and while they were making a trip from Buffalo to New York, a distance of five hundred (500), miles they could have gone to Chicago and returned, nearly twice the distance, at a less cost.

Three (3) fleets of barges which cost 50 per cent less would have carried the same amount of grain in the same time.

For whose benefit is this six hundred million dollars (\$600,000,000) to be expended? Not for the commerce of the West, for it does not need it. The State of New York does not call for it, neither do the vessel owners upon the great lakes.

Let New York still keep its faith in its canals, improve them from time to time as science dictates and it will reap its reward. The railroads, because of their great wealth, may be able for a time to so lower their rates that they can compete, but this will not be so always. The cheapest route must prevail in the end. For a time the railroads sought to compete in transportation with the great lakes, but they had to abandon it, and to day all the great



railroads own steamships that struggle for the western commerce.

The reason that the Erie canal is at a disadvantage is because it has been neglected, but as the necessity for cheap transportation increases, it will make itself felt. But New York must not think that this can be done without an effort. It must deepen its canals, it must lengthen its locks, it must furnish itself with every device that has proved useful elsewhere. It must take the example of the railroads and care for its property, or else it will be greatly outdone, and the supremacy that New York has held for nearly a century will pass away.

HORATIO SEYMOUR, JR.

#### EXCEPTION TO JUDGE'S CHARGE.

*Recommendations to Commissioners of Code Revision as to Changes in section 995.*

ROCHESTER, N. Y., October 14, 1895.

*To the Commissioners of Code Revision, Albany, N. Y. :*

GENTLEMEN — I am in favor of a general revision of the Code of Civil Procedure.

I am in favor of a revision of the Code of Civil Procedure in the following particulars: That section 995 be amended so as to strike out all the words after the 31st word therein, and in place of the matter stricken out to insert the words, "it may be taken either at the trial or thereafter at any time during the period allowed for appeal herein from the judgment entered upon the verdict rendered; and each single proposition in the charge which is intended to be excepted to by either party shall be reduced to writing and specifically set forth, and the whole thereof enumerated serially, and the same shall be filed with the clerk and a copy thereof shall be served upon the opposing attorney within the same time as a part of the appeal.

JACOB SPAHN,

*Attorney-at-Law,*

*517 Ellwanger & Barry Building.*

ROCHESTER, N. Y., October 14, 1895.

*Hons. Charles B. Lincoln, William H. Johnson and A. Judd Northrup, Commissioners of Code Revision :*

Between the care of a large practice which I superintend alone, and the care of a large amount of real estate which I am unfortunate enough to own in an age of municipal plunder by ruinous assessments, etc., your letter was reserved to be answered as early as practicable, and so suffered from the delay which I seek to excuse in the foregoing statements.

For years I have been impressed and to growing experience as time speeds forward, am more and more impressed with the fact that section 995 of

the Code of Civil Procedure contains one radically unjust, no less than insecure feature, concerning which I have sought the views of many brother lawyers who concur with me in what I am about to offer to your consideration in the hope that you will devise either some better remedy or adopt the remedy which I venture to suggest herein.

It must often have occurred to you that trial judges who are and mean to be perfectly fair men in the course of long charges to a jury frequently invent, with the best of intentions always, a great quantity of bad law which they impress hopelessly upon a suitor's rights because his lawyer is no stenographer. This deficiency will invariably prevent that lawyer from getting down specifically (or in any adequate detail) the whole of the objectionable matter to which he would except and which is exceptionable because it is bad law. Thus he is prevented from wholly protecting his client's rights; and though the remedy of appeal lies open to him, the rule also existing that his exceptions to any portion of the charge must cover specific matters charged in order to avail his client higher up, coupled with the fact that the present state of the Code neither gives him time to order a copy of the charge and carve out of it the exceptionable matter (since this must be done before the jury finds the verdict), nor lets him take an omnibus general exception against the charge with the right to frame specific details later and files these with the county clerk for use on appeal, he is lost with his client before the battle in the Appellate Court has even begun on this head. It is useless to advance argument here that the trial court may in a proper case grant a new trial without recourse to any exception. That is discretionary of course. Yet the trial court does not uniformly do so but hesitates too often although it should never hesitate at all. Now a good system of law leaves nothing to human discretion because humanity are weak. Science alone is strong and where the rules of justice are no less liberally just than scientifically accurate human fallibility is never able to play its incurably erratic part. Of course we all understand the claim that the reason why exceptions to the charge must be taken before the jury is discharged, was to give the law judge, if he desires, an opportunity to revamp his utterances to the empanelled judges of the fact. The better reason however remains for amending section 995 as herein suggested and that is to give the suitor, who is infinitely more concerned in the verdict than the law judge, a right enforceable by appeal to insist that the law judge shall always *nolens volens* charge good law, otherwise that his charge shall suffer the fair consequences which follow and ought by right to follow in every proceeding or step of a proceeding tainted with bad law

whenever that bad law has resulted in a miscarriage of justice. Than the latter there is nothing worse to society except anarchy. Indeed every miscarriage of justice is in essence anarchical for it is antagonistic to good order.

Therefore I ask you gentlemen in the name of a system of Code law that shall be liberally just no less than scientific, to either secure an enactment of Section 995 of the Code of Civil Procedure in a form providing that a general exception against the trial judges charge to the jury is insufficient and shall avail to enable a suitor on appeal to raise every possible objection to each distinct proposition of bad law charged or else that a suitor may within the usual time for appeal file his objections and exceptions seriatim as specific points in numerical order to every one of the propositions of the charge which he thinks are bad, and then within the same time to serve a copy of these objections and exceptions upon his adversary for the purpose of any appeal in the premises. There is no such thing as making the rules of justice too broad along the mighty avenue of appeal wherein so many men and so much property have in time past been rescued from the direst risks. We must move and keep moving higher to a still better order of things mundane in the practice of jurisprudence.

Respectfully,

JACOB SPAIN.

N. B. — I enclose your blank with the suggested amendment suitably framed. J. S.

### New Books and New Editions.

**RES JUDICATA; 2 VOLUMES; A TREATISE ON THE LAW OF FORMER ADJUDICATION, BY JOHN M. VAN FLEET, Esq., OF THE INDIANAPOLIS BAR AND AUTHOR OF "COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS."**

The scope of this work includes that important branch of the law which determines when judgments of courts of law and decrees of courts of equity are conclusive and final adjudications, together with the force and effect of former adjudications as evidence to establish in another suit the cause of action or of defense or some issue therein as against parties, privies or strangers. The great importance of this branch of law would too often lead an author to expand the principles of the subject into an enormous and bulky book which would not at all meet the requirements of the bar. On the other hand a too short and general work on this important subject would not comprehend within its narrow confines the different phases of the subject which its importance merits. The author has

happily arranged the work in two volumes and in such a form that any part of the subject can be easily found, while the two volumes cover all the essential rules and principals which a work on this subject should contain. The cases cited are not only those of America and of every State within our confines, but includes Australian, Canadian, English, Hawaiian, Indian, Irish and those of New Zealand. It will thus be readily seen that the work is broad in its scope, while it is comprehensive and practical. The arrangement of the book is particularly satisfactory as each chapter is divided into sections and at the beginning of each chapter the section is placed with a short paragraph giving the contents of the section in a short, concise form. This makes the work easy of reference, while the foot-notes allow the practitioner to find the cases from which the principles are deduced. The first volume is divided into twelve chapters and there are eleven chapters in volume two. Chapter one deals with General Matters, while the succeeding chapters contain Special Matters, Final Judgments, Abatements, Cause Entire or Divisible, Defenses Omitted, Estoppels, The Issues Contested or Not Contested, The Issues, Immaterial, The Issues, Plaintiffs, The Issues, Defendants, The Same Issue Determined by the Record, Principal and General Matters. Volume two commences with chapter 13 on The Same Issue—Determined by the Record, while succeeding it are chapters on The Same Issue, Determined by Extrinsic or Parol Evidence, Election of Remedy, Wrong Remedy, Parties, Privies and Strangers, Crimes and Criminal Proceedings Cause Entire or Divisible, Issues Determined in Criminal Causes, Jeopardy in Criminal Causes, Pleading, Practice and Evidence in Criminal Causes, Second Appeals, Effect of Decision on First Appeal in, and Pleadings in Civil Causes. The index is arranged at the end of volume two and as it contains over 140 pages its practicability can easily be determined. Published by The Bowen-Merrill Company, Indianapolis and Kansas City. Price \$12.

**A BRIEF DIGEST TO VOLUMES XXXVII TO XLII OF AMERICAN STATE REPORTS, TOGETHER WITH AN INDEX TO THE NOTES AND A TABLE OF CASES REPORTED, BY EDWIN D. SMITH.**

This small index will be of great value to those who use this series of excellent reports, and is compiled with care. It will be acceptable and satisfactory to the active practitioner. Naturally, these digests of a small number of volumes of reports are more burdensome to the lawyer than otherwise, for it can be readily seen that no index can be arranged and added to yearly, and this convenient form of adding to the index of a series must be resorted to.

The Digest is bound in heavy paper, and contains an index to notes in the reports. Published by Bancroft-Whitney & Co., San Francisco, Cal.

#### AMERICAN STATE REPORTS, VOLUME 44.

This last volume of these reports contains selected decisions from many of the reports of different States, including 91-93 Georgia, 95 Kentucky, 78 Maryland, 162 Massachusetts, 56 New Jersey Law, 115 North Carolina, 3 North Dakota, 164-65 Pennsylvania, 41 South Carolina, 3 South Dakota, 66 Vermont, and 90 Virginia. The reports are printed in their usual excellent manner, and the selection of cases by the editors seems most happy. Published by Bancroft-Whitney Company, San Francisco, Cal.

#### Abstracts of Recent Decisions.

**ADVERSE POSSESSION — BOUNDARY.** — Where a land-owner, believing that his land runs to a certain line, retains possession up to such line, which is on the land of an adjoining owner, he does not hold adversely to such owner, there being no agreement between them that such line should be the dividing line between their lands, and the former never intending to claim any more land than belonged to him. (Davis v. Caldwell, [Ala.], 18 South. Rep., 103).

**APPLICATION OF PAYMENTS — SECURED DEBTS.** — On foreclosure of a mortgage securing a note, the interest on which is guaranteed by a third person, the mortgage is entitled to have proceeds of the sales applied in payment of the principal of the notes before the interest. (Smythe v. New England Loan & Trust Co., [Wash.], 41 Pac. Rep., 184).

**BOUNDARIES — DISTANCES.** — Where three sides and the number of acres are known, and it is disputed whether the fourth side is a straight or meandering line, the straight line will be adopted, when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted. (Hostetter v. Los Angeles Terminal Ry. Co., [Cal.], 41 Pac. Rep. 330).

**CONTRACT — TIME OF PERFORMANCE.** — When time is not made the essence of a contract for payment by the performance of specific services, the party entitled to such services does not absolutely forfeit them by failing to require them within the time named in the contract. (Kanopolis Land Co. v. Morgan, [Kan.], 41 Pac. Rep. 205).

**CORPORATION — PROMOTERS.** — Where certain persons procure a charter, and are named therein as the directors of a corporation for the first year, and, as such directors, elect themselves as officers of such organization, but no *bona fide* subscription of stock

is ever made, and no arrangements made for the payment of debts or liabilities which may be incurred by such organization, the organization cannot be said to have such a corporate existence as would authorize its directors to incur any liability in the name of the corporation, and the persons so engaged in the enterprise are liable personally, as promoters thereof, for a debt incurred for material purchased by one elected by them as superintendent and general manager, and needed in carrying on the business for which such organization was formed. (Whetstone v. Crane Bros. Manuf'g Co. [Kan.], 41 Pac. Rep., 211).

**COVENANTS — ACQUIRING TITLE BEFORE SUIT.** — In an action for breach of warranty, where it appears that when the deed was made defendant had no title, but acquired title before the suit was brought, plaintiff is entitled to only nominal damages, as the title acquired by defendant inured to plaintiff's benefit. (Sayre v. Sheffield Land, Iron and Coal Co. [Ala.], 18 South. Rep., 101).

**MARINE INSURANCE — CONSTRUCTION OF POLICY.** — A policy of marine insurance, containing a printed clause which prohibited the vessel from certain waters including the Gulf of Campeachy, had written into it the amount of insurance, the name of the vessel, and the terms of the policy, after which was written the words "Excluding the Gulf of Campeachy." Held, that the written words were not for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of Campeachy, near which the vessel was when insured. (Parker v. China Mut. Ins. Co. [Mass.], 41 N. E. Rep. 269).

**MASTER AND SERVANT — DANGEROUS MACHINERY — WARNING OF DANGER.** — An employer who knows that a need of warning an inexperienced servant working on a dangerous machine has arisen, is bound to give it, though the danger arose from the negligence of a fellow-servant. (Bjbjian v. Woonsocket Rubber Co. [Mass.], 41 N. E. Rep. 265).

**MORTGAGE OF ONE PARTNER'S INTEREST.** — A mortgagee takes no greater right or interest than the mortgagor had, and, as one partner cannot take possession of the partnership property, neither can his mortgagee do so. (Aldridge v. Elerick, [Kan.], 41 Pac. Rep. 199).

**VENDOR AND PURCHASER — COVENANT TO GIVE TITLE — DEFAULT.** — A vendor is not in default on a covenant to give warranty deed on payment of the price, merely because, before final payment, a mortgage on the land was foreclosed; but the purchaser must tender balance of purchase money and a deed for execution. (Pate v. McConnell, [Ala.], 18 South. Rep. 98).

# The Albany Law Journal.

ALBANY, OCTOBER 26, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in this issue of the LAW JOURNAL the address of Mr. J. Wreford Budd, President of the Incorporated Law Society, recently delivered at Liverpool, England. It might seem at first that this paper is one which might have little or no interest in the United States, but on a second consideration it is apparent that the subjects which are discussed not only give us a clear insight into many English legal matters, but demonstrate the development of the science and the desire in our sister country of more appropriate legal methods. The question of land transfers is one which has been greatly discussed in this country because of our present unwieldy and intricate systems. We have already published considerable in regard to the English Companies' Acts, which is, at least, in advance of our own methods. Perhaps, though, the most remarkable point of the address is the discussion of a better and more business-like method of legal procedure. Taking the very words of Mr. Budd, he says: "Ordinary business men having a dispute to settle, arising in the ordinary course of business, have for many years past been found to prefer to resort to arbitration and other unsuccessful methods of settling their disputes rather than submit to the expense and delay involved in recourse to the tribunals of the country." This is certainly an admission which we regret to say we must concur in; it is a state of affairs which is lamentable and which many of the legal profession in the round of their yearly toils fail absolutely to consider; it is a state which may cure itself or otherwise may seriously injure those whose lassitude and inactivity prevent their taking active steps to remedy such circumstances. It seems most unfortunate that this condition of affairs should be recognized as existing not only here, but in England. A

beginning has been made; admissions from prominent members of the profession in both countries are heard, and the most influential papers devoted to legal literature are interested. A minority, generally, cannot rule; but if we can only obtain a hard fighting body of lawyers who are impressed with the absolute necessity of a change on agreed lines, they can thoroughly thrash the large majority of immovable, inactive practitioners, and obtain a result which will be of practical benefit to members of the legal fraternity and their clients.

A subject which was also discussed at the meeting of the Incorporated Law Society, was the registration of title and conveyancing reform, and the paper on this subject was read by B. G. Lake, Esq. The desirability of a change in our present methods of recording deeds and mortgages, is evident. The suggestions which appear in the paper of Mr. Lake will at least enable some of us to formulate ideas which may result in a system in which simplicity and economy will be the main characteristics. Mr. Lake said:

"The evidence clearly shows that the system of registration of title established by the act of 1875, requires complete remodeling, and, as will be seen by reference to the report, the Attorney-General scarcely disputed this. Mr. Wolstenholme's evidence, from his wide experience and acknowledged eminence as a conveyancing counsel, carried great weight, and was well supported by that of our then president, Mr. Hunter, who devoted a great deal of time and labor to the subject, and by the numerous witnesses, lay as well as professional, from different parts of the country, who proved the great rapidity, cheapness and security with which conveyancing of all kinds, especially in small transactions, is now carried out. I do not propose to do more than refer to the evidence so given. The evidence must, I think, have satisfied all who heard it that, although solicitors are naturally biased in favor of the existing system of conveyancing, with which they are familiar, and which, in their opinion, provides for all the requirements of land dealing, their opposition is not to registration of title as such, but to the proposal to make it compulsory, while yet untried and imperfect,

instead of so improving and amending it as to make it flexible and attractive, and then allowing landowners (as is the case generally in Australian colonies, except as to land alienated in fee by the crown subsequently to the special act introducing the system into each colony) the option of selecting whichever system might seem most suitable to their needs. It was also proved that the opposition was not confined to solicitors, though they, as having the most practical acquaintance with dealings in land, naturally took the lead, but was concurred in by the most eminent conveyancers, by bankers and by building and land societies. The chief argument in favor of compulsion was that the system would not otherwise become known or self-supporting, and the lord chancellor suggested that the practical failure up to the present time, of the system of 1875, was due to ignorance of its advantages. But the suggestion was deprived of weight when it was pointed out and not disputed that Sir R. Torrens, the founder of the Australian system which led to the acts of 1862 and 1875, refused to register his English land; that neither Lord Halsbury nor Lord Herschell, both of whom are landowners, had taken advantage of the act which they have so persistently endeavored to make compulsory on others; and that no building or land society, notwithstanding the missionary efforts of Mr. Brickdale and the advertisements issued by the land registry, has as yet been induced to give the system a trial. In other words, dealers in land, who have at present the option of either registering their property under the act of 1875 or of dealing with it according to the present system, have not been convinced that there is any advantage in taking the former course. As was well stated by Mr. C. T. Saunders, 'the rigidity of the forms and regulations — the want of elasticity to accommodate them to ever-varying circumstances — the interposition of a government official who must take cases in their order, regardless of emergency — the inability which must then exist of the solicitor being able to promise the client an all-important advance of money within a few days, as he now can — the daily fret and annoyance arising from delays and official requirements in the place of the present free and uncontrolled mode of dealing with ordinary conveyancing

matters, would be intolerable.' Nor is this surprising, for the principle of the bill is to take the title of every landowner out of his own care and to place it in charge of State officials, with the result that the landowner who, under the present system, gets a title which is, or after a certain number of years will become, absolutely perfect, and who, under the present system, cannot be dispossessed or prejudiced except by his own act or default, will always be at the mercy of a careless, credulous, or fraudulent official, by whose neglect or act he may at any time lose his land altogether, and even if he be entitled to compensation at all, will have paid for it out of his own pocket, and will only obtain it after contested proceedings with their attendant cost and delay. The existence of this danger was scarcely contested, and, though this was not admitted, witness after witness showed that, in their opinion, registration of title, as at present established, would add considerably to the cost of all transactions, as well large as small, with little or no advantage to the present generation. Probably Lord Halsbury, now again Lord Chancellor, will, ere long, introduce a measure for extending the system of registration of title. If this be so, it is to be hoped that he will not be satisfied to follow blindly the views put forward by the land registry authorities, but will avail himself of the knowledge and experience of conveyancing counsel and solicitors, and will introduce a well-considered measure repealing the act of 1875, introducing the amendments which have been shown to be necessary, and providing for the establishment of a system of registration of title which, without being compulsory or costly, will be flexible and attractive. Flexibility can only be secured by vesting the control of the registry in a small working board with considerable executive powers, and composed, in part at least, of practicing barristers and solicitors. If, in addition, the power to remove land from the register were restored, landowners would be more ready to try the experiment than they are at present, when the step, once taken, is irrevocable, while the fear lest the right of removal might be extensively exercised would lead the officials to do all in their power to make the working of the system rapid and free from friction. The Lord Chancellor

may feel assured that, if he should deem it right to follow such a course as I have ventured to indicate, there will be every desire on the part of solicitors to place their knowledge and experience at his disposal, and to give the new system, if established, a full and fair trial. Whatever may be the future of registration of title (and I am still, as I long have been, an advocate of its establishment as an alternative system which, if properly managed and modified from time to time as circumstances require, may eventually supersede, in the case of many estates, the system of conveyancing which now exists), it is clearly our duty to do our utmost to simplify, perfect and cheapen the existing method of dealing with land. The interests of solicitors and their clients are in the long run identical, and the more dealings in land are facilitated the greater will be their number, and the more important and necessary will become the class of skilled agents to carry them out. How best to effect such reforms as may be necessary has been under consideration by the council ever since the address at Bristol last year of our then president, and the evidence of Mr. Wolstenholme, Mr. Hunter and others pointed out pretty clearly the direction which any such reforms must take. It may be reasonably anticipated that just as Mr. N. T. Lawrence's presidential address at Cambridge, in 1879, was the precursor of the conveyancing reforms of 1881 and 1882, so Mr. Hunter's presidential address of 1894 may prove the origin of further and more extensive reforms during the present Parliament. Mr. Wolstenholme had, in 1862, read a paper on the simplification of conveyancing, and during the inquiry before the select committee of the past session he handed in a summary of that paper, which will be found at p. 238 of the report, and should be carefully studied. Its proposals, if embodied into law, would 'reduce the title to land to a series of simple conveyances of the legal fee-simple, or a rent-charge in fee, or a term of years absolute, apart from all equities.' Equitable interests would be protected by a *distringas* register, which would be the only search obligatory on a purchaser, whether as regards bankruptcy or otherwise, and no equitable interest not so protected would affect the

land or a purchaser whether he had or had not notice of its existence. Where the title to the property is well known, or the intending purchaser is otherwise satisfied that there are no trusts or undisclosed incumbrances affecting the property, the search could and would, no doubt, be neglected, as is often the case at present. Provision should be made for an official search, for communicating with the register office through the post, and for a short interval (say two days) until the expiration of which a *distringas*, though lodged, should not be of any effect against a *bona fide* purchaser or mortgagee. This would make it possible to complete sales and mortgages elsewhere than at the register office. A deposit of the title-deeds would, as at present, be available to create an equitable security, which could either be made absolutely safe by means of a *distringas*, or, as at present, rest on the practical impossibility of dealing with the property without their production. Such a reform would not only greatly simplify the existing system of conveyancing, but would take away all justification for making registration of title compulsory. Any landowner who preferred to keep his deeds and be his own registrar could and should be allowed to do so. The *distringas* register would not require the aid of a map, which is a fertile source of difficulty and expense; for whether for a *distringas* or an inhibition—*i. e.*, a stop-order—it would be sufficient that the name of the house or estate of the parish or township, and, in case of town property, of the street in which it is situate, with the number or distinctive name of the house, should be entered in the register. If, in addition, power were given to the cautioner or inhibitioner to declare, on receipt of a notice of proposed dealing, that the *distringas* or inhibition did not affect the property about to be dealt with, or that the dealing might proceed notwithstanding the *distringas* or inhibition, and without prejudice to the *distringas* or inhibition as against other property not dealt with, the trifling inconvenience of a register, with its attendant search would be reduced to a minimum. Of course, a caution would be lodged at the risk of the cautioner being made liable in damages if it were lodged without good cause. When lodged, it should

entitle the cautioner to notice of any intended dealing, and should remain in force for (say) fourteen or even twenty-one days after warning. An inhibition or stop-order should remain in force until withdrawn or otherwise cancelled, either altogether or as regards a particular property, and would only be put on with consent of the landowner or by order of court. With a view to facilitate searches, there should be a register in every principal county court, with a general register in London, so that a complete search could always be made in the metropolis in cases in which property was situate in more than one county or district. There are many reforms not mentioned in Mr. Wolstenholme's paper which, or some of which, could be properly introduced into any bill which may be prepared to carry his proposals into effect. For instance, succession duty should not affect land in the hands of a purchaser for value, but should as is already the case in sales under the Settled Land Acts, attach to the purchase-money and remain a personal liability on the vendor. This reform alone would do more than anything else to shorten the examination of title. Sales made through the Chancery Division should confer on the purchaser an absolute title to the property or the interest in property which was the subject of the sale, all adverse rights being transferred to the money, which would be paid into court and distributed by order of the judge in chambers. This is a suggestion thrown out by Mr. Wolstenholme, and, though not free from practical difficulties, would be very useful in dealing with existing titles, though after the adoption of his proposals it would be of less value. A purchaser who acquires only a portion of property held under a common title, and who, therefore, does not obtain possession of the title-deeds, should be entitled to have indorsed on the last common deed a memorandum showing the date and parties to his conveyance, a short description of the land conveyed, and any restriction affecting the unsold portion of the property. This, if taken advantage of, would render it impossible for the holder of the deeds and apparent owner to deposit and borrow money on them without disclosing the sales which had taken place. It should be provided that the memorandum should only be notice of

the particulars so authorized, not of the contents of the deed. Whether this protection might not be carried further by requiring that, as a condition of its validity against third parties, every conveyance or mortgage (at all events after Mr. Wolstenholme's simplified conveyancing had been introduced) should refer to the previous deed, and a memorandum of its date and parties be indorsed on that deed, is well worth consideration. Such a provision would effectually guard against the suppression of material documents of title, which is the weak point of the existing system. The danger was pointed out many years ago by the late Mr. Cookson, who made a similar suggestion to meet it, but his views were not then adopted. There seems no reason—subject to the difficulty of making it clear in whom the legal estate is vested being overcome—why, as was recommended by the select committee of 1879, a simple receipt on a mortgage should not operate as a reconveyance without any formal deed. Probably no saving would be affected in cases in which the mortgage was of long standing and the equity of redemption had been dealt with; but in simple cases the relief would be considerable. It must not be overlooked that these and similar reforms will lessen the responsibility of solicitors, and cause a demand for reduction of the authorized charges in cases of ordinary sales and purchases. But the evidence recently adduced shows that the scale charge, though not, in my opinion, excessive, does not prevail generally, at all events not in country districts; and the probability is that if its amount were reduced it would be more uniformly adopted. However this may be, solicitors exist for the public, not the public for solicitors, and in the long run skill and ability will reap their due reward, especially now that the law permits a special agreement for exceptional services."

### Abstracts of Recent Decisions.

**FEDERAL COURTS—EQUITY—PARTITION.**—A Federal Court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied, although a State statute permits courts of equity to take cognizance of questions of title in partition suits. (*American Ass'n v. Eastern Kentucky Land Co.*, U. S. C. C. [Va.], 68 Fed. Rep. 781.)

**ANNUAL ADDRESS BEFORE THE INCORPORATED LAW SOCIETY BY ITS PRESIDENT. J. WREFORD BUDD. AT LIVERPOOL. ENGLAND.**

It is now forty years since what I believe was the first meeting in the provinces of members of our profession was held in 1855, at Birmingham, under the auspices of the Metropolitan and Provincial Law Association, which had, as you know, been formed in 1844, and which was in 1874 amalgamated with the Incorporated Law Society, and this is the twenty-second annual provincial meeting of our own society. Many of the papers which are read at these provincial meetings deal with subjects which are of great interest, not only to ourselves but to the public at large, and we may, I think, note with satisfaction that some of those read in years past, and the discussions which have taken place upon them, have contributed in no small measure to many important improvements in law and practice; and I trust that these meetings will continue in the future to be what they have been in the past, not only pleasant social gatherings at which we meet and learn to know more of one another, and so facilitate the transaction of business when our professional relations bring us into contact, but useful meetings of business men, at which we discuss and exchange our views on subjects of interest to our profession, and so fit us better to assist with our counsels and suggestions when alterations in the law or its administration are contemplated. I am sure that our present meeting at Liverpool will form no exception to the rule. On two previous occasions, namely, in 1875 and 1885, have we met in Liverpool and have received the hospitality of the Liverpool Law Society, whose institution dates back almost to 1825, the date of the foundation of our own Incorporated Law Society, for it was itself founded in 1827, and has been incorporated since 1867. As naturally might be expected in a city where life commercially and intellectually is so active as it is in Liverpool, the Liverpool Law Society has ever been in the van of all movements tending to improve the education and status of members of our profession and to facilitate the transaction of the important business with which, as members of that profession, we are intrusted. My own whole business life has been spent in the heart of the city of London, and in the midst of commercial business of every kind, and it is, therefore, a great satisfaction to me to have the honor of presiding over your deliberations at Liverpool, the largest provincial city in the kingdom, and the center of commercial activity and prosperity. There are so many subjects of interest to us, and so much has happened to attract our attention during the past year, that I have felt some difficulty in

selecting those topics upon which to address you; for it is impossible in the short compass of a president's address to speak of more than a very few of the numerous matters which are of so great interest to us, and to which, if time permitted, I should have been glad to direct your attention. There is one subject which must be in the minds of many if not of all of those whom I am now addressing, and which I desire to allude to before passing to the other matters of my address. I mean, of course, the loss which we have all sustained during the last year by the death of our old and valued colleague, Mr. Jevons. Mr. Jevons has passed away from us at a ripe old age and with the respect of all who knew him. There was no one who had more at heart the higher education of those aspiring to be members of our profession, and how long and earnestly he labored in that direction you all know. His colleagues with whom he worked as an active member of the Liverpool Law Association knew his worth; and he was no less respected at the Council Board in London of the Incorporated Law Society, where he held a seat for eighteen years. His long and distinguished professional career is closed; but he has left behind him an example of disinterested zeal for the higher interests of the profession which we can only emulate and admire.

It is customary for your president to review at the annual provincial meeting the more important Acts of Parliament which have been passed in the preceding session. My task in this respect is this year a short one. The amount of legislation has been very small, but there are one or two enactments to record, and which interest us from a professional point of view. First, there is the Solicitor Mortgagees Costs Act, promoted by the Liverpool Law Society, and which has remedied some of the hardships of the case-made law on this subject, and with the provisions of which you are, of course, all already familiar. The Land Clauses (Taxation of Costs) Act has remedied a defect in the Act of 1868 and 1869, and provides for the taxation by one of the masters of the Supreme Court of all Consolidation Acts. Then there was a most useful provision, which has been inserted in the Finance Act, empowering the commissioners of internal revenue to mitigate or remit at any time any penalty payable on stamping deeds, so that the limit of time imposed by the Stamp Act of 1891 no longer hampers the commissioners in this respect. By the Judicial Committee Amendment Act provision is made for five judges of the Supreme Courts of the colonies of Canada, Australasia and South Africa becoming members of the judicial committee of the privy council. By the Summary Jurisdiction (Married Women) Act considerable facilities are given for married women in poor circumstances obtaining



some redress when ill-treated or deserted by their husbands. I wish that more progress had been made in the codification of our law. It has always appeared to me that it is a reproach to a great commercial country like ours, that what is the law on any subject has to be sought in an entangled mass of statutory enactments, and in the difficult and nice distinctions to be deduced from the study of perhaps a host of decided cases. We have, however, in the last fifteen years obtained at least five important Codification Acts on matters of mercantile law; such as the Bills of Exchange Act 1892; the Factors Act and the Arbitration Act 1889; the Partnership Act 1890, and the Sale of Goods Act 1893, besides the arrangement in single acts and the amendment of existing statutory provisions such as the Merchant Shipping Act 1894. We are promised an early codification of the law relating to marine insurance, and I hope that the day is not far distant when we shall have all the more important branches of our commercial law embodied in Codification Acts, which will at least pave the way for that greater and much-desired object, a general codification of all our law. But if the last session of parliament has been barren of complete legislation, there have been under discussion during the past year many matters of great interest to the profession. First and foremost is, of course, land transfer, and then come the very important subjects of trusts and the amendment of the Companies Acts.

As to land transfer, you have heard so much on that subject that, important as it is, I am sure I shall best study your feelings by confining what I desire to say within a comparatively small compass. I trust that, after the evidence which was given last summer before the committee of the House of Commons, the present Lord Chancellor will pause before he introduces such a bill as that of last session. If the Government would follow the example set last year by the Board of Trade, in the matter of the Companies Acts, and appoint a really strong and competent committee to consider the subject of land transfer, and suggest some workable scheme for the improvement of the law, we should, I am sure, hear no more of such a measure as the Land Transfer bill of 1895. It was twenty years ago that our then president, Mr. Gregory, in his presidential address, here at Liverpool, pointed out the defects in the act of 1875, and predicted its failure, which he said would be mainly due to the absence of power to take off the register land once registered, as "the rules were sure to be cumbrous and expensive in small transactions." The present system of conveyancing, though matters have been greatly improved since 1875, is not without its faults; but side by side with the system proposed by the bill of

last session it would compete with it and run it down. Why, then, are the owners of property throughout the country to be compelled at enormous expense to adopt a system which they will not adopt voluntarily? And in whose interest is the scheme so strenuously supported? If half the energy which has been spent in pushing this bill for compulsory registration of title to land were devoted to carrying through the reforms indicated by Mr. Hunter in his address at Bristol last year, we should soon have an improved system of transfer by deed, against which no land registry would without compulsion have any chance whatever. Those theorists who clamor for a registry of title have, I am sure, no experience of the delay and expense involved in dealing with the simplest matters which arise in reference to registered titles; and if this is the case now, when so few titles are registered, what must we expect if the whole of the conveyancing of the kingdom had to pass through the offices of the land registry? In the spring of the present year I was asked to arrange the transfer of a house. I knew that it had been bought more than twenty years ago, that the owner had long since died, leaving all his property to trustees for sale, and that one of the four trustees was dead; and in answer to an inquiry how long it would take to transfer the property, I answered, "A few hours." Alas! I spoke without my host, for I had forgotten that it was a land registry title. I had to register the probate, prove the death of the trustee, and the land registry, before accepting the probate, required notice to be given to the heir-at-law and a valuation of the property to be produced. Some delay, of course, occurred; and in this particular case the delay did not injure my clients, for their proposed sale fell through, but I had to pay between £6 and £7 in fees to the land registry and other disbursements to clear the title and place the surviving trustees in a position to sell, and with an unregistered title 5s. would have covered the disbursements, and a transfer could have been made at once. We, as practicing lawyers, are not law-makers; we can only indicate what we think the law should be. Your ex-president, following (I believe unwittingly) the lines suggested by Mr. Wolstenholme in 1862, advocated last year at our provincial meeting at Bristol some very radical changes in the law of conveyancing. Personally I am prepared to go even a step further than I believe he and many who think with him are prepared to go. We should, I think, always have an owner of the whole fee simple of land from whom a purchaser or mortgagee could get a clear title free of any trusts or equitable interests, and that whether the purchaser or mortgagee has or has not notice of such interests; and in cases where the

nominal owner is trustee for others, they should look to the trustee and the proceeds of the disposition of the land, and have no claim on the land itself. Beneficiaries under settlements of stocks, shares and securities look to the trustees, and a purchaser of the investments has no concern with the beneficial interests. If this in the vast majority of cases is safe with regard to stocks, shares and securities, how much more free from risk must it be in the case of land, the ownership of which is usually a matter of notoriety, and where no transfer to a purchaser would be likely to pass unperceived as in the case of other investments. We may make the conveyance and transfer of land as simple as that of any kind of personal property (not passing by delivery), but we cannot get over one or two inherent differences which some people who talk glibly on the subject seem to ignore, and there will always have to be considered and dealt with the particular incidents, such as rights of way and other easements affecting or passing with the land transferred, as well as the possession or occupation of the land, and the land registry will not simplify this. Let Parliament improve by every means practicable the transfer of land, but let our clients be saved from having to transact all their business in a government office. When titles are known, the transfer of the land is at present as simple as the transfer of stocks. The defect of the present system is that, when a title is such as requires investigation, a purchaser has to look into the equitable as well as the legal title; has to search registers, see that no duty is charged on the estate, and all this could be remedied by providing that the purchaser, on obtaining a transfer of the fee-simple, shall acquire a title paramount to all equitable and other charges; and it is because I feel that a cheap and simple system of conveyancing by deed is feasible and infinitely superior in this country to any system of land registry, that I urge the appointment by the government of a competent and independent committee. If a strong committee were appointed, such as that which has been dealing with company law, we should have many improvements in our conveyancing law and practice, and there would be plenty of experienced members of our profession ready enough to suggest and assist in carrying out practical improvements, and the transfer of land would be simplified and rendered more expeditious and its cost lessened; but I do not believe that any scheme such as that of the Land Transfer Bill of 1895 for forcing upon an unwilling public a system which does not suit their requirements, and which they have for twenty years refused to adopt voluntarily, would find favor with such a tribunal.

We have had in the case of trusts a somewhat

similar experience to that in the case of land transfer. There is no subject which occupies our attention more, or fills a larger place in our daily business, than the administration of trusts, and it was therefore with no little apprehension that one recently saw signs of the spirit of officialism endeavoring to secure to itself yet another important slice out of our daily business. Happily, wiser counsels have in this case prevailed; apparently we are not to have an "official trustee," and the public are to be allowed to manage their trust business in their own way, without the interference of a great Government department. You are all aware that the subject of the administration of trusts was referred to a select committee of the House of Commons, before whom the Lord Chancellor, Lord Justice Lindley, Lord Watson, Mr. Cozens-Hardy, your then president (Mr. Hunter), and Mr. Walters, and others gave evidence. The committee reported in May last, and in June the Attorney-General introduced a bill into the House of Commons, to carry into effect the recommendations of the committee. The committee's report deals partly with the law affecting trusts, and partly with their administration, and the two recommendations of the committee with regard to the law are: (1) "That the court be empowered to relieve any trustee from personal responsibility when satisfied that he has acted honestly, reasonably, with the intention of carrying out the terms of the trust, and ought fairly to be excused for having acted without the directions of the court;" and (2) "That the court be empowered to give sanction beforehand to such departure from the terms of any trust as have become expedient owing to altered circumstances and are for the advantage of those beneficially interested." If these proposed alterations in the law are sanctioned by Parliament, and if when cases arise the statutory provisions are liberally interpreted by the court, considerable progress will have been made in alleviating the difficulties under which trustees have hitherto labored. I hope when the bill comes to be dealt with in Parliament that the words "with the intention of carrying out the terms of the trust" will be struck out, or the relief offered may be found to be illusory; if, before granting relief, the court has to be satisfied that the trustee "has acted reasonably, honestly, and ought fairly to be excused," it would seem to be all that is required. These alterations of the law will have, I am confident, the approval of all those who have had experience in the administration of trusts. The ends to be arrived at by the alterations suggested in the machinery for administering trusts can, I think, be best put before you by quoting the words of the report—the committee say: "It would be an immense benefit if those who desire to place their money in trust for others, or to

have their money distributed at their death, or who are the beneficiaries under trusts, could know that there was within their reach a cheap method by which they could secure just administration of the trust funds with an absolute assurance of security. It would also be a benefit to trustees who, from unforeseen difficulty, or from altered circumstances, might desire to be relieved of their burden that they should be able without expense to transfer to competent and responsible hands those duties which they can no longer satisfactorily or conveniently discharge." The committee then go on to say, that they have learnt in the course of the inquiry that "there is in existence in Scotland a system of administering private trusts under judicial supervision, which appears to have worked admirably," and they describe in general terms the mode of administering a trust by a "judicial factor," and say that there is little difference between the expense of a judicial factor and a private trust, and they add: "In considering what methods would be most suitable for England, the primary conditions of success must be borne in mind. It is indispensable for the success of any system that it should be inexpensive, that those who administer it should be easily and promptly accessible, and personally ready to take the same steps as a sensible private trustee now takes to acquaint himself with all that belongs to the trust committed to him." The committee indicate the class of persons from whom judicial trustees should be selected, and they include district registrars, county court registrars, solicitors, and accountants, and advise that their services should be paid for by a commission, and they should be in the situation of officers of the court, able to ask, without either formality or expense, for directions from the judge, who might, if he thought it necessary, give other parties an opportunity of presenting their views, or informing his mind before giving his directions, and that facilities should be given for hearing any complaint or representation by persons interested in the trust; and the committee also suggest that accounts should be rendered periodically and audited officially. It is a satisfaction to note that the committee reported against compulsion, for they say: "It would be not only unnecessary, but mischievous to make such a system as is here proposed compulsory." I must say that I was somewhat astonished when I first saw the reference to the judicial factor system as a novelty in this country; I had always thought that "judicial factor" was only Scotch for "receiver appointed by the court," and I should like to have heard the answer which would have been given to the committee by anyone conversant with the two proceedings to a question as to the distinctions to be

drawn between judicial factors in Scotland and receivers in England — both are appointed by the court — and so far as I have been able to ascertain, the mode of applying for a factor, and the circumstances under which one is granted, are almost, if not entirely, the same as those relating to the appointment of a receiver in England. A judicial factor and a receiver both deal under the control of the court with the property committed to their charge, both render accounts, and pass them in court, and on reference to the Standard Text-Book in Scotland on judicial factors, I find that his office is defined as "analogous to that of a receiver in England." I understand that considerable improvements in the system have been introduced in Scotland since the passing of the Judicial Factors Act 1889, and I believe that judicial factors are more frequently appointed in Scotland than receivers in England, and the more frequent use in Scotland of these facilities may well be accounted for by the fact that the details of working the system are better in Scotland than in England; and it is for this reason that I should have been glad to have seen this Bill for the Administration of Trusts accompanied by the draft rules, which clause 6 proposed to authorize the Lord Chancellor, with the concurrence of the treasury, to make for the purpose of carrying the act into effect. The objects which the committee in their report say should be sought, are most desirable in every respect, though I for one am not Quixotic enough to expect that absolute security of trust funds, and due and proper administration of trusts by capable and experienced men, can be achieved at little or no expense to the beneficiaries. If the rules inaugurate a procedure which comes anywhere near the system foreshadowed by the report, a great boon to trustees and beneficiaries will have been attained; the new system will, at all events, have the support of our branch of the profession, and, if competent solicitors are frequently appointed judicial trustees, we may rest assured that the trusts committed to their charge will be administered in a business-like and satisfactory manner. The Council of the Incorporated Law Society have at all times and in all places protested against the unsatisfactory process of legislating by rules to be made hereafter, and in this particular case the protest is more than usually necessary, as all depends on the manner in which the general scheme of administration covered by the bill is worked out in practice by the rules to be made under it.

You are doubtless aware, and I have had occasion already in this address to allude to the subject, that in November of last year the board of trade appointed a committee (and a very strong committee

it was) "to inquire what amendments are necessary in the companies acts, especially with a view to the better prevention of fraud in relation to the formation and management of companies, and to report on the clauses of a draft bill to be submitted to them." The committee held a great many sittings, and communicated with, and ascertained the views on many points of the London and Liverpool and other chambers of commerce, the London and other stock exchanges, and they considered all the various projects for altering the companies acts, which have been submitted of late years to parliament, and they have drawn up a very able report and settled a draft bill which will no doubt be introduced at an early date. It is, I think, much to be regretted that the committee have almost entirely devoted their attention to clauses for the prevention of fraud, and have not done much to facilitate the administration of companies—a very important object—when it is borne in mind that more than a thousand millions pounds sterling are invested in English companies, many of them carrying on business abroad, and when it is so desirable that every facility should be given for the establishment and administration here of companies carrying on foreign business, the control of the capital for which would otherwise go abroad. It is satisfactory to be able to note that the committee have reported against many of the "fads" of which we have heard so much of late years, such, for instance, as double registration, or, as a preliminary to carrying on business, an official investigation into the formation of a company. Upon this latter point the views of the committee are clear and precise, for they say: "To make any such investigation into the position of every new company complete or effectual, would demand a very numerous staff of trained officers, and lead to great delay and expense, while an incomplete or perfunctory investigation would be worse than none. It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses." The committee have moreover reported against the proposals for prescribing a statutory form of balance sheet, for making a reserve liability capital obligatory, for prohibiting charges on uncalled capital, for requiring the balance sheet and profit and loss accounts of private companies to be published, and many similar suggestions. But it is not only from what it negatives that the report is valuable. Many of the alterations proposed are desirable from every point of view, and have been long desired, and now at last they will be put forward backed by this committee's report, there is a strong probability that at no distant date they will be-

come law. Among the alterations proposed are the following: (1) In the articles of association of every company and every public prospectus is to be stated the minimum amount on which an allotment is to be made, and no company is to commence business or exercise borrowing powers until a proper allotment is made in accordance with these provisions. (2) A public register of mortgages is to be kept in which are to be registered all charges on unpaid capital, all floating charges, all securities for any series of debentures, and all mortgages on chattels which would, if made by an individual, require registration as a bill of sale. (3) Directors who incur debts on behalf of a company, knowing that there is no reasonable expectation of the company being able to pay them, are to be personally liable. (4) That unintelligible and unsatisfactory section 38 of the Act of 1867 is to be repealed, and a new clause introduced prescribing what disclosures are to be made in prospectuses issued to the public; and contracts on the face of which the public take shares in a company are not to be altered without the sanction of the company in general meeting. (5) The statutory meeting of shareholders is to be held within a month, and is to be made a real meeting, and not a useless affair as it is at present. (6) Although no form of balance-sheet is to be prescribed, the balance-sheet must give certain prescribed information, and among other important alterations, it must state on what basis the assets are valued, and what allowance has been made for depreciation; and (7) Clauses are to be introduced with a view of making the audit of companies' accounts more satisfactory than it is at present. Many other alterations on what I think are matters of minor importance are suggested, but those I have mentioned appear to me the most important, and I would single out from them the clause which will render directors liable if, on behalf of their company, they incur debts which they have no reasonable prospect of being able to meet. We must all of us have known cases where directors have given to bankers and others charges on all the available assets, and have gone on carrying on business and incurring liabilities in the name of the company where there could be no reasonable expectation of the company having funds to meet them. If such a practice as this is put a stop to, no small reform will have been effected in the manner in which some and not a few companies are administered. More money, I think, has been lost to shareholders by directors going to allotment on insufficient capital than perhaps from any other cause, and the alterations proposed by the committee in this respect will, I feel sure, be hailed with general satisfaction. I wish I could feel

equally satisfied that the alterations proposed as to what must be disclosed in a public prospectus will bring about the very desirable end of preventing or lessening the number of frauds. As the committee say, it is a trite observation that "the Legislature cannot protect people from the consequence of their own imprudence, recklessness or want of experience." Some, no doubt, of intending subscribers do carefully scan the clauses of a prospectus; the large majority, however, do nothing of the kind. They subscribe on a name or on an idea, or because some one else tells them it is a good thing, or because they think that the public are going in for it. I am by no means sure whether all these elaborate provisions do not serve only for the protection of the fraudulent promoter. The honest man sets out in his prospectus all which he considers it material that an intending subscriber should know, and he runs the risk of perhaps failing to comply with some of the statutory requirements. The fraudulent promoter cares not whether he tells or does not tell all that an intending subscriber ought to know, but he takes very good care that he complies with the statutory requirements, and when the crash comes he can with confidence say, "I have set out in the prospectus all that the act of parliament prescribes." Some of the provisions which the committee suggest as to the information to be given in prospectuses will, I venture to think, be altered in parliament, for the clause of the bill enumerating in general terms what is to be set out themselves occupy a page of the bill. What then is to be the length of the prospectus which gives in detail the information enumerated under so many general heads? There are, I think, many important alterations in the companies acts which are urgently called for, but which will not be dealt with by this draft bill; and it is much to be regretted that we are not at once to have a consolidation act, and that the new model form of articles of association is left to be settled by the board of trade instead of by the committee. The form of articles of association given in table A to the companies act 1862 is obsolete and quite useless. It should be replaced by a form which the experience of the past thirty-three years has shown to be desirable. It is important that there should be a good standard form which at all events small companies, where expense is an object, can use; and I hope moreover that, if a good standard form receives the sanction of parliament, it will be accepted as satisfactory by the stock exchange, and that we shall be saved the extremely unpleasant experience of late years of never knowing from day to day what will satisfy the requirements of the committee of that body. Then what a waste there is of time and money in connection

with the second meeting necessary to pass a "special resolution." I have had no small experience in companies' administration, and I have never known a single case in which the decision of the three-fourths majority at the first meeting has been reversed by the second meeting; the confirmatory meeting is simply a useless expense, and must, I surmise, have had its origin in the brain of some draftsman with no practical experience of how such business is carried on. Why should there not be an enactment that an extraordinary resolution (a three-fourths majority) shall serve all the purposes of a special resolution? I should moreover have been glad to find that this committee had reported in favor of allowing a company, by the vote of a three-fourths majority, to alter the objects for which it may have been constituted. Some, but very limited, facilities in this respect have, as you know, been given by the act of 1890. Let us consider for a moment what the restrictions imposed by the act of 1862, and the narrow views taken by the courts on the subject of the powers of companies, have led to. Now-a-days, if the real object for which a company is intended to be formed be, say, to carry on a water-works undertaking, or lay and work a submarine telegraph cable, or something similar, what do we find in its memorandum of association? Why at least fifteen or sixteen clauses referring to every conceivable kind of business which an expert draftsman can imagine possible. I took up a short time ago from my table at hazard a prospectus of a brewery in which I was invited to take debenture stock, and which was put forward under the most respectable auspices, and I find the "objects" of the company defined in nineteen separate clauses. In practice most dangerous powers are thus conferred on the managers of companies in order to secure that no risk may exist of their powers being questioned in transacting in ordinary course the business for which the companies are really constituted. If it were possible for a company to enlarge its objects by a three-fourths vote of its members, we should quickly see a different practice arise, and no such dangerous powers would be contained in memorandum of association as now habitually find a place there. The Legislature and the courts in their desire to prevent a company formed for one object carrying on any business not strictly within a very narrow construction of its memorandum of association, have brought about in practice a much greater evil than that which they have endeavored to guard against, and in my opinion the sooner the remedy which I have indicated is adopted, the better it will be for those who invest their money in the shares or securities of joint-stock companies.

The subject of legal procedure is one which

of necessity interests a meeting of lawyers, and I need no excuse for dwelling at some length on this subject. It is a matter of common knowledge that the volume of business in the superior courts, more especially on the common law side, has greatly diminished of late years, and that there is 'among the public a strong and widely spread feeling of dissatisfaction with the procedure for administering justice in civil proceedings in the superior courts; and the causes are not I think, far to seek. Many and important improvements have been made in procedure since the introduction, in 1873, of the first Judicature Act — and among these improvements are two which stand out pre-eminently beyond the rest; I mean, of course, the facilities for summary judgment, given under Order XIV., and the power under Order LV. of obtaining expeditiously and cheaply judgment upon questions arising in the administration of a trust, without the necessity of an administration in court of the whole trust estate. I hope that the time is not far distant when we shall at least see the provisions of Order XIV. greatly extended, a course which has, as you know, been strongly recommended by the committee of our society, which reported in 1892 on suggested changes in our legal procedure. But though much has been done in the right direction, it is impossible for any of us who are engaged in large practice to maintain that our system meets with or merits the approval of those for whose benefit it should be designed, namely, our clients, the litigants themselves. The whole manner in which commercial business is conducted in this country has changed enormously of late years, and men of business are accustomed to transact their business rapidly, and expect to have their ordinary business transactions settled up promptly and expeditiously. Can it be said that the improvements in our procedure have kept pace with the ever-changing conditions under which business is carried on, or that our system is, to use a slang expression "up to date"? At no time in the history of this country has the confidence of business men in the ability and integrity of our judges been greater than it is at present — at no time have we had a more distinguished Bar — and as to our own branch of the profession, who is there who is ignorant of the strides which have of late years been made in meriting and obtaining public esteem? If therefore, the public, as they have, have full confidence in those who administer the law, how is it that business men have for many years been more and more shy of resorting to our tribunals for the settlement of their disputes? We have heard many explanations offered. Some optimists among us have been known to put it all down to depression in trade, and to assert that our legal procedure

is all that is desired. I am not of that opinion, but think that the answer is that our procedure does not satisfy the requirements of business men. An institution to flourish in a free country must offer to the people the thing that they want. Our legal procedure is far too complex, too dilatory and uncertain as to time, and too expensive for the requirements of business men in ordinary transactions at the end of the nineteenth century. I say advisedly, "for ordinary transactions;" for however complex, expensive and dilatory procedure may be, people who have sensational libel cases to bring before the public, cases where questions of character are involved, or cases involving very large sums of money, will not be deterred by any considerations of expense and difficulty from bringing them before the most suitable and competent tribunal to which they can resort. But ordinary business men, having a dispute to settle, arising in the ordinary course of business, have for many years past been found to prefer to resort to lay arbitration, and other unsatisfactory methods of settling their disputes, rather than submit to the expense and delay involved in recourse to the tribunals of the country. The object of procedure is to settle disputes; disputes must and will in the course of business arise, and they are a necessary evil. They interfere with business, and all time and money expended in consequence is from an economical point of view "waste," and the problem which those who are responsible for settling the procedure of our law courts have to set themselves is, how to place before the public a machinery for satisfactorily determining these disputes with the least possible waste of time and money. I shall have something to say later on with reference to the recent establishment in London of a separate court for the trial of commercial cases, in respect of which a giant's stride has been made in the right direction; but for the moment I am dealing only with our system generally, and I desire to call your attention to what I consider some of the most salient defects in it, and in doing so I must remind you that the views which I express must be considered as personal to myself, and that the president for the time being in delivering his annual address does not in any sense speak as representing the views of his colleagues on the council over whom he has the honor for the year to preside. (1) Our procedure is regulated by the Judicature Acts 1873 to 1894, and the rules (more than 1,000 in number) made under them, forming altogether a mass of complex provisions constantly being changed, and in the interpretation of which it is inevitable that doubts and difficulties will from time to time arise. These difficulties when they arise are not determined by the rule-making au-

thority for the benefit of litigants as a whole, but are judicially settled at the expense of particular litigants, so that a plaintiff and defendant who embark in litigation may not only have to pay the expense of settling their own particular dispute, but may find themselves involved in a heavy expense in settling what is the meaning of some statutory provision or some rule of procedure. I find that in the Annual Practice for 1895 there are between seven and eight thousand reported cases referred to as indicating the effect and construction of the existing rules, and where rules have been altered to meet difficulties which have arisen, a reference to the case is of course no longer necessary; and there are, moreover, a number of cases which are never reported in which litigants have had to pay expenses for determining obscure points of procedure. From the mere fact, however, that there are upwards of 7,000 reported cases which it is necessary to refer to in order to ascertain what the existing rules mean, some idea may be formed of the number of cases which have arisen and the enormous expense to which litigants have been put in determining not their own particular disputes, but what is the meaning of the complicated procedure under which they have to work if they desire to bring their disputes for settlement in the High Court. Is not this in itself enough to deter would-be litigants? (2) Then the course of litigation is, or may be, the same whether the amount involved is large or small, whether the case is a simple one or complex, whether the facts are really disputable or not, and, except in the limited application of Order XIV., there is no summary process by which in an ordinary action a defendant having no defense, or a plaintiff having no case, can be prevented at an early period from putting his opponent to the expense and delay involved in carrying the action through all its possible stages. (3) The third point I wish to refer to is the long vacation. How in the name of common sense can it be expected that the public will voluntarily patronize an establishment, the doors of which, in addition to other "vacations," are substantially closed from the 12th of August to the 24th of October in every year? What other business establishment conducts its affairs in this fashion? Bear in mind that in our own offices we carry all our administrative work at all times of the year, and it is only in respect of litigious business that we have a long vacation. In the city of London we have probably as much general work then as at any other time of the year. Each and every hard worker in every branch of life requires sufficient and regular holidays. The officers and the staff of all great banking institutions, of all railways, all without difficulty get their proper periods of repose from work, but the banks do not

close their doors, nor do the railway companies refuse to carry us during a close time of over ten weeks every summer, to say nothing of other holidays in the year. What in the nature of the case is there which makes lawyers different in this respect from every other class of workmen in England, and why should the establishment which we all co-operate in carrying on be administered on such unbusiness-like principles as these? We are all so used to our long vacation that some of us think that we could not live without it, and we are astonished that outsiders should consider its continuance in its present form a blot on our institution. Believe me the long vacation as such is an anachronism, and the sooner it is done away with the better for us and the clients whom we serve. (4) The fourth point I will refer to is this, and I will only devote a few words to it, for it is a matter only too well known and recognized; I mean the great waste of judicial strength arising out of the present circuit system. The remedy has been pointed out again and again; but we are, I fear, as a nation, slow, only too slow, in applying known remedies to known defects. This is a matter which I feel cannot and will not, be allowed to remain in its present unsatisfactory position. (5) The next point in reference to our present system to which I would call attention is that of the relations between counsel and client. It is, of course, a subject of some delicacy, and upon which I desire to speak with all consideration for the other branch of the profession, among whom are numbered some of my most valued and intimate friends; but I for one think that the relations of the bar to the client are one of the other anachronisms in our system. In theory the services of counsel are gratuitous, and their fees are honorarium—theory has been left in the lurch by practice. In reality, counsels' fees are bargained for by their clerks. The junior counsel requires a fixed proportion of the leader's fee, however eminent the leader may be, however junior the junior. The clerk of the leading counsel on the side where, perhaps, fees are marked lower than by the adversary, requires to have his master's fee raised to the level of that of his opponent, and so on through a variety of phases with which we are all familiar. I have nothing to say against the practice of a professional man demanding for valuable services as much as he can get, as much as the public will pay him. But let it be done openly by the master, and not by a clerk acting ostensibly against his master's orders and in violation of the gratuitous service and honorarium theory which are said to rule the relations between counsel and client. Though the barrister cannot sue for his fees, the bar can and do bring the pressure of the society to bear upon

solicitors who are members with the view of compelling payment of fees in arrears. We hold, and have always held, that it is unbecoming a member of our society not to pay his counsel's fees; and though fees are not recoverable at law, they can, to a great extent, be, in fact, recovered as effectively as if they could be sued for, and I doubt whether there is any other vocation in which so small a percentage of bad debts is made as in the case of counsel fees. It is time, I think, that these anomalies should cease to exist; then, if the fees are payments for services contracted for, it would follow that the services would be performed or the fees returned, and we should no longer have the unedifying spectacle of counsel holding briefs in cases they cannot possibly give attention to, or putting in an appearance for short periods at intervals during the hearing of a case. Believe me, there is nothing in the administration of justice with which the lay client finds so much fault as paying for services the benefit of which he does not obtain, and knowing that in the most favorable circumstances he must needs feel anxiety as to whether or not counsel, to whom he has paid heavy fees, will attend to and conduct his case. (6) Another strong deterrent is to be found in the very strict and technical rules of evidence acted on in our courts. Something in the right direction has, you know, been done in this respect, but much remains to be done before business men will come to our courts and risk failure in litigation, in consequence of the rules of evidence in reference to facts, which, to their lay minds, admit of no dispute, or in respect of which they are in the habit of acting upon materials which the courts, at present, refuse to look at as evidence. Consider, too, how much unnecessary expense and delay arises in practice from the necessity of having, in some cases, to prove, under a commission abroad, facts which are notorious and documents which are recorded. (7) Then there is the well founded grivance as to party and party costs, and much dissatisfaction exists as to the practice in taxing costs as between party and party. A distinguished member of the Court of Appeal alluded, at a public meeting in June last, to this as the principal deterrent cause which keeps the public away from the law courts. A successful litigant thinks he should have a complete indemnity from his unsuccessful adversary in respect of all costs reasonably and properly incurred by him in the litigation, and so he should. In theory the court gives him this; but when he comes to the taxing master's office he finds by experience that he only gets about two-thirds of what he has been obliged to spend. Some misapprehension, I think, exists in many quarters as to this subject, and I have heard it suggested that legislation is required to place the

matter on a satisfactory basis, but I do not think that this is the case. To the question what costs should a successful litigant be able to recover from his opponent, the answer must be, "all that he has reasonably and properly incurred in the litigation." And what does the rule say on the subject? Only that the taxing master is not to allow costs "not necessary or proper for the attainment of justice, or which have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party." No alteration of the rule seems necessary. No one, I suppose, will desire to make an unsuccessful litigant pay costs for work "not necessary for the attainment of justice," or "incurred through over-caution, negligence or mistake," or "merely at the desire of the party." In theory the rules are all that can be desired; but where the shoe pinches and where alteration is needed is in the practice and application of the rules in the masters' offices. This was the view acted on by the committee of judges in 1892, who spoke of the matter as "the practice as to the taxation of costs which at present distinguishes costs as between solicitor and client from costs between party and party," and who did not suggest that any alteration in principle was needed or that any new statutory powers were required. And, if my memory serves me, the late Sir Henry Jackson, who some years ago brought a bill into parliament on the subject, found on consideration that the grievance could be remedied without legislation; but unfortunately the grievance exists, and no effectual steps have been taken to remedy it. The taxing masters, following the practice of many years and various decided cases which they are bound to follow, take far too narrow a view of what is necessary for the attainment of justice, and if the powers that be would see that the rules are more liberally interpreted and would lay down regulations for the guidance of the taxing masters, successful litigants would more nearly attain the indemnity to which they are entitled from their unsuccessful opponent. It must not, however, be overlooked that the more competent the practitioner and the more calm-headed the client, the less is the difference between party and party and solicitor and client costs. It is, in my judgment, not a practical suggestion that an unsuccessful litigant should be expected to pay for the incapacity of his opponent's advisers, or for any and every fancy of a nervous adversary. The principle laid down in the rules is in this respect good enough. What we want is a liberal and proper interpretation of the rules in practice. I have indicated some of what I think are the most salient defects of our system of procedure, and some of these defects can easily be remedied. It would be a simple remedy to have all



questions of practice settled without litigation by a small rule committee, whose duty it should be to remedy all defects, and clear up all doubts arising in practice on the rules, and to do this as the points arise, and without cost to the litigants. There should be no great difficulty (in spite of the opposition from small places), in rearranging the circuit system so as to prevent the present waste of judicial strength. The Council of Judges, in reporting to the Secretary of State in 1892, indicated how this could be best done, and added that, unless the circuit system be rearranged, "all the other suggestions (for the improvement of legal procedure) will be of little effect, and the most valuable part of the proposed reform in the present administration of the law will be frustrated." The long vacation and the present anomalous relations between counsel and client will probably die hard; but, in my judgment, go they must if we are to have any efficient reform such as to render our system likely rather to attract than, as it does now, repel suitors. I trust that the strong views held by Lord Justice Smith on the subject and his influence will have the effect of regulations being laid down for the taxing masters, so that a successful litigant may, on taxation, be allowed all his costs and expenses reasonably and properly incurred. But there are other important reforms which are, I think, imperatively called for. Our system, which we call procedure, is a far too highly polished and complicated machine for the requirements of everyday cases. It is a terrible weapon in the hands of an unscrupulous litigant. In theory it is all simple enough; we have our summons for directions and many other apparently useful rules; but we know that, except in cases which the courts consider to come under Order XIV, a defendant who has in reality no title of a defense can keep his adversary months, and, in some cases and under favorable circumstances, years, from getting a judgment, and that either party can, for an undue length of time, put off the inevitable moment of coming face to face with his adversary before the court. Much has been done in the right direction by Order XIV, much by order LV; much has been done by the establishment in London of a court for the trial of commercial cases, hampered in practice by no technical rules of procedure and presided over by judges whose whole lives have been spent in the conduct of commercial cases, and who possess the confidence of men of business. If such a tribunal had been established twenty years ago we should have heard less, if anything, of the commercial classes refusing to resort to our courts for the settlement of their disputes, and inserting in their sale and purchase contracts clauses for compulsory reference to lay arbitrators. With respect to litigation generally, there

are, of course, some cases in which it might be difficult to arrive at a just conclusion as to the merits without formal pleadings and particulars, and without going through the processes of discovery and interrogatories and all the rest of it; but in nine cases out of ten—in, I would almost say, ninety-nine cases out of a hundred—none of this is necessary; only a very small percentage of actions commenced really proceed through all the preliminary stages to trial and judgment—in many cases the parties know perfectly well beforehand what are the points in dispute—what, if any, are the material facts upon which there may be doubt; and in many cases the rights of the parties depend merely on the construction of some written instrument; there are, under the existing rules some facilities for obtaining a speedy decision in such cases; but the existing rules and the manner in which they are interpreted are not, I think, such as to satisfy in this respect the reasonable expectations of the public. Compromises and settlements of litigation usually arise in consequence of one party to an action learning something which he has not before known, or has not appreciated, of the strength of his opponent's case. If a settlement of the dispute in the early stages of a litigation is an object, as I think it is, to be desired, it is important that each litigant should as speedily as can be learn something of the strength of his opponent's case, and I should like to see what I will call the underlying principle of Order XIV extended to every kind of case, and I would give to every litigant, be he plaintiff, defendant, applicant or respondent, the right immediately that all necessary parties are before the court to apply to the court in a summary way for any judgment to which he may think himself entitled in reference to the subject-matter of the litigation; and to do this on such materials as he may then be able to bring before the court. There are a vast quantity of cases in which a short investigation performed by an able judge would show that the applicant had no reasonable ground for his application, or that the respondent had no such grounds for objection; and it should be the duty of the judge to enter judgment on the materials before him either for the applicant or respondent, or in such manner as he thought just, unless for special reasons he should consider that the particular case ought to be carried through in the manner prescribed by existing rules; but I would let it be possible to make such judgment a provisional judgment only, and allow the aggrieved party, on giving security for costs, or on such other conditions as the court might impose, to have the action or proceeding tried or brought to hearing in the ordinary way. I am confident that, if the court possessed such a power as this, and if the parties

were at an early stage of the proceedings brought face to face before the court, a settlement between the parties themselves would in the vast majority of cases take place, or a satisfactory judgment would be pronounced, and further proceedings avoided. I cannot leave the question of legal procedure without saying something on the subject of "costs." Much misapprehension, I am sure, exists on the subject — the word costs ought, perhaps, only to be used to indicate the solicitors' fees and disbursements, but it is often used to indicate the whole of the expenses of litigation, and few, except those who have made a special study of it, know how small a part of the expenses of litigation represents the solicitor's own remuneration for his services. It would, I know, astonish some persons to be told, but it is a fact, that from ten to twelve per cent of the costs of litigation is what represents the solicitor's own remuneration — that is to say, he must have work passing through his hands costing in the aggregate £1,000 in order that he can earn for his own remuneration £100. In some special circumstances, such, for instance, as in a small office where the solicitor himself does all the work performed in large offices by clerks, or in a very large office with a numerous staff and an unusually large amount of work, the percentage may be higher, but about ten per cent is all that a solicitor usually gets as his net remuneration, including interest on the capital in his business. The expenses of ordinary litigation, and which are vulgarly referred to as costs, include — (a) court and judicature fees; (b) counsels' fees; (c) witnesses' remuneration; (d) the solicitor's charges and disbursements. The court and judicature fees represent a very considerable amount; in administrative actions they are very heavy. Counsels' fees have increased with the altered value of money, but they have also increased to a very great extent beyond this, and they constitute a very large percentage of the expenses of litigation. Payments to witnesses, especially skilled witnesses, may and do form another important heading of expense. The solicitor's own remuneration is in the main based upon a scale of allowances fixed in the year 1807, and which have undergone no increase; and if, in 1807, they were adequate allowances for the work done and the skill employed, they are certainly not so now. Money has decreased in value, the remuneration of all other professional men has been increased; we alone have to content ourselves with a scale fixed nearly a century ago, and this notwithstanding that the average education of solicitors has enormously increased, and the practice of our profession has certainly not become less anxious or more easy with the altered times; our remuneration in litigious matters is a bare pittance, and we are hampered by

rules which in some cases make the solicitor's remuneration payable in an inverse ratio to the responsibility and labor involved; for instance, it is more remunerative to a solicitor to instruct a counsel to attend in chambers than to attend and conduct his case himself. On the question of legal procedure I have, I am sure, said enough to show you that our house wants putting in order, and when those in authority think that the time has come for doing so, I hope that some alteration of our fees will be effected by which, at least, we shall be adequately rewarded for all necessary work, and in which there shall be no temptation to any practitioner to increase his client's disbursements as a means of adding to his own fees.

I propose in conclusion to say a few words on two of the more important duties of our society, and on its organization and its finances. It was so long ago as 1877 that the whole control of the examination of articled clerks passed into the hands of the society. Previously to this the council, as delegates of the judges, had practically had charge of the examinations, but since 1877 the responsibility for, and the whole conduct of, the examinations has been vested in the society; and a very important duty this is, and the thanks of the profession are due to the Examination Committee of the Council for the exemplary and painstaking manner in which they superintend and regulate this department of the society's function. It is a satisfaction to myself personally, and I think it will be so to many of us, that we are getting year after year a larger proportion of graduates, and men who have passed the London University Matriculation Examination, coming into our ranks — when young men have to undergo a five years' service under articles, there is unfortunately too great a temptation for them to leave school at an early age — a University degree delays only by one year the date of admission, and the advantages, where they can be afforded, largely in my judgment overbalance the disadvantage of beginning professional life a year later. I may mention that in 1864 the number of graduates and four-year men was only seven and one-third per cent of the whole number of members admitted; in 1874 the proportion had risen only to nine and two-thirds per cent, in 1884 it had increased to fifteen per cent, and last year it was nearly twenty-three per cent. Turning now to the duties imposed upon us respecting disciplinary control over members of our profession, it was in 1888 that under the Solicitors Act of that year was transferred to us from the masters practically the whole of the work of investigating into and reporting upon charges of misconduct on the part of members of our profession, and in the Statutory Discipline Committee is now vested the duty of hearing in the first instance of all complaints against solicitors. The satisfactory manner in which this duty has been performed leads me to hope that the time is not far distant when we shall be vested with yet fuller powers over our members, and that those who

investigate the facts will be charged (subject to appeal to the court) with the duty also of determining what is the proper measure of punishment in those cases in which they have to come to a decision adverse to the solicitor complained of. As to the organization of the society I would remind you that the council is composed partly of solicitors practicing in London, partly of solicitors practicing in the provinces. The London members have hitherto been selected with a view of getting as thoroughly representative body as possible of the various phases of London practice, and I am glad to say that there appear always a sufficient number of eligible men willing to devote their valuable time and great experience to the service of the society and ready to fill vacancies as they occur. Eleven out of the ordinary members of the council are at the present moment country solicitors practicing in various parts of England, and we have as extraordinary members of the council ten presidents of country law societies. Through our country members on the council board, and through the Associated Provincial Law Societies, there is constant and direct communication between the country and town members of our profession, and if ever there was a time at which the council of the Incorporated Law Society was thoroughly in touch with the whole profession, and represented its interests and views generally, it is at the present time. I wish I could add that substantially every solicitor was, as he ought to be, a member of the society. We have made considerable progress in this respect; still, there is much yet to be accomplished in this direction. In 1875, when the provincial meeting was first held in Liverpool, there were only 2,961 members in our society out of 11,500 practising solicitors. Ten years ago, when the meeting was held here, for the second time, there were about 4,200 members out of 13,800 solicitors taking out their certificates; and now, at this, our third meeting in this city, there are in round figures, 7,500 members out of a total number of about 15,200 solicitors. These figures show that in both the last past decades a considerable improvement has taken place in the proportion of solicitors who are members of our society. There will, at all times, so long as membership of the society remains voluntary, be necessarily a large number of solicitors who, though taking out certificates to practice, are either from ignorance or apathy, content to remain isolated from the advantages appertaining to membership of our society. The society offers so much to members, and is so active in supporting, at all times and in all places, the higher interests of the profession, that I for one hope that it will continue to remain what it is now, a free institution, supported on its merits by the members of our body. At the same time the society is now entrusted with so many and important duties, and performs so many important functions in the interest of solicitors generally and of the public at large, that we are justified in expecting that at least the expenses which it incurs in the performance of its public duties shall be de-

frayed, not out of the voluntary subscriptions of its own members, but by an increase in the charges levied on the whole profession.

Having thus pressed on all members of our profession the importance of their becoming members of this society, let me say one word in favor of two institutions which at all events cannot be said to exist or be fostered for any selfish objects — I mean, of course, the Solicitors' Benevolent Association and the other association, whose area is confined to London, namely, the Law Association for the Benefit of Widows and Families of Solicitors in the Metropolis and Vicinity. In doing so I cannot do better than quote the very pregnant words of our ex-president, Mr. Hunter, who during his term of office made an appeal on behalf of the Solicitors' Benevolent Association to every member of the profession. Mr. Hunter says: "Having been a director of the Solicitors' Benevolent Association for nearly twenty years, I can speak with confidence on the manner in which its affairs are administered, and also as to the great assistance it is able to give to the poor and necessitous members of the profession and their families. During the time I have been a director I have been surprised to find how many applications have been made to the association for assistance from solicitors and relatives of solicitors whom I find personally known as apparently prosperous members of our profession only a short time before, but who had been reduced by misfortune to dependence upon others, and this experience leads me to wish to impress upon every member of the profession to become a subscriber to the association." I cannot too heartily echo these words of my predecessor, whose name at the foot of such a circular is the best assurance we could have that the affairs of this charitable institution are administered judiciously and well, and that it deserves our cordial support. The ranks of our profession are, as we all know, overcrowded; how many among us must of necessity, if ill-health overtakes them, be involved in penury; how many there are whose families must be left ill-provided for, and under circumstances that help must be required for providing the mere necessities of existence. What poverty is so keen, so hard to endure as that of those who have been well educated and have known better days? Let those among us who have enough and to spare help this good object. I speak not only of the comparatively very prosperous man, but of the ordinary well-to-do members of our profession. Let each and all of us who come within that category think not only of ourselves and those dependent on us, but let us devote some small portion at least of our savings to the assistance of those less fortunate among us, who from ill-health and other misfortune have been unable to make that provision for themselves or those depending on them which more favorable circumstances would have enabled them to do, and in no better way can we help the necessitous among our profession and their families than by contributing to the funds of those associations."

# The Albany Law Journal.

ALBANY, NOVEMBER 2, 1895.

## Current Topics.

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ON Tuesday, October 22, the judges designated by the Governor as members of the appellate division of the Supreme Court met in the Senate library in the capitol at Albany and organized by the selection of Justice Hardin as presiding justice of the convention. The most important work was the appointment of a committee to amend the rules of the Supreme Court, and Judge Celora E. Martin forwarded a draft of the changes proposed by him and which met with general approval except the suggestion as to the filing of briefs before argument. It was stated at the convention that the practice, started by the Court of Appeals, had worked in a satisfactory manner, as it tended to limit the number of points which the appellant raised on the review of the case before the court of last resort. It is easily seen that such a practice would work more effectively in the Court of Appeals than in the Appellate Division, for the reason that an attorney before the court of last resort has had the benefit of the trial and the argument on appeal before the appellate division, which would naturally tend to demonstrate what were the strongest points to be raised before the court which finally determined the matter. It does not seem, however, from another point of view, that the practice would be valuable in the appellate division, for in that court the appeals are heard, usually, very shortly after the first decision, while in the Court of Appeals many cases are on the calendar for a considerable length of time before they are reached, which enables the practice to be more effective. It was also said at the convention that, especially in the first department, the practice would not be a success and would not meet with favor inasmuch as it would tend to put over many appeals which ought to have immediate consideration and determination and which here would be finally determined before the appel-

late division. We do not think that the limitation of points raised on appeal, which would be gained by such practice, would be proportionately so valuable as the expeditiousness of the present system, and we consider that considerable valuable time would be lost by appeals having to go over the term and by contentions between the parties as to whether the briefs had been filed in time and in a proper manner.

Perhaps the most important work which the convention actually accomplished was the re-appointment of Marcus T. Hun, Esq., as official State reporter of the Supreme Court. This was a proper and pleasing compliment to a reporter, who by diligent effort and marked ability has made the Supreme Court reports equal to any in the country. An amusing feature of the convention was the discussion by the judges as to their powers as members of the appellate division. The General Term of the First Department had already held that under the revised Constitution they had no power to designate newspapers to publish notices for the appointment of commissioners to condemn property for the Rapid Transit Company of New York city. This is another instance of the failure of the late Constitutional Convention to properly provide bodies to perform necessary acts during the year 1895, and is in many respects similar to the contention that was raised in regard to the powers of the last Legislature, as the Constitution provided that after January 1, 1895, the Senate should consist of fifty members and the Assembly of 150 members. The cheering news, however, was brought to the judges of the appellate division that the Court of Appeals had handed down a decision in the case of the Rapid Transit Company of the city of New York in which it was held that the General Term of the Supreme Court had power during the year 1895 to appoint commissioners to condemn property, even though such power was expressly given to the appellate division by section 18 of article 3 of the Constitution.

The convention adjourned to meet in this city at a later date to formulate and adopt rules and designate trial terms.

As already mentioned the Court of Appeals decided in the matter of the application of the

Board of Rapid Transit Commissioners for the City of New York that the General Term of the Supreme Court has power during the year 1895, to appoint commissioners to condemn property, even though such power is expressly given to the appellate division of the Supreme Court by section 18, of article 3, of the revised constitution. The opinion of the Court is written by Judge Peckham who shows the power, although given by the article of the section referred to the appellate division, must be performed by the General Term of the Supreme Court, who had the power formerly under the old constitution, as the appellate division can not exercise any power until after the first day of January next, in pursuance of the provisions of the constitution. Judge Peckham, after reviewing the constitutional provisions on this subject, shows that the General Term exists and will continue to exist until the first day of January, 1896. Judge Peckham says there is absolutely no reason which affords a plausible pretext for the belief that there was an intentional withholding of jurisdiction from the General Term of the powers vested in it during the last year of their existence, and especially as to this subject. Concluding, therefore, that there was no such intention to take away this particular jurisdiction, he says that article 15 of the present constitution provides that this constitution shall be in force from and including the first day of January, 1895, "*except as herein otherwise provided.*" He then shows that the same state of affairs exists in regard to the Senate and Assembly and shows that there is no intention to blot out the Legislature of 1895. He then cites the case of *The People ex rel. Jackson v. Potter*, 47 N. Y., 375, in which able opinion by the late Chief Justice Folger it is held that the intention is to be sought after and when discovered must prevail over the literal meaning of the words of any particular provision of the law; the general principle is to be ascertained and the constitution must always be supposed to have been prepared and adopted with reference, not only to the existing statutory provisions, but also to the existing constitution which is to be amended or superceded. The provisions in regard to which the contention arose, Judge Peckham held, should have a reasonable construction and one that will not

work public mischief. The construction which shut the doors of the court for one year and closed all operations of street railroad building in the State for that time ought not to be adopted without a plain mandate to that effect from the constitution itself. For these reasons the court held that the proceedings should be remitted to the General Term in order that the application may be there acted upon on its merits.

An opinion of general interest is that of *Enterprise Sav. Assoc. v. Zumstein*, 67 Fed. Rep. 1000, in which the court holds that it is within the power of Congress to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters or the payment of money orders to a person or corporation which, upon evidence satisfactory to the head of the department, is found to be engaged in conducting a lottery, and that the courts have no jurisdiction to enjoin the execution of an order of the postmaster-general, made pursuant to statute, when the postmaster-general finds that a certain corporation and its officers are engaged in conducting a lottery, and forbidding postmasters to deliver registered letters or pay money orders to them, since the making of such an order involves an exercise of discretion reposed in the postmaster-general. It is easily recalled that within the past year or so, and especially since the Louisiana lottery ceased to carry on its business openly, that a number of organizations, known as bond investment companies, engaged in the business of selling bonds, the payment of which is determined more or less by chance, and whose operations have been regarded by the Federal authorities and by the public to be in the nature of lotteries, have existed. Under the statutes of the United States (Rev. St. §§ 3929-4041, and acts of Congress September 19, 1890) the Federal authorities have refused the use of the mails to such organizations. On this account they have, in many instances, resorted to injunction and *mandamus* to compel the postmaster-general in the locality in which they carried on their business to give them the privilege of the money order and registered letter department of the government, which had been withheld by order of the postmaster-

general. In all these legal proceedings to obtain the use of this part of the postal service these organizations have failed, and the present case is not remarkable because it is the first denial of any rights to these lottery concerns, but only because it fully determines the correctness of the decisions of the courts and of the postal authorities. After a clear statement of the methods which are employed for the issuance and redemption of the bonds, the Circuit Court of Appeals of the sixth district delivered the opinion by Judge Lurton. The first part of the opinion is given up to a discussion of the provisions of the statutes on this point, and which have been mentioned in the case under discussion, as distinguished from *Commerford v. Thompson*, 1 Fed. 417, and *Bank v. Merchant*, 18 Fed. 841. In the first case cited the mail withheld by the direction of the postmaster-general was not registered mail at all. Therefore, there was no authority under the statute to direct the retention of such ordinary mail matter. In the case of *Bank v. Merchant* the order of the postmaster-general, which found the fact of the unlawful use of the mails, had been revoked, and the subsequent orders contained, in the opinion of Judge Pardee, an insufficient finding of fact. The power vested by the Constitution in Congress "to establish postoffices and post roads" has always been construed as authorizing Congress to prescribe what should be mailable matter. As was said in the case of *ex parte Jackson*, 96 U. S. 732, "The power vested by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." It is not contended by the plaintiff that the postmaster-general used his authority either maliciously or fraudulently, but was simply to the effect that he erred in judgment, and that there is no remedy unless the court will take jurisdiction, reconsider the facts, enjoin the defendant from obeying the order, and require him to extend to it the free and unlimited right to use the inhibited facilities in the conduct of its business. The question is then discussed as to whether the courts of the United States have jurisdiction to control the action of the executive branch of the government. In this respect the court says :

"The answer must depend upon the question as to whether the refusal to deliver registered mail matter and to pay postal money orders is, under the statutes organizing the postal department, a purely ministerial duty, or does the postmaster-general, under the power conferred upon him by Congress concerning the circumstances under which he may direct the withholding of registered mail, or forbid the payment of a postal order, exercise judgment or discretion? We shall not undertake to analyze the elaborate and alluring plan under which an uncertain per cent. of the holders of the complainant's bonds may be redeemed at an early day in the progress of the business, and realize an enormous profit, at the expense of others enticed to invest by the prospect of an early and accidental redemption, but who, in weariness, have dropped out, and forfeited their payments. The boundary between such schemes and some of the insurance and investment methods which have managed to escape legal condemnation may be very dim. Judgment as to which side of the line complainant's device belongs would much depend upon what should be taken as the standard of a clearly legitimate enterprise. The honorable postmaster-general, when called upon to pass judgment upon the business of this association, may have been somewhat perplexed as to how to deal with a scheme so elaborately arranged as to present, upon one view of it, a legitimate investment business, but which, when looked upon from the other side, seemed to show many of the features characteristic of lottery or other like schemes. The settlement of the question undoubtedly involved the exercise of judgment and discretion, and this very fact operates to take his duty out of the mere ministerial class, and therefore beyond the control or review of the judicial department of government, by means of *mandamus* or injunction. In *Mississippi v. Johnson*, 4 Wall. 475, a ministerial duty was thus defined :

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted, or proved to exist, and imposed by law."

"If the postmaster-general could not have been compelled by judicial proceedings to have

made an order inhibiting the use of the registry or postal money department by any one at the suit of another, because the duty was not purely ministerial, but involved the exercise of judgment and discretion, it must follow that the bona fide exercise of such judgment and discretion under a statute expressly reposing the power would not justify the judicial department in reversing his action by the substitution of its judgment for that of the officer to whom Congress had intrusted it. (*Marbury v. Madison*, 1 Cranch, 137; *McIntire v. Wood*, 7 Cranch, 504; *Kendall v. U. S.*, 12 Pet. 527; *Decatur v. Paulding*, 14 Pet. 515; *Commissioner of Patents v. Whiteley*, 4 Wall. 534; *Gaines v. Thompson*, 7 Wall. 347; *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12; *U. S. v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197.")

The Supreme Judicial Court of Massachusetts held, in the recent case of *Bjbjian v. Woonsocket Rubber Company*, that the negligence of a competent servant, who, in the course of his daily duty of oiling machines, fails to readjust the cylinders of one of them, whereby the operator thereof is injured, cannot be imputed to the master; that an employer who knows that a need of warning an inexperienced servant working on a dangerous machine has arisen is bound to give it, though the danger arose from the negligence of a fellow servant, and that one just commencing to operate a machine for compounding rubber; under the charge of an experienced man, cannot be held, as a matter of law, negligent for continuing to feed the rubber to it in the usual manner with his hands, notwithstanding the sudden falling through the cylinders of the machine of pieces of rubber, where this would indicate to an experienced man, but not to him, that the cylinders were too far apart, and that there was increased danger therefrom; and the evidence authorized the finding that on the falling through of the rubber he by a look appealed to the one in charge of him for advice, and the latter, by merely laughing, in effect instructed him to go on as before. The court said: "Of course, no man of ordinary intelligence, with a day's experience in operating the machine, could contend that he did not know that if his hands were so placed between the upper portions of the revolving cylinders as to

come in contact with their surfaces, there was obvious danger that his arms would be drawn in. The plaintiff admitted that he knew that if he put his fingers between the cylinders they would be cut or broken, and there was contradicted evidence that he had been told that the machine was dangerous, and that he must be very careful. And, besides this, the sudden falling through of the pieces of rubber, when first fed, was enough to make it his duty to inquire of himself, or of his instructor, whether he ought to feed them in the same way again. But the machine, as then out of adjustment was very much more dangerous than usual. \* \* \* If, without asking advice, he had again placed the pieces of rubber in the machine with his hands, he might have been said to have been at fault, although that was the usual way of feeding, and the only way in which he had been instructed. If he was yet a pupil, ordinary care required that he should not repeat such an operation without asking for instructions."

The Summary Jurisdiction Married Women's Act is one of the most interesting statutes passed in England during the present year. It partly amends and partly consolidates, and will go into effect on the first of January next. The fourth section of the act of 1878 empowers any court convicting a husband of aggravated assault on his wife to make a separation order if the court be satisfied that the future safety of the wife demands such action, and further gives power of summary jurisdiction to make an order of maintenance on application of a wife who has been deserted. The new statute repeals these provisions last mentioned, but re-enacts them in a new manner. The jurisdiction now vests when the husband has deserted his wife, or if he has been guilty of continued cruelty to his wife, "or shall neglect to provide reasonable maintenance for her and her infant children," whereat she has been caused "to leave and live separately and apart from him." The application for the order is to be made to a court of summary jurisdiction in the ordinary course; but if the conviction be on indictment, the wife may apply to the court before which the conviction has taken place, and the court shall for that purpose become a court of summary jurisdiction, and have power

to hear the application and grant the order asked for. 'The act changes the age of children who may be committed to the custody of the wife from ten years to sixteen, and the maximum allowance which the court may grant to the wife, to be paid by the husband, is fixed at two pounds in all cases, whether the complaint is on account of desertion or cruelty. Apparently this is a statute which is a vast improvement on the English practice on this subject, and is one which we might appropriately copy. It certainly has in it two very valuable improvements which we might utilize. First, in granting the relief to the wife without a divorce; and, secondly, by giving expediency in legal procedure. Both are valuable; the first to women; the second, perhaps especially important, as the beginning of a thorough change in legal matters, more properly making them conform to business methods.

The Supreme Court of Rhode Island in *Ireland v. Globe Milling and Reduction Co.*, held that the stock of a non-resident in a foreign corporation cannot be attached, the stock in question not being actually or constructively in the State, though its business is being carried on and its officers are within the State. The court said in part as follows:

"We think it is well settled that shares of stock owned by a non-resident defendant in a foreign corporation, cannot be reached by process of attachment, although the officers of the corporation are within the State, and the business of the corporation is being carried on here. The *situs* of the stock for the purposes of attachment and execution, is the domicile of the corporation, and that place only. (See *Cook, Stocks & S.* [3d ed.], § 485, and cases cited; *Plimpton v. Bigelow*, 93 N. Y. 592, 23 Am. & Eng. Enc. Law, 632, and cases cited; *Winslow v. Fletcher*, 53 Conn. 394, 4 Atl. 250.) A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although, by comity, it may be allowed to do business through its officers and agents in other jurisdictions. (*Chafee v. Bank*, 71 Me. 514.) Our statute, which authorizes 'the attachment of the shares of the defendant in any corporation,' etc. (Judiciary act, chap. 33, § 20), 'is to be construed,' as

said by the court in *Plimpton v. Bigelow* (*supra*); concerning a similar statute of New York, 'in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment, in order to any valid or effectual seizure under the process.' (See, also, *Taft v. Mills*, 5 R. I. 393.) In the case at bar the stock in question was neither actually nor constructively in this State at the time of the attempted attachment thereof, and hence the proceeding was a nullity. And this statement is equally applicable to the attempted proceeding by trustee process or garnishment, set out in the pleadings, as to the said attachment proceeding; although we do not wish to be understood as intimating that shares of stock in a corporation can be reached in this way. In this connection see *Lowell, Stocks*, § 9, and cases cited."

At a meeting of the Virginia State Bar Association at White Sulphur Springs, West Virginia, the annual address was delivered by Roger A. Pryor, Esq., of New York city, who was born in Virginia. The subject of his address was the Influence of Virginia in the Formation of the Federal Constitution, which is most interesting as well as instructive. Mr. Pryor spoke in part as follows:

"As in every crisis of American history, Virginia had advanced to the front, so now she again took the lead in the march toward a renovated government. Simultaneously with her cession of territory, she imparted to the Congress the power of impost; thus, in the language of Mr. Bancroft, 'marshalling the United States on their way to a better union.' Still more decisively, Virginia summoned the convention to recast the constitution; and Virginia first commissioned delegates to that auspicious assembly.

"Thus, on a review of the successive stages in the development of the republican system in America, we observe: That it was Virginia who set the example of representative government and colonial autonomy; that it was Virginia who gave the first signal of resistance to British aggression; that it was Virginia who initiated union in the common cause; that it was Virginia who first abjured allegiance to the



English Crown and instituted a republican polity by the act of her sovereign will; that it was Virginia who first proposed to the sister colonies a declaration of independence; that the sword of one son made good what the pen of another had proclaimed; that for the sake, even, of an imperfect federation, she surrendered a domain of imperial magnitude; that she opened a way for the career of progress and expansion which the republic has since so gloriously pursued; that on the collapse of the Confederacy she rescued the country from chaos by summoning the States to the reconstruction of its fundamental law; in short, that Virginia stimulated the desire and provided the means; and prompted the effort and furnished the ideal for the Federal Constitution of 1787. We are now to see her in the act of making it—moulding its form and fashioning its features, by her consummate statesmanship.

"Forecasting, on the eve of the convention, the probable influence of Virginia on its action, her commanding attitude in the Confederacy was a significant factor. In deference to her superior wealth, her greater population, her historic primacy among the States, and her foremost part in the achievement of independence, the initiative and ascendancy were accorded to her without dissent. 'As the convention had met,' says Hildreth, 'on the invitation of Virginia, it seemed to belong to the delegates of that State to start the proceedings.'

"The approved abilities and ripe experience of the men whom she specially commissioned for the work, gave assurance that it would be done by them and be well done. Washington, in whose unerring wisdom the nation reposed its surest trust—"I know," wrote Knox, 'your personal influence and character is the last stake which America has to play'—Randolph, delegate in the Congress of the Confederation, and successively, attorney-general and governor of the commonwealth; Blair, long a Burgess of the colony, member of the convention of 1776 and of the committee which reported the plan of State government, member of the Court of Chancery and Chief Justice of the General Court; Wythe, strenuous champion of independence in the House of Burgesses,

signer of the Declaration in Congress, with Jefferson and Pendleton framer of the reformed legislation for the State, and member of the Court of Chancery; Madison, also member of the convention of 1776 and of the committee to report a constitution for the State, member of the Legislature and of Congress, active and able and eminent in every station; Mason, author of the first constitution for an independent American State, and of the first bill of rights ever formulated for a free community; ranking, by these achievements, with the most illustrious law-givers of the world—such were the characters who, in behalf of Virginia, assumed the task of reconstructing the Federal government.

"Of alliances offensive and defensive, of leagues of friendship such as the Articles of Confederation, and of Federal associations with varying degrees of intimacy, examples were not wanting, either in ancient or modern times. But here is a system at once Federal and National; its constituents, states as well as individuals; acting coercively within the limits of the several sovereignties, yet, so acting without restraint upon local autonomy or abatement of its own efficiency, and without peril of collision between the concurrent forces. The expedient by which so felicitous and so marvellous a result was attained consists not, as commonly taught, in a partition of powers between the Federal and State governments—for each retains its faculties in all their plentitude—but in the distinction of objects to which those powers are directed—Federal functions being limited to purposes of national policy, and State functions restricted to the ends of local economy—and in an effectual provision against conflict between the co-ordinate jurisdictions by according precedence and supremacy to the Federal authority.

"This contrivance,' says Judge Hare, 'so far as my knowledge extends, has no precedent in political history.' With equal emphasis, Prof. Fiske exclaims that 'thus at length was realized the sublime conception of a nation in which every citizen lives under two complete and well-rounded systems of law—the State law and the Federal law—each with its legislature, its executive and its judiciary, moving one within the other, noiselessly and without

friction. It was one of the longest reaches of constructive statesmanship ever known in the world.'

"By whose genius the solution of the hitherto insoluble problem of national unity with local self-government was achieved, authentic history demonstrates to the world. In advance of the convention, Madison sketched in outline a project of Federal union, which, approved by his colleagues, was propounded as the plan of the Virginia delegation. Two competing plans, the one of New Jersey and the other of Hamilton, were submitted; but, these cast aside with slight regard, the convention proceeded to construct a system on the principles of the Virginia programme. After four months of earnest and exhaustive discussion, the Virginia scheme emerged from the stormy debate, altered in detail, but identical in substance; and, so modified, was promulgated by the convention for acceptance by the states. That 'Madison gave the outline of the plan which the convention adopted,' and that 'the fundamental conception of our partly Federal, partly National government, appears throughout the Virginia plan as well as in the Constitution which grew out of it,' are the explicit concessions of Hare and Fiske, critics from whom Virginia may not expect anything of exaggerated commendation.

"Thus did Virginia, acting upon the initiative allowed to her hegemony in the Confederation, introduce to the convention the true theory of Federal government; and thus is the Constitution of 1787 but the articulation of the principles she propounded. Nay more, in the form of its acceptance by the states, that is, by ratification in sovereign convention of the people as proposed by Madison, she gave it a sanction and a stability of which it would have been destitute had a mere legislative approval, as suggested by Hamilton, been the only basis on which it reposed."

A quite important decision has been made in the Supreme Court of South Carolina in the case of *Groesbeck v. Marshall*, 22 S. E. R. 743, in which it is held that a note which on its face recites that it was given for value received may be shown to have been given to prevent a criminal prosecution, although recitals are made in a receipt which was executed

simultaneously with the note to the effect that the note was given in settlement of the claims of certain persons against third parties. This is, perhaps, a proper and just exception to the general rule as to the admission of oral evidence to disprove a written instrument, but the decision is only in accord with the changing mark of limitation which the courts have placed at various times on kindred subjects. The decision in part is as follows:

"We will first consider whether the defendant had the right to interpose against the plaintiff such defenses as could have been set up against Stokes, the payee of the note. This is not an action for damages alleged to have been sustained by the plaintiff on account of incorrect statements in the instruments of writing aforesaid, inducing him to become the indorsee of the note, nor is it an action by the plaintiff, seeking to be subrogated to the rights of J. Foster Marshall in the property conveyed to the defendant on the ground that the consideration upon which it was conveyed having failed, he should not longer be allowed to hold the same; but this action is simply upon the note. If the note was given upon the consideration that the prosecution against J. Foster Marshall for embezzlement should be discontinued, such contract would be against public policy, illegal, null and void (*Williams v. Walker*, 18 S. C., 577, and cases therein cited). The general proposition that an indorsee of a negotiable promissory note after maturity takes it subject to all equities existing between the original parties to the note is not questioned; but it is contended that the defendant is estopped by reason of the fact that J. Foster Marshall, to whom the defendant had delivered the receipt and certificate hereinbefore mentioned, showed them to Groesbeck at the time he became the indorsee of the note, and thereby induced such action on the part of Groesbeck. Let us analyze the statements contained in the receipt and certificate. The only fact set forth in the receipt which does not appear upon the face of the note is that it was in full settlement of all demands of Wise and Strough against J. Foster Marshall. The facts set forth in the certificate which do not appear upon the face of the note are (1) how the proceeds are to be divided among those to whom the several amounts are

due; (2) that J. Foster Marshall had conveyed his interest in real estate in Columbia, S. C., to the defendant as security for the sums therein mentioned; (3) that Stokes signed the receipt in full as attorney and so stated that he was attorney for the parties therein mentioned; (4) that the \$600 was not to be held until the maturity of the note for \$1,187.50, but was to be paid out immediately. The certificate bears no date, and there is nothing upon the face to show whether it was made before or after the maturity of the note, except the words 'until the maturity of the note,' which indicates that the certificate was made before the maturity of the note, though the testimony is to the contrary. The certificate does not show the nature of the demands which Wise, Strough and others held against J. Foster Marshall. A note given by a third person as compensation for the civil injury in a case of this kind, is without consideration. In the case of *Williams v. Walker*, *supra*, the court says: "But where a note is given by a person not liable for the damages sustained by the party injured, for the purpose of stopping a prosecution, even for assault and battery, it will be held void, as based upon an illegal consideration, because in such a case the consideration cannot be referred to the compensation due by the one to the other, for there is nothing due in such a case from the maker to the payee of the note, and the consideration must be referred to the stopping of the prosecution, and is therefore illegal." These views are fully supported by the following cases: *Corley v. Williams* (1 Bailey, 588); *Mathison v. Hanks* (2 Hill [S. C.], 625); *Banks v. Searles* (2 McM. 353); *Gray v. Seigler* (2 Strob. 117); also, *Hearst v. Sybert* (Cheves, 177). The case of *Booker v. Wingo* (29 S. C. 116, 7 S. E. 49) differs from the case of *Williams v. Walker* in some important particulars: (1) The deed executed and delivered by the third party was based upon a valuable consideration, apart from the compensation made for the civil injury sustained by reason of the criminal act. (2) The contract was executed, the grantee performed his part of the contract, and the grantor acquiesced in his possession for eighteen months. Under these circumstances the court refused to lend its aid, as the parties were in *pari delicto*, especially as the *status quo* could not be re-

stored, nor had there been any offer to restore it. It does not appear that the plaintiff made any inquiry as to the consideration of the note, although he had ample opportunity to do so. There were facts and circumstances sufficient to put him on inquiry, and his failure to find out the facts in the case must be attributable to his own negligence. He should have inquired why J. Q. Marshall, a third party, living in South Carolina, gave a note to settle demands of certain persons in Missouri against J. Foster Marshall. He cannot insist that he was misled by the statement in the certificate that J. Foster Marshall had conveyed his interest in real estate in Columbia for the purpose of securing the defendant for money advanced, as it is not contended that this statement is untrue. This court is, therefore, in view of all the foregoing facts and circumstances, of the opinion that the defendant could set up his defense against Groesbeck, the plaintiff.

The rights of the riders of the silent wheel have again been successfully upheld in a recent case tried before a *nisi prius* court of Pennsylvania, whose holding is valuable argumentatively rather than otherwise. The action was begun by a wheelman against the owner of a wagon who had driven on his wheel, which had been leaning on the curb outside, and smashed it. The court, in addressing the jury, charged that bicyclists had no more rights on the sidewalks than vehicles; that sidewalks were reserved for persons who were walking, but that on the public thoroughfare bicyclists had the same rights as persons driving wagons or engaged in similar occupations. Upon the streets a wheelman is entitled to his share of the road and no person should needlessly or recklessly run him down, and should they do so they must answer for damages.

#### THE CANALS AND THEIR IMPROVEMENT.

The many lawyers in the Constitutional Convention last year manifested generally quite a reluctance to commit themselves either for or against the canals. While it was alleged in some quarters that the lawyers of eminence in the State were largely corporation lawyers, and for that reason opposed to the

canals, such was not really the case. Their opposition, if such it may be termed, was due more to a lack of knowledge of the real feeling toward the canals on the part of the people. They dreaded anything that might in any way injure the passage of the constitutional amendment relating to the judiciary and many others, and so at first tried to side-track the canal improvement amendment.

So well known a corporation attorney as Edward Lauterbach, however, actually saved the day in the Constitutional Convention, by making a speech on the roll-call for absentees when the amendment lacked some dozen votes. It received just one more than it required as a result of Mr. Lauterbach's speech. In the final arrangement of the submission of the amendments it was decided to separate the canal improvement section from the others. In this the friends of the canals acquiesced with pleasure, confident of the people. Their confidence was justified, in that the separate canal improvement amendment received a majority of 115,315, which was a larger majority by 32,000 than was given for any other amendment.

As a result of this Gov. Morton strongly urged the Legislature to provide for the improvement of the canals, which it did, a bill being passed by a majority of 103 to 35, providing for the bonding of the State for \$9,000,000 for the deepening of the Erie and Oswego canals from seven feet, as now, to nine feet, and the Champlain from its present depth of five to seven feet. The committee working up public sentiment in behalf of the bill assert that the improvement will enable the present boats to carry twice the commerce, by the increase in their loads and greater quickness of trips, and so reduce transportation rates from 33 to 50 per cent.

It is said that this is the first time in the history of this State that a bill, in its nature wholly a referendum, has thus been submitted to the voters for their approval, and the result is looked for with great interest. The canals have this advantage, that they have always received enormous majorities, when before the people in the form of constitutional amendments, as, for instance, when they were, in 1882, made free of tolls by a majority of 323,868. The three canals which it is proposed to improve have paid into the treasury of the State over \$34,000,000 more than they cost up to the time tolls were abolished, and their low rates of transportation which the railroads meet during the season of navigation, have made them very popular with the people.

There is little doubt of the bill's adoption. It, probably, is merely a question of how large a majority it will be. Conservative estimates, made by those particularly interested, place the majority at about 100,000.

## "ONE LAW FOR THE RICH AND ANOTHER FOR THE POOR."

MR. C. H. PICKSTONE.

An address delivered before the Incorporated Law Society at Liverpool, Eng.

ONE of the most humiliating positions in which a man who takes any pride in his profession can possibly be placed is to hear his chosen calling publicly abused, and to have to remain silent because the particular charge is one he cannot refute. And this is a position in which a lawyer must, of necessity, occasionally find himself. At such times his pardonable pride in the law, and in himself as a representative of that law, retires to his boots, and he begins to wonder whether, after all, the object of his worship is a mere idol of wood and stone to which the people appeal in vain. Perhaps the most vulnerable spot in the whole system of our laws has been that which has lent itself to the contemptuous reproach that there is "one law for the rich and another for the poor." That such a pernicious charge should have a shadow of foundation is greatly to be regretted, and I often wonder how it is we so frequently permit it to pass unchallenged, and thereby appear to countenance it. Possibly we trust too much to the notorious shortness of public memory to efface the recollection of the circumstances which from time to time give occasion for its illustration. We forget, however, that though, to the average citizen, yesterday and all its incidents is wiped out the moment it expires, and that, like the grasshopper in the fable, we live only in the present, there are yet scattered amongst us divers irrepressible individuals who, note-book in hand, eagerly record these ephemeral incidents to be used with effect at times—such as election times—when the public mind is more susceptible to the contagion of nasty things. However much we, as lawyers, may be inclined to ridicule the idea that there is in fact any foundation for the suggestion that the law is a respecter of persons, there can be no doubt that, as an abstract belief, the sentiment is inherent in the breasts of the whole of the lower classes, and that the periodical exhibition of concrete illustrations of it forms a weapon which is most effectively utilized by the agitator in his ceaseless war on capital. It has seemed to me that our supineness regarding the charge is to some extent due to the foundation upon which our legal education is built up. For, observe, upon what different lines proceeds the education of a lawyer and a man of business in this respect. The very first impression that is implanted in the mind of the embryo lawyer—and which forms the elementary truth on which his idea of law is hinged—is that the portals of justice are open to all comers indifferently. This

is the fundamental creed for which there is no less an authority than Magna Charta itself. "*Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam.*" Great words, eloquent words, these; words which had they been at all times, in all places, and under all circumstances, faithfully insisted upon in their integrity, would have made the law as the embodiment of inexorable justice the dearest bulwark of our liberties. That this was the idea animating that determined band of primitive radicals who, nearly 700 years ago, procured the great charter, and that their object was thought to have been accomplished, is evident when we bear in mind the language of Sir Edward Coke upon the point: "Therefore," says he, "every subject for injury done to him *in bonis, in terris vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done him freely without sale, fully without denial, and speedily without delay" (2 Inst. 55). However grandiloquent and open to satire this passage may sound to the layman of to-day, Blackstone (and later Stephen) lovingly takes his stand upon it, and makes it the text of his proud boast that 'the courts must at all times be open to the subject.' Nor was the old common law herself slow to seize the situation. For did she not years ago expound her views in one of those trite maxims upon which our law is built up; '*Ubi jus, ibi remedium*'? What more could possibly be claimed? For every wrong a remedy, and that remedy fully, freely and without delay. Such being the basis of his education, is it matter for wonder that the young lawyer starts a sceptic as regards the popular notion of law as being a luxury attainable only by the rich? But sooner or later he is destined to be troubled with doubts, and it gradually dawns upon him that what has seemed to him a calling second to none in its potentialities for good, is after all only looked upon by the public as a medium for earning bread and butter. The education of the business man, on the other hand, proceeds on wholly different lines. His mind has not been trained in the faith of Magna Charta, and nursed in an atmosphere of *ubi jus*. He knows nothing of either. Thank heaven he doesn't! For though the lot of him that expecteth nothing and gets it is hard, the lot of him who has been led to expect great things which are not realized is infinitely harder. It is the lawyer, not the laymen, who is destined to disappointment. The business man's earliest conception of law is that it is synonymous with trouble; and, later, when he finds it a necessity, he terms it a 'luxury' and a 'necessary evil.' And the poor man, knowing that 'luxuries' are not for him,

resignedly accepts the idea of it which comes from the street orator and the Sunday newspaper, and which is in accordance with his experience of other commodities—viz.: that it is of two qualities; one for the rich, another for the poor. Here, then, we have two irreconcilable views; the legal one that '*Ubi jus, ibi remedium*,' the popular one that there is one law for the rich, another for the poor. Because I am a patriotic lawyer I uphold the former, but because I desire to be perfectly just, I shall have something to say in reference to the tenacity of the latter. The truth is, that whatever foundation there might be for saying that the law is a respecter of persons, it is not the fault of the law—meaning by the term 'law' the legal principles upon which the remedy is based. Used in this sense there is only one law, just as there is only one Gospel, for rich and poor alike; the trouble is that it must of necessity take money to put that law into motion, just as it takes money to carry the Gospel into foreign parts; and it is here—viz., in the administration of the law—that the poor man feels—or perhaps I ought rather to say felt—the pinch. He finds that the sovereign of the rich man will do more than his humble shilling—not that it will buy legal principles of a different essential quality, but will command the services of the most proficient exponents of that law, who must always be the most effective, and whose employment, therefore, on the side of the rich man must, in the nature of things, handicap the poor man. It is not the law but the administration of the law that has been to blame, and it is matter for regret that the fallacy of there being in this country legal principles of various qualities to suit varied purses is still permitted to mislead the public and injure the profession by bringing into unmerited disrepute a system of laws which is, without doubt, the finest in the world. There is nevertheless some truth in the popular notion, but truth of a kind which is overlooked by and scarcely helps the case of those who profess to believe it. For, singularly enough, the only cases in which we literally do find two kinds of law—one for the rich, and another for the poor—are those in which the poor have been favoured by a special law of which the rich man cannot avail himself. Let us take a few examples: A gentleman takes an expensive residence, or a business man a warehouse. The one naturally expects to be able to live in his, the other to use it for the purposes of his business. Both may be disappointed. The house may be ruinous, insanitary, uninhabitable; the warehouse dangerous, and utterly unfit for the tenant's business. Both must grin and bear it. Both are held to their bargain, and neither has any remedy against the landlord for consequential damage (Hart v. Windsor, 12 M. & W. 68). On the other hand, let the poor man

in his humble dwelling find anything amiss, and suffer any damage in consequence, the law, which turned a deaf ear to the importunity of the rich man, is instantly on the alert, and compels the landlord to make compensation (48 & 49 Vict. c. 72, § 12.) Again, the widow and children of a poor intestate may obtain letters of administration, free of duty, from the registrar of the district County Court on payment of a nominal fee (36 & 37 Vict. c. 52.) Again, the salary or income of the rich man is at the mercy of his creditors by way of attachment. But the law's attachment is not extended to the wages of the poor man, and they cannot accordingly be touched (33 & 34 Vict. c. 30.) Again, how often do we hear the bold assertion that a rich man, whose finances become hopelessly involved, may 'whitewash' himself through the Bankruptcy Court, whereas there is no similar relief for the poor man, who must bear his load of small debts as best he can. But this is, of course, a fallacy, as under section 122 of the Bankruptcy Act, 1883, a very effective whitewashing can be had at a nominal cost by the working man whose debts do not exceed 50*l.*, whereby he gets all the protection and none of the terrors of bankruptcy. Once more—and this is a very apt illustration. Suppose a blacksmith to get into arrear with the rent of his shop, and receive a visit from the certificated bailiff—what happens? Why, the same old law that the poor blacksmith had thought was deaf to the appeal of poverty rushes to the rescue, and says to the bailiff, 'Stand back! You touch anything here at your peril; these things are privileged either as being in actual use or as being the tools of this poor fellow's trade' (51 & 52 Vict. c. 21, s. 2). And the bailiff retires discomfited. Then does this same bailiff, breathing out threatenings and slaughter against the disciples of the law, forthwith seek the office of the hard-pressed lawyer on a similar errand of mercy. What happens? Why, it is inconceivable that a lawyer can be a poor man, and so the place is stripped bare, even to the very books that the unfortunate lawyer is poring over, and the same old law that lovingly shielded the tools of the blacksmith turns a deaf ear to the appeal of the poor lawyer to at least protect his beloved books. And yet, are his books not the tools of his trade? And, lastly, need I remind you that if a man has the good fortune to be so desperately poor that he can prove he has not 25*l.* worth of assets in the world, the generous law gives him something a richer man can by no possibility obtain, being nothing less than the priceless boon of free law. I do not suggest that the poor man is deliriously grateful for this concession; indeed, I have heard it hinted that this free law has some of the attributes of a free lunch and some of the quality of a pauper's coffin. 'Upon this point

I desire to express no opinion,' but would merely point out that the free entrance to the law courts is not besieged by a struggling mass of ravenous litigants, such, for example, as surges round the insatiable public laundry, where husbands and wives are wont to wash their discolored linen. In fact, though we offer the poor man free law, he does not seem to fancy it, and like every other phase of pauperism it is not popular. These are a few of the cases in which it occurs to me it may truly be said that there is one law for the rich and another for the poor. I commend them to the attention of those who cherish the popular interpretation of the cynicism, as they may perhaps remind them of that ancient individual who was summoned expressly to do some particularly virulent cursing, and unexpectedly gave forth a stream of blessing. But the agency that has done more than anything else to refute the reproach, and to bring justice and adequate protection to the door of the workingman's home, is the county court. I say, without fear of contradiction, that whenever the county court is available as the remedial agency, the idea of the great charter is literally attained, and the poor man, every whit as certainly as the rich man, has 'justice and right for the injury done him freely without sale, fully without denial, and speedily without delay.' That this is no empty boast will, I think, be conceded when it is borne in mind that the poor man may have an advocate of tried capacity, and may through his instrumentality recover—say 10*l.*—on contract or in tort, without incurring any solicitor's bill if he wins, and at the risk of having to pay his solicitor only 18*s.* if he loses. Eighteen shillings for services which often involve hours of thought, research, hard work, and anxiety, all borne by the solicitor personally! Compare this with the 3*l.* 10*s.* indorsed on a high court writ for a miserable debt, in respect to which the solicitor never expends one moment of time, and which may, in fact, be earned for him by his office-boy, whose salary it will pay for ten weeks! This handsome remuneration is no extravagant conception of mine adduced for the purposes of display; it is (except in certain very special cases under section 119 of the County Court act), full pay, and the solicitor cannot possibly recover more on a 10*l.* verdict, even from his own client (*Ex parte Lamond*, 57 Law J. Rep. Chanc. 503; L. R. 21 Q. B. Div. 242; *In re Langlois*, 60 Law J. Rep. Chanc. 123; L. R. (1891) 1 Q. B. 349). The fact is, there is no such thing as 'solicitor and client' costs in the county Court. There is only one scale—*i. e.*, that between party and party—and consequently the successful plaintiff receives the fruits of his judgment, undiminished by that onerous deduction for solicitor and client costs which invariably absorbs all the honey from a high court verdict. One never hears it said

of a County Court judgment: 'Yes, he won the day; but there was nothing left after he had paid his solicitor.' Surely this must compel the law's detractors to admit that their pet conception of law as an expensive luxury, obtainable only by the rich, is, after all, a fallacy, and, indeed, a slander. In face of facts like these, what twaddle it is to rave about the 'inequality of the law!' I could adduce many proofs of the appreciation and confidence in which the County Court is held by the people. One striking one I should like to refer to, as it not only proves this, but demonstrates the unwisdom of offering to the poor man any other substitute. As is well known, the law at an early stage in its history, in order to carry out the policy of the great charter, laid down the principle that all contracts prohibiting the parties from taking their grievances into the queen's courts, or purporting to oust their jurisdiction in any particular case in favor of some self-constituted tribunal, are void, and, subject to the provisions of the Arbitration Act, 1889. This is still the law. As is further known, parliament, in its anxiety to assist the poor man, made a serious inroad upon this sound principle in the various acts passed for the encouragement and protection of friendly, industrial, and building societies. Rightly or wrongly — wrongly, as I maintain — parliament conceived that it would tend to the benefit of the working man to exclude the queen's courts from all jurisdiction over disputes between members of such societies and the societies, and to compel the party injured to submit his grievance absolutely and finally to the tribunal fixed by the rules, only allowing recourse to the law courts when the rules contained no provision as to the manner of determining disputes, or when the society omitted after a reasonable time to deal with the dispute under its rules. How has this experiment worked? Has it worked for or against justice for the working man? I say unhesitatingly, speaking more particularly in reference to friendly and industrial societies, that it has worked against justice and right for the poor man. My invariable experience has been—and scores of cases have come under my notice—that the injured party has no confidence whatever in obtaining justice from society's tribunal, and innocently looks to the County Court for his remedy. And keen indeed is his disappointment when you have to tell him that Parliament has locked the door of his favorite tribunal and given the key to the society, who are accordingly masters of the situation; as the society will almost invariably be found to have taken advantage of the kindness of the Legislature, and to have a rule referring the dispute to some 'district committee,' with, perhaps, a right of 'appeal' to an awe-inspiring 'general council.' How small are the chances of obtaining justice from such

a tribunal when the society's exchequer is involved only those who are familiar with their *modus operandi* can appreciate. Indeed, the good old legal maxim, '*Nemo debet esse iudex in propria sua causa*,' is habitually outraged with impunity. So that what the Legislature intended as a boon for the special benefit of the working man is very often a curse and a means of perpetrating gross injustice — a striking illustration of the old adage, 'Save me from my friends.' A loophole for escape was, indeed, the other day opened by a robust decision of a strong divisional court, who held that if the society's tribunal did not proceed in accordance with the rules of natural justice their 'decision' was no decision and accordingly the county court became available to the injured party. (*Bache v. Bellingham*, 69 L. T. 322). Unhappily—though I say it with all respect—the court of appeal, whither the society lost no time in taking so damaging a decision, could not see it in the same light, holding that even had the committee been guilty of misconduct in arriving at their decision, it was, nevertheless, a 'decision,' and could not be treated as a nullity for the purpose of giving jurisdiction to the county court. (L. R. (1894) 1 Q. B. 107). I do not scruple to assert that not one in a hundred members of the innumerable friendly and industrial societies which lie scattered up and down the country dreams, until it is too late that Parliament, in the garb of dear old grandmother, has closed to him the courts of the land and left him — very often — to the tender mercies of the very persons who have got to pay, if any paying has to be done. Shade of illustrious Coke! But in order to carry out my determination to treat my subject impartially, I am compelled now to advert to the only instance in which I would admit there is, to-day, justification for the reproach that the law is a respecter of persons. But, even in this case, there is no question of one law for the rich and another for the poor; there is a legal remedy provided for a grievous wrong, but the remedy is impossible for the poor man, because the only mode by which it can be made available is quite beyond his pocket. I refer to the law of divorce. Human nature is human nature, whether its representative be clothed in purple or rags, and the rich have no monopoly of the privilege of breaking the seventh commandment—though I regret to say, as things are at present, our law gives them a monopoly of the remedy. Fortunately, the moral standard of the working classes, at least when subject to the restraint of marriage, is, speaking generally, higher than that which prevails amongst the idle rich. And for this there are several obvious reasons. But, be that as it may, I have had frequent opportunities of painfully learning — and I am sure most of you will bear me out from your own experience — the appalling injustice

inflicted upon the poor by their inability to divorce an unfaithful partner. Whether the home that is shattered is a cottage or a mansion makes no difference so far as regards the bitterness of the cup which the innocent party has to drain—indeed, the moral ruin is, perhaps, more disastrous in the poor home, because the hardships it entails on the innocent party cannot be escaped from. There is a notion—I have heard it myself—that divorce is a luxury, and, like other luxuries, is necessarily lost to the working man, and that, moreover, he does not feel the same urgent necessity for getting rid of a faithless partner as he does for having a ready means of recovering his wages. But, in accordance with the best traditions of our law, we are bound to provide a remedy for every wrong. And here is the most grievous wrong of which human nature is capable—a wrong productive of consequences more permanent and far-reaching than any other wrong with which I am acquainted—a wrong that eats into the very vitals of the State, and paralyzes the energies of those who are the immediate sufferers; and yet to a large majority of English people it is a wrong practically without a remedy, because that remedy is so utterly inaccessible. It is idle to say that, if we cheapened divorce, we should be immediately inundated with such a flood of cases that the courts would be blocked. This very suggestion shows how fearful we are of learning the truth—i. e., that there are hundreds of innocent persons patiently enduring this most iniquitous wrong, because they cannot afford the remedy. I am not one of those who would enlarge the grounds upon which a divorce can be obtained; by no means enlarge the remedy, but by all means bring it within the reach of those who deserve it. How, then, can it be so brought within reach? The answer is plain and irresistible—through the instrumentality of the county court, that court which has acquitted itself with such signal success in every direction in which it has yet been tried, and which, as I have endeavored to show, has earned the confidence and respect of the whole country. Surely and steadily, year by year, have the merits of this tribunal become recognized, and Parliament has not been slow to observe the signs of the times—viz: that it is the only tribunal which is really popular, because it is the only one whose justice fulfils the triple ideal set forth in Magna Charta of accessibility, economy and despatch. If the law is to be saved from the stigma of being inaccessible to the poor man—a stigma than which there is none more dangerous to the State—there must be placed within his reach all the remedies that are within reach of the rich man, and the State fails in its duty to its citizens if it gives any countenance to the belief that legal re-

dress is a luxury. The county court already has a limited jurisdiction in probate and admiralty which it has discharged with credit to the country. Let it be intrusted with a limited jurisdiction in divorce, say, upon affidavit of the injured party that his or (if it is the wife) her husband's income does not exceed £3 a week. The evil is undeniable, the necessity of relief even the Old Book itself concedes. What readier or more satisfactory solution of the difficulty could be desired than to confer upon county court judges the powers of the president of the divorce division within some such limits as I have suggested? In order to make the suggested remedy effectual there is, however, one feature of the high court divorce practice which would require modification. As matters stand a husband has to pay for the defence of his wife, whether she be innocent or guilty. I do not, of course, object to the law taking care an innocent wife should not be hampered in establishing her innocence by want of funds. But it is surely a monstrous shame that this law should enable a guilty woman to put forward an entirely vexatious defence for no other reason than the pleasure of adding to her unfortunate husband's misery an appalling bill of costs. This would never do in the County Court. It would be easy to compel the wife as a condition of being allowed to defend to declare her merits in a preliminary affidavit, though of course when such an affidavit was not forthcoming the court would have to be on the alert against connivance. It may be said that this is not one of those 'reforms' which are insisted upon by those who advocate the cause of the working man. My reply is, that the time of the professional reformer is so entirely absorbed in the pursuit of the illusory 'living wage,' and the various phases of the eternal warfare between capital and labour, that he overlooks domestic needs, including the fact that the working man has a heart as well as a stomach, and that his wretched home may sometimes be more due to an errant partner than to the want of a 'living wage.' History and experience have taught us that the worst enemy of the State is a system of unequal laws—laws which handicap the poor man in asserting and maintaining his right against another's might. Discontent is always smouldering, and, as the professional agitator well knows, very little stirring sets it ablaze. Our law fortunately learned long since that the finest safety-valve for discontent is the right of public meeting and free speech. There are many less profitable occupations for the young constitutionalist—and such, I take it, every lawyer ought to be—than occasionally going out of his way to hear the views of his country's law expressed by the poor man under circumstances where he is able to address his fellows with perfect freedom. The oratory may be



occasionally turgid, the orator unjust, but the result offers plenty of food for reflection to those who desire that the law should have the implicit confidence of the people. It is because on such occasions I have observed that the charge which is most frequently made and most bitterly resented is that which heads my paper—because I think it is a charge that is misapprehended, and is to-day undeserved—and because I think the part silently played by the County Court in its refutation and in the evolution of the working classes generally has not received the merit it deserves, that I determined to offer these few remarks. Finally, my thoughts revert once more to those ever-memorable words of the great Sir Edward Coke, in which he so eloquently reminds us that the aim of our law is to secure to every subject “justice and right for the injury done him freely without sale, fully without denial, speedily without delay.” Although it is 300 years since these words were uttered, can anyone improve upon them as an ideal conception of what law ought to secure? What we as lawyers have to do is to take this conception of Coke’s, and breathe into it the breath of life, so that it may cease to be merely the dry bones of a stillborn ideal, and become the living substance of an accomplished end. *Finis coronat opus!*

#### NATIONS AS CLIENTS.

THE following account of the growth of international arbitration was recently given by Dr. Benj. F. Trueblood: “The first real cases of international arbitration were between this country and Great Britain less than a century ago. These were provided for by the Jay treaty of 1794. From 1816 to the present time there has been an average, through the whole seventy-nine years, of one important case of arbitration per year. Only four or five of these are known to most people, for one war makes more noise than a hundred arbitrations, and costs more than a thousand. Only recently the President of the United States, as arbitrator, settled a difficulty between Brazil and the Argentine republic involving a territory of thirty thousand square miles, and the papers of this country had, perhaps, two inches notice of it! In the last twenty years these cases have occurred at the rate of two or three a year. They have covered questions of boundary, of insult to the flag, of property, of personal injury—every question, in fact, with which nations have to do except the one question of the actual existence of the national life. In every case the difficulty has been settled for all time, and no war has grown out of any of them. Our country has settled more than forty of these difficulties. During this period of eighty years we have had three wars

with foreign nations, lasting altogether only four years and a half. We have been literally the peace nation of the world. Great Britain has settled about a dozen in the same period, and all the nations of Europe have had from one to seven cases. Japan and China have, in this way, settled difficulties; all the South American republics except two, and two of the Central American republics, have done the same. What it is proposed to do is to crystallize into law what is the general practice of this nation to-day, and, to a considerable extent, the practice of our nations.

“We shall find another interesting subject of discussion in the proposed establishment of a great international tribunal of arbitration, which shall be to the nations of the world what the United States Supreme Court is to the States of this republic.”

#### HABITUAL CRIMINALS.

SOME little interest has been aroused this week by newspaper accounts of the arrest of a man, alleged to be “well known to the police,” who was merely “loafing along the street” at a point below Liberty street, in this city. The prisoner was discharged when taken before a magistrate, and the episode has served to call attention to a custom, said to have formerly obtained among the police, of arbitrarily arresting, without a warrant, and although no suspicious acts had been observed, ex-convicts found in the neighborhood of Wall street. The custom, if it ever existed, was, of course, illegal. Even in order to have the status of habitual criminal imposed upon a person, he must have been expressly adjudged one upon at least a second conviction of a penal offense, and in addition to or instead of other punishment. (Code of Criminal Procedure, § 510.) Certain arbitrary powers of arrest without warrant are conferred as to habitual criminals, but they apply only to formally adjudicated habitual criminals, and not to persons who merely, as matter of fact, are ex-convicts or the constant associates of criminals.

It would, however, be exceedingly difficult for a man of bad record, and who could not decisively show that he had reformed, to gain any substantial redress for such an infringement of his constitutional rights. And the incident serves to call attention afresh to the advisability of further developing the “habitual criminal” remedy, and of making use of it in its present form more frequently than has heretofore been done. A person was adjudged an habitual criminal in this city by Recorder Goff a few weeks ago, and such action attracted considerable comment because of its rarity. A statute is in force in

Ohio providing that every person convicted a third time of felony shall be sentenced to imprisonment for life. The enforcement of such law has been held constitutional by the Supreme Court of Ohio, where the first of the two previous convictions of the defendant occurred before the passage of the act. (*Blackburn v. State*, 36 N. E. R. 18.) We strongly approve of the policy of this statute. It gives more than a fair chance for reform. But, when a person has committed three felonies, it may properly be said that his criminal disposition is permanently fixed, and it is simple folly to go on turning him loose to prey anew on the community, and to waste public money in fresh trials and convictions. Somewhat the same result as that contemplated by the Ohio statute may be accomplished in our State under section 688 of the Penal Code, providing for sentences for increased terms upon convictions for second offenses. Under this section, Judge Fitzgerald wisely exercised his discretion last week to impose practically a life sentence on the fire-bug Shoenholse. We do not see why the law of New York should not be retained practically as it is to cover cases of second offenses, and the Ohio statute also borrowed in order to make a life sentence inevitably follow a third conviction of felony, no matter what the grade of the different offenses.

The criminal classes are apt to be quite prolific reproducers of their kind, and observation and statistics show that the criminal disposition is almost invariably transmitted to offspring. Of course environment has much to do with hardening the inherited nature, but the specific criminal heredity is often so potent that educational influences and moral surroundings during childhood are incapable of neutralizing it. The perpetual imprisonment of habitual criminals, besides protecting the present generation from their practically certain depredations, would quite materially diminish the quota of heredity criminals of the next generation.

It is altogether possible that the indefatigable efforts of modern Charity Organization, by making it more difficult to pick up a living by mendacity and begging, will drive considerable numbers of shiftless persons into positive crime. But we cannot say that the policy of Charity Organization is to be deprecated because of this incidental result. If the status of habitual criminal, with its penalties as above outlined, certainly await a convict, an additional deterrent from crime and an additional incentive to honest work will be offered. And, in the long run, society can probably deal with the hopelessly vicious as habitual criminals to better advantage than if they were permitted to go on unmolested in their impositions upon the benevolent. —*N. Y. Law Journal*.

## Abstracts of Recent Decisions.

### ASSIGNMENT FOR CREDITORS — PREFERENCES.—

Where an assignee was the cashier of a creditor bank, the insolvent's preference of an usurious claim to the bank will invalidate the deed of assignment. (*Hiller v. Ellis* [Miss.], 18 South. Rep. 95.)

**ATTACHMENT — DAMAGES.**—In an action for the wrongful attachment of property which the owner had sold, the value of the property, in estimating the measure of damages, is the price contracted for, though it is in excess of its market value. (*Curry v. Catlin* [Wash.], 41 Pac. Rep. 55.)

**CONFLICT OF LAWS — INSOLVENT CORPORATIONS — PREFERENCES.**—The fact that the laws of New York forbid preferences by insolvent corporations does not render void authority conferred in that State, by the board of directors of an insolvent corporation, organized under the laws of New York, but holding its entire property in Pennsylvania, on the corporation's president, to execute in Pennsylvania, a judgment note in favor of a creditor of the corporation. (*Appeal of Chautauqua County Nat. Bank* [Penn.], 32 Atl. Rep. 539.)

**COUNTY WARRANTS — LIMITATION — MISSOURI STATUTE.**—Rev. St. Mo. 1889, § 8195, providing that county warrants not presented for payment within five years of their date, or, being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within section 6791, providing that the limitation of ten years prescribed by section 6774 for action on any writing for the payment of money shall not extend to any action which shall be otherwise limited by any statute. (*Knox County v. Morton* [U. S. C. C. of App.], 68 Fed. Rep. 787.)

### DEED—TITLE TO VEST AFTER GRANTOR'S DEATH.

—An instrument from a father to his children, which is in form an absolute deed, and executed as such, but not attested as a will is required to be, which contains the clause "provided always, and it is expressly understood and agreed, that this conveyance is not to take effect till after my death, and that, at my death the title to the foregoing lands are to vest immediately in my said children," will be construed as a deed reserving a life estate to the grantor, where it was delivered when executed, and the grantor lived on the land with the grantees till his death, without attempting to make any other disposition of the land. (*Abuey v. Moore* [Ala.], 18 South. Rep. 60.)

### Correspondence.

#### SPECIAL VERDICTS IN INDIANA UNDER A NEW STATUTE.

*To the Editor of the Albany Law Journal:*

The General Assembly of the State of Indiana, at the session of 1895, made a radical change of the law as to special verdicts. This law has come before the courts for the first time at the Fall sittings. It is as follows:

"That in all cases tried by the jury, the court shall, at the request of either party, in writing, made before the introduction of any evidence, direct such jury to return a special verdict upon any or all of the issues of such case. Such special verdict shall be prepared by the counsel on either side of such cause and submitted to the court, and be subject to change and modifications by the court. The same shall be in the form of interrogatories so framed that the jury will be required to find one single fact in answering each of such interrogatories; the jury, on retiring, shall take all the pleadings in the case, including the instructions of the court, if in writing, and the interrogatories as approved by the court, and shall answer each of the interrogatories submitted to them."

Under our former practice the courts were required to order the jury to render a special or a general verdict at the request of either party. If a special verdict was required, the courts were required to order the jury to answer special interrogatories on the request of either party. If the general verdict was not in harmony with the answers to the interrogatories, judgment might be rendered upon the answers to the interrogatories and against the party in whose favor the general verdict was rendered.

This law repeals the law allowing special interrogatories to be propounded, and the only form we now have is the general verdict, or special verdict prepared according to the above statute. Each of the Superior Courts and the Circuit Court of this county has had special verdicts rendered under this statute, and the change from the old practice is thought to be very satisfactory, especially in cases where a jury might be more affected by sympathy than by the facts proved.

The practice under this new statute is, after proper request by either party, for counsel on each side to prepare a special verdict in the form of interrogatories. The court takes these forms as prepared and has a new draft made embodying anything pertinent in either form submitted, and adding any other interrogatory that seems to be necessary for a finding upon all of the facts. This is submitted to the jury as coming from the court, and they have no intimation as to which side prepared any particular interrogatory. The conclusion

of the verdict is in the usual form that if, upon the above findings, the law is with the plaintiff, then we find for the plaintiff and assess his damages at — dollars; and if the law is for the defendant, we find for the defendant.

So vital a change in the form of special verdicts cannot but attract the attention of the profession at large, and if it should prove satisfactory, other States may be inclined to profit by the example.

JOHN A. FINCH.

INDIANAPOLIS, Oct. 2, 1895.

### New Books and New Editions.

THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY. By George S. Boutwell.

A long experience as legislator and as a legal practitioner has given the author of this work a familiarity with the Constitution of the United States which renders him unusually well fitted to prepare such a work as this. The book is prepared in a way which is almost novel to members of the legal profession, and may be considered not only a treatise but also a text-book on this most important subject. Its value, however, extends largely beyond that which a text-book ordinarily possesses. Its preparation shows careful and conscientious work, aided by great experience and unusual ability. The work is divided into sixty-four chapters, which at first seem to be too many in a work of only 400 pages, but the convenience of the subdivisions is apparent after a careful examination. The work begins with the Declaration of Independence, and subsequently the Constitution of the United States is published with annotations. We consider, perhaps, the most valuable part of this work to be the analytical index of the Constitution of the United States, which occupies sixty pages of the volume. Few persons who have not carefully studied the Constitution appreciate the immense amount of material which is contained within the few pages, and the index to which we refer strengthens the opinion which we have had of the immensity of the Constitution. We consider that this index alone will give lawyers a more easy means of referring to the Constitution than anything we have ever seen before. The decisions of the Supreme Court on constitutional questions are cited under the sections to which the decisions relate, and the leading decisions appear with a careful examination of their scope and meaning, while the lines between State sovereignty and the national government are distinctly marked. The development of the Constitution from the colonial charters is ably demonstrated; in short, the whole work is a most complete and comprehensive book on the subject. The arrangement of the work is most appropriate, and we are especially pleased with the way in which each section of the Constitution has a chapter devoted to its explanation, origin and development. It is bound in cloth and in a convenient form for use.

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# The Albany Law Journal.

ALBANY, NOVEMBER 9, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

AT the recent meeting of the Alabama State Bar Association, H. C. Tompkins, Esq., offered several interesting suggestions in regard to changes which might be made in the statute law of the State in order to make it conform more properly to the laws of the United States and of the different States. Mr. Tompkins showed that at present the law in Alabama was that a person who took negotiable paper as collateral security for a pre-existing debt without any new consideration is not a *bona fide* purchaser for value. The same principle is recognized in New York State, and Mr. Tompkins showed how the law was practically over-ruled on account of the different holdings in the United States courts. A few remarks can demonstrate the necessity of uniformity of laws in the States and the United States, and there was an evident feeling at the meeting that some action should be taken in this direction. Just before the close of the session of the Association this desire was put in a practical form by the introduction of a resolution to promote uniformity in the existing laws on the subjects of marriage and divorce, the form of notarial certificates, the descent and distribution of estates of decedents, acknowledgments of deeds, execution and other subjects relating to the domestic relation, and the transaction of business. It was also determined that commissioners should be appointed to promote such uniformity and to act in conjunction with like commissioners who have been or may be appointed by other States. It is with great pleasure that we regard this increasing desire on the part of active members of the bar to further the ends of this most important reform. Mr. Tompkins said in part:

There is another matter that I would like to call to the attention of the Committee on Legislation, it is a matter that I have thought a great deal about, and read an article before the

American Bar Association in 1890 at Saratoga, and that is the necessity of having some legislation governing and regulating commercial paper, so as to get somewhat of a uniformity. We all know that under the decisions of Alabama a person who takes negotiable paper as collateral security for pre-existing debt, with no new consideration, is not a *bona fide* purchaser for value; that is also the law in New York. In 1880, I think it was, a railroad company made a note, and all its directors endorsed it, and turned it over to an agent to negotiate that note for the purpose of raising money for the benefit of the railroad company; the agent took that note and carried it to his bank, and as he owed that bank an overdraft he deposited it with that bank as a collateral security for his overdraft. Subsequently the bill matured, it was not paid, the bank instituted suits in the courts for the money against the endorsers on that paper, the case went to the Court of Appeals of New York, and that court held that as this bank was not a *bona fide* purchaser for value, that, therefore, there could be no recovery. At that time the laws of the United States allowed a bank to bring a suit in the courts of the United States regardless of the residence of the parties. The bank brought suit in the Circuit Court of the United States for the southern district of New York; they got a judgment for the amount, and that case went to the Supreme Court, and the Supreme Court held that a party taking paper of that sort was a *bona fide* purchaser for value, and that the railroad company was liable. They had not sued the railroad company in the first suit. Now, a man can make a note in Alabama, an accommodation paper, it can be deposited by a mere depositor who has endorsed it as collateral security for his pre-existing debt, bring a suit in the courts of Alabama, the bank or party taking it cannot recover, but if he happens to live in Georgia and he can make it convenient to stop in Columbus and live months enough to be considered a resident, and bring suit in the courts of the United States he can recover. Again, we have what we call irregular endorsements. I make my note to you promising to pay you so much money by a certain date; I procure my friend Col. Hargrove to endorse that note — what we call an irregular endorsement under the laws of

Alabama—that note is subject to all the rules governing any other commercial paper or bills of exchange—there must be a protest or notice of non-payment, he cannot be charged unless there is protest or notice, but if the party who holds the note was to move out of the State of Alabama, and bring suit in the United States Court, the result would be that Col. Hargrove would be charged as a maker, not as an endorser, and no protest necessary. These various views of the law are held by the different courts. There are very few courts that hold with the Alabama court. New York and some few other states are the only states that hold with Alabama if they are deposited as collateral for pre-existing debt. I move as an amendment that the Committee on Legislation take into consideration and report on the feasibility of legislation to procure uniformity of commercial law, and the law governing commercial paper.

At the same meeting of the Alabama State Bar Association, the annual address was delivered by Samuel M. Meek, Esq., who made some excellent suggestions in regard to the reform which might be instituted by the bar. The subject of the address was the Power and Influence of the Bar. There were many thoughtful lines in this address and part of it runs as follows:

“Every enlightened and candid lawyer must concede that the character of the bar is not what it ought to be. It is a fact, that a large number of people in every community, and many of them people of great intelligence, regard a lawyer not only as a trickster, but as a fellow who in the practice of their vocation will speak without any regard to the truth, and will do anything short of a violation of a positive criminal law. Of course the people make exceptions of some members of the bar. But such is certainly the opinion of a great many citizens of every community in regard to many, perhaps a majority of the members of the bar. Now, the question is, is there any just foundation for this opinion? Do any considerable number of lawyers, by their habitual practice and conduct, afford just ground for this opinion, and thus, so far as their examples go, fix upon the bar generally this stigma? I am afraid that every candid lawyer would have to admit that

the imputation finds much to warrant it in the conduct and practice of many members of the bar. Is it not a fact that many members of the bar do not, in the pursuit of their profession, consider themselves at all subject to be controlled by the ordinary rules of morality? And do they not habitually in their dealings and practice as professional men set at naught the plain rules of right and duty? Do they not frequently practice falsehood and deceit to ensnare the unwary and to compass their ends?

“And to what are we to ascribe this departure by many members of the bar from the path of rectitude? Must we not ascribe it, in many cases, to the defective methods of legal education? The great point with many young men is *to get to the bar*—to procure license to practice law,—which very many do without the necessary preliminary study and preparation; and entering the profession without any just conception of its true nature and proper functions, and regarding it as merely a position to enable them to get money, by any available means and methods, they wholly disregard that high moral standard which is the basis of all professional character and excellence.

“Surely every candid lawyer must say that the bar needs reform—that the unworthy members ought to be cast out, and that only those possessing the proper qualifications and character and learning should be allowed to enter or remain in its ranks.

“Nor, in this matter of reform, ought the bench to be overlooked—that needs reform too. A seat on the bench ought to be the crowning final of an honorable career at the bar—the fitting reward of ripe professional experience and untarnished integrity and unsullied honor. Indeed, in proportion as the bench is elevated, the character of the bar will be raised, and unworthy persons will not easily find places in its ranks.

“The law is practically what the bench and bar make it. If the bench be learned and upright and dignified, and if the standard of the bar be elevated and lofty—if its members esteem it as their first and highest duty to advance truth and justice, then the law will be what it ought to be—will be in practice what it is in theory—a great system of rules and principles for the vindication of right and the

administration of justice among men — the highest of human functions.

"You know that even religion itself is practically, in a great measure, only what its priests and ministers make it. If these, instead of being enlightened in mind and upright in character, and pure and holy in life, be ignorant and vicious, then religion will degenerate into a miserable superstition, and instead of elevating and purifying its votaries, will only degrade and debase them."

These views, so well expressed by this able lawyer and distinguished jurist, the reflecting mind I think will admit, to a great extent, to be true. That there are bad and unprincipled men members of our noble profession—some of them, too, deeply learned in its scientific principles, and men of high intellectual attainments, for none of us are faultless—all of us will admit. When admitted, they, perhaps, had the necessary attainments, both in learning and morals, but belonging to a fallen and falling race, the temptations of the flesh overcame them and they fell! Peter and Judas, when they first attained the companionship of the Savior of mankind, were thought to be worthy, but the weaknesses of poor human nature they were unable to shake off; there moral structure being weak, in an evil moment the one denied Him and the other betrayed Him. I do not mention these instances as a justification, but simply to show that the paths trodden by poor fallen humanity are "devious and winding," and that it requires the utmost caution and the most constant watchfulness to keep all things straight. Hence, while we are forced to admit that there are bad and reckless and unprincipled men in our profession, yet I most emphatically deny that in its ranks immorality more frequently exists than in the other various avocations of life. The science of the law is a physical science, and has its foundations in reasons and justice. Its ethical standard to-day is as elevated and pure as in any previous period of the world's history. The law has often been made an engine of oppression, and the great and learned Coke and the justly abused and notorious Jeffrey are shining examples of the methods pursued in their days. The most illustrious example of judicial blindness and cruelty is to be found in the career of

Sir Matthew Hale, who, under the forms of law, executed devout and spiritually minded women, upon the charge of witchcraft.

Our profession, from the earliest times, has been subjected to the severest criticisms that ingenuity and malice could invent. The great Bard of Avon reveals the prevailing sentiment of his times, when he makes one of his characters in Henry VI exclaim:

"The first thing to do, let us kill all the lawyers."

The great, good and stainless John Marshall, while chief justice of the Supreme Court of the United States, was charged, while in a fit of passion, from which none of us are exempt, by no less a personage than the immortal Thomas Jefferson, with having prostituted his high office and stained the judicial ermine for sordid purposes, and he pronounced him unfit to occupy the high office which for so great a time he adorned. With all these brilliant examples before us, and knowing as we all do, the gross injustice to which our profession, *as a profession*, has been subjected, we can only move onward in the thorny path before us with a firm tread, undismayed and unchecked by the howlings of prejudice and the shafts of passion. To the unthinking, ignorant and howling multitude, if their ravings are noticed at all, we proudly point to the names that decorate the sky of our profession and crowd its ranks in the daily pursuit of their high vocation, and to the illustrious men who wear the judicial ermine of the various States and of the Supreme Court of the United States — which for more than a century "has blazed the way through the unexplored forest of a Republican form of government" — have preserved the judicial ermine from soil or corruption, and commanded the respect and admiration of mankind. We must look above and beyond these base reflections.

"For 'tis a base, ignoble mind,

That mounts no higher than a bird can soar."

The times in which we live are crowded with great and ever-varying events, and it demands all the bold energies of fearless manhood to meet and control them.

This Alabama of yours, in which as one of her sons I feel so much pride, in all the elements which constitute a great and noble State—in fertility of soil, in salubrity of climate,

in beauty of scenery, in mineral wealth and agricultural resources, in manhood and womanhood—stands proudly pre-eminent in the sisterhood of American States. And it is with pride and pleasure that I can say that your bar, *as a bar*, for all the elements which adorn and dignify professional life—for learning, integrity, devotion to duty, fearless manhood and unflinching moral worth, occupies an envious position—second to none, not even of the older States of the American Union. Your judiciary have ever been pure, elevating and ennobling, setting worthy examples for the younger members of the profession. Your Supreme Court has been adorned and dignified by many of the most eminent jurists who ever sat upon the American Bench, and to-day, be it said to her credit, the judicial utterances and opinions of the Supreme Court of Alabama are sought for with avidity by the members of the profession throughout the entire South. This is the position of your judiciary to-day, and while it perhaps would not be proper to say more than this of your living judiciary, I cannot refrain from referring to a few of the great names of the past, whose illustrious example is worthy of all imitation, and whose works and deeds have covered them with a renown which will live as long as learning is appreciated and virtue adored. What Alabama lawyer does not look with admiration upon the names of Abner S. Liscomb, who for fifteen years was a judge of your Supreme Court, eleven years Chief-Justice, and afterwards, after his removal to Texas, was elevated to the Supreme bench of that State—of Collier and Ormond and Goldthwaite; of Dargan and Clay and Hitchcock, of Chilton and Peck and Stone, and others too numerous to mention? These names, gentlemen, shed a lustre over your State, and give a dignity to your bar which not even the tooth of time can eradicate.

We publish in this issue of the LAW JOURNAL a letter from John A. Finch, Esq., of Indianapolis, on special verdicts under a new statute in Indiana. The value of such practice, it is evident, is great where prejudice may enter into the decision of a jury and the practice is rather simple, though we can appreciate that the interrogatories by counsel to the court for its consideration might be multitudi-

nous, which is the only unfortunate possibility we can see in the system. It remains to be seen how many States will follow the statute which has been adopted by Indiana.

There has been so much opportunity within the last year to discuss the principles of the Monroe doctrine, and it is a subject which demands careful consideration and calm judgment from lawyers of this country, and which can be only properly carried out by a complete and perfect acquaintance with the principles which it involves, that we publish almost in entirety the article in the *Nation* of Oct. 31st on the Monroe Doctrine. The article is as follows:

“But being now requested to cover the whole ground, we answer frankly to the first question, that, in our opinion, we should ‘remonstrate or interfere in the proceedings taken by powers other than American with American nations on this continent other than our own,’ in all cases arising under the Monroe doctrine? What is the Monroe doctrine? Here it is, taken textually from President Monroe’s message:

“‘We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power, we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States. \* \* \*

But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form,

with indifference.' (Message of December 2, 1823.)

Consequently, if any European power should seek to set up or impose on the people of any South American state, by force of arms, any government or form of government which the people did not demand or were opposed to, or should seek to "oppress them or control their destiny" in any manner, we should hold it to be the duty of our government to repel by as much force as might be necessary any such attempt. The invasion of Mexico by the French was an attempt of this order, and Mr. Seward acted properly in giving them peremptory notice to quit as soon as we had forces available to compel compliance. This is an answer to questions 1 and 2.

The third question, apropos of the Venezuelan trouble, requires more extended treatment. England is already a neighbor of Venezuela, and holds conterminous territory by a title which nobody denies. The frontier runs for a long distance through a tropical wilderness. There have, for this reason, been disputes of long standing over the exact line, as there are between nearly all Spanish-American States. They are aggravated in this case by the fact that this wilderness is a gold country. All this raises the strong probability either that neither side is quite right, or that the truth of the matter is hard to get at. The Venezuelans are no more moral than the British, and no less greedy, and if we acknowledge the right of Great Britain to hold territory on this continent, we must acknowledge her right to protect that territory against invasion or appropriation. We cannot ask her to consider herself in the wrong because she is the more powerful, or confess that weakness, any more than might makes right, because we should never think of applying such a rule to ourselves. We have always, in all disputes with these little South American States, imposed on them our own view of the justice of the case. Witness our treatment of Chili in 1892.

The dispute is in part historical, in part topographical; or, in other words, one to be settled by lawyers and surveyors, not by big guns. It has been so treated by all our diplomats, and is so treated still, and the ascertainment of the facts is an essential preliminary

to all judgment on the affair. A person who writes on it as Senator Lodge does in the magazines, or as the young men in the *Tribune* office do, with hardly any knowledge of these facts, is as ridiculous as your lawyer would be if, the minute you employed him on a difficult real estate litigation, and before he had looked at your papers and proofs, he began to make it hot for your adversary in the newspapers by calling him a notorious robber and defrauder of widows. All this sound and fury, besides making us a ludicrous spectacle as a nation, seriously embarrasses our officials who are charged with the duty of deciding what part we shall take in foreign disputes, and who have all the available and most correct information about it on their tables. Whatever their faults and shortcomings, they are our chosen and accredited representatives, and the business of deriding them because they do not take a hand in other people's quarrels should begin only after they have publicly revealed their folly or stupidity.

As to our duty in such quarrels, neither the Monroe doctrine nor any other doctrine known among civilized men gives us the right to protect the South American States against the natural consequences of their own insolence and folly. If they quarrel with a bigger power, rob its subjects, or assault and insult its representatives, they must take the consequences, which are usually a fine, with some sort of security till it is paid. There are eighteen Spanish-American States, with a population of about 50,000,000. Not one of them has ever exhibited the slightest desire to accept our influence or control except when it got into a row with some European power. They are independent sovereign States, *de facto* and *de jure*. We are in no way responsible for them, and our policy towards them has always been marked by a little dislike and a good deal of contempt, so that the notion that we are injured or insulted if anybody makes them pay their debts or indemnify people whom they have robbed or outraged, is worthy only of schoolboys who want to see a naval battle or read about it.

Whether Great Britain is proposing or "trying wrongfully to take and hold a large share of Venezuelan territory and hold it permanently



as England's own" is something which we do not know, and we do not know anybody in the United States who does know. There cannot be less trustworthy witnesses on this subject than the Jingoists and the young newspaper men. Not only do they not know the truth, but they do not want to know it, if it is favorable to England. And we shall never make beneficent or rational contributions to international law until this presumption against England gets out of the heads of people who write or think on this class of questions. To a great many Americans "abroad" or "foreign powers" always means England, and England is a monster who is always trying to seize more territory. When these publicists want to annex something, they always declare that England wants it too, and sit down and wait for the appearance of the British fleet. This is funny, but it disturbs the judgment, and makes a great deal of our talk on international affairs sound irrational. England is very much like other nations except in having a larger fleet. This superstition causes, too, a widespread but comic popular belief that anybody who opposes any bit of aggression or fanfaronade on our part, is either in the pay of Great Britain or is secretly working for her interest and aggrandizement, and he is, therefore, not listened to. This, together with the boyish eagerness for a big fighting force, like a fleet, that will not entail risk or inconvenience to people on shore, is rapidly causing us the loss of the great place in the international forum which we occupied in the beginning of the century, and which the founders of the government thought we would solidify and improve as we grew stronger. We need more men in public life, in the press, who seek national greatness in the sphere of mind and law, and resist the popular longing for more bloody corpses, desolated towns and the general "hell of death and destruction," called war.

At the circuit term of the Supreme Court in Ithaca, Judge Walter Smith in granting a non-suit recently made the following decision which is on the face of it most important. The action was a suit for damages brought by one Ludlow against the Groton Bridge Company. The plaintiff was injured while in the employ of the bridge company. The foreman of the

shop, who, it is claimed, was negligent and caused the plaintiff to sustain a broken leg, was a Mr. Hemmingway. In the decision, Judge Smith says:

"Gentlemen, I have taken some pains to examine this question. There is a case where a foreman had charge of removing a hatchway. He had the sole right to employ and discharge men. The hatchway could be safely removed only by two or three persons acting together. The foreman ordered one person to remove the hatchway and although he was foreman in charge of the work his act was held to be the act of a fellow servant.

"There is another case where there had been some blasting of rocks, and a foreman was in charge of the blasting, and one of the fuses did not go off, and the foreman directed his men to proceed, nevertheless to work near where this fuse was. Afterwards the fuse did go off and injured the parties. Although they were working directly under the charge of the foreman and he had the sole charge of the work, it was held that where the place was rendered unsafe by the negligent act of a fellow servant, that that was not the act of the master for which he could be held responsible; and it was held that the foreman was a fellow servant.

There is another case where a foreman who had charge of men and of placing them and directing them, had put a man under an embankment to work, which embankment was unsafe, and which the foreman had reason to believe was unsafe because it had been made unsafe by the acts of the foreman himself; and it was held that notwithstanding the act of the foreman, and his having charge of the location of the men, and its being the duty of the master to furnish a safe place to work, his act was not the act of the master, but was the act of a fellow servant. The later cases have all established the rule that it matters not what may be the position of the servant, whether high or low, whether a foreman or a mere day laborer, that his act is not to be judged by the position as representing the master or representing a co-servant; but whether he be the master or a co-servant, whether he be the *alter ego* of the master or a co-servant, is to be determined purely by the acts done. So far as furnishing safe apparatus is concerned, the act of the humblest mechanic who furnishes the apparatus

is the act of the master. In the Cortland case, the engine had become unsafe, and it required to be repaired and a mechanic was employed to repair it; and his negligence is held there to be the negligence of the master because it was in the performance of a duty which the masters owed, and that duty was to furnish safe machinery and a safe place to work.

It has become settled, however, now, that if a master has furnished competent servants and safe machinery, that the use of that machinery, however negligent, and by whomsoever used, is not attributable to the master. I think the same case practically establishes that. But whether it does or not, there are cases, and many cases, which hold that very conclusively. In this case the master had furnished two cars—two different kinds of cars or trucks; the high truck and the low truck. It does not appear why one was used in preference to the other. He had also furnished the proper stakes or side-bars to those trucks, but they were not used. It is impossible that a master himself can control the detail work of any corporation or any private business of any size. This injury arose from negligence which was connected with the detail work, and I am frank to say that while this morning I was in some doubt, from the examination I have made, my mind has been removed, and I think there is no possible question, and that this case cannot be sustained even if Mr. Hemmingway was negligent, which we will assume for the argument, for these cases hold that his negligence is not the negligence of the master, but is purely the negligence of a co-servant.

This is one of those unfortunate accidents which no one can be made to pay for, at least no employer. Whatever liability there may be on the part of Mr. Hemmingway to this man I do not discuss, but so far as the liability of this defendant to this plaintiff, I can find no such liability in the facts here proven. I assume that there is no proof in this case whatever to go to the jury upon the question of the competency of Mr. Hemmingway. I cannot see any proof that will make an issuable fact, and the motion for non-suit must, therefore, be granted.

The Supreme Court of Alabama in *Holbrook v. State*, 18 S. R. 109, held that where the de-

fendant was given property by the prosecuting witness to deliver at the latter's house, and defendant sold it, he might be convicted of larceny.

"The defendant was convicted of petit larceny. The evidence tended to show that the defendant was employed by one Wigginton to carry him from his home by conveyance to the depot, where he intended to board a train. Arriving at the depot, Wigginton left with the defendant a quilt, to be returned to his home, which the defendant agreed to do. The defendant carried the quilt to a store and traded it off for an amount much less than its value. The defendant requested the court to charge the jury that: 'If the jury believe from the evidence that the witness Wigginton delivered the quilt to the defendant, to be conveyed back to Wigginton's home, and that the quilt was received by the defendant for that purpose, and, after so receiving the quilt, the defendant conceived the intent and purpose to wrongfully dispose of it, he is not guilty as charged.' One of the difficulties in distinguishing between larceny and embezzlement consists in the fact that in larceny there must be a trespass, and a trespass is a wrong to the possession. A bare charge of or custody of goods which belong to another does not divest the possession of the owner. It has, therefore, been held that a servant or other person, having the mere custody of goods, may commit larceny of them (2 Bish. Cr. Law, §§ 823, 824, note; 2 East P. C., 565; 1 Brick. Dig., p. 482, § 487; 12 Am. & Eng. Enc. Law. 768). In *Oxford v. State* (33 Ala. 416, 418) it is said: 'It is a clear rule of law that, where a party has only the bare charge and custody of the goods of another, the legal possession remains in the owner; and the party in custody may be guilty of trespass and larceny in fraudulently converting the same to his own use.' In *Rosc. Cr. Ev.*, § 646, it is said: 'In order to render the offense larceny, where there is an appropriation by a servant, who is already in possession, it must appear that the goods were at the time in the constructive possession of the master. They will be considered in the constructive possession of the master if they have been once in the possession of the master, and have been delivered by the master to the servant. But if the goods or money have come

to the possession of the servant from a third person, and have never been in the hands of the master, they will not be considered to have been in the constructive possession of the master, for the purposes of larceny. \* \* \* 'The rule has never been doubted,' &c. In the case of *State v. Washington* (17 South. 546) we held that the statute (Code, § 3795) creating and defining embezzlement, did not, and was not intended to, convert that which was larceny at common law into statutory embezzlement. The general rule, that to constitute larceny the felonious intent must exist at the time of the 'taking and carrying away,' does not militate against the rule of constructive possession by the owner, the defendant having but the bare custody, received from the owner, and, having such bare custody, fraudulently converts the money or goods. We are of opinion, under the facts of the case, that the court did not err in refusing the charge requested."

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*

THE HECKER-JONES-JEWELL MILLING COMPANY relator and appellant v. EDWARD P. BARKER, JOHN WHEALEN and JOSEPH BLUMENTHAL, as Commissioners of Taxes and Assessments of the City of New York, respondents.

Appeal from orders entered at General Term, affirming the action of the Commissioners of Taxes and Assessments in assessing the personal property of the relator for the years 1893 and 1894.

Where there is some evidence to support the conclusion reached by the Commissioners of Taxes and Assessments, this court will not interfere.

It was made to appear by the record in the proceeding brought for 1893 that the company had assets at its home office enough to permit a deduction of all indebtedness asserted, and no indebtedness was claimed for the purchase of property in this State. The meaning of the words in chapter 37 of the Laws of 1855, "in any manner invested in business in this State," refers to property paid for and in the possession of the persons or associations doing business in this State or to such increase beyond any indebtedness incurred as may be established by competent proof upon the application to the Tax Commissioners.

The People *ex rel.* The Thurber-Whyland Company against the Tax Commissioners (page 11 N. Y. Reports, page 118) explained and distinguished.

Bowers & Sands (John M. Bowers of counsel) for the relator and appellant; Francis M. Scott (David J. Dean and James M. Ward of counsel) for the respondents.

PECKHAM, J.—The above relator obtained two writs of *certiorari* under chapter 269 of the Laws

of 1880, for the purpose of reviewing the action of the above defendants in assessing the relator for all sums invested in its business in this State in the years 1893 and 1894, a separate writ having issued for each assessment. The defendants were commissioners of taxes and composed the Board of Taxes and Assessments of the city and county of New York, and they made an assessment in each of the above years against the relator, which is a foreign corporation having money invested in this State, such assessment being based upon the provisions of the act, chapter 37 of the Laws of 1855, one section of which reads as follows: "All persons and associations doing business in the State of New York as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this State, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this State, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong." The relator disputes the validity of each assessment. The defendants, in 1893, assessed the relator at a certain sum, after deducting that portion of its indebtedness which they decided had been incurred in this State in the purchase of property herein, and in 1894 they made an assessment without deducting any of the indebtedness of the relator whatever. The relator claims that the defendants, in 1893, did not deduct all its indebtedness which had been incurred in the purchase of property within this State, and that if they had done so, there would have been no assessment made against it here. It also claims that the assessment of 1894, was void because of the refusal of the defendants to make any deduction whatever for any indebtedness. The reason for the difference in the two assessments is based by the defendants upon the decision of this court in *People ex rel. Thurber-Whyland Co. v. Barker et al.*, reported in 141 N. Y. 118.

That case was decided here subsequent to the assessment of 1893 and prior to that of 1894. The defendants were of opinion that the decision in question covered this case and obliged them to assess the relator without making any deduction for any indebtedness whatever even though such indebtedness or some portion thereof were incurred in the purchase of the assets in this State for which the assessment of 1894 was made.

Prior to the time for finally making the assessment for each of the two years 1893 and 1894 respectively, the relator rendered to the defendants a verified written statement of the condition of the company as of the second Monday of January in each of such years. The statement of 1893 shows that the total gross assets in all parts of the world

then belonging to the relator then amounted to \$4,615,326.07, and from that sum it was claimed should be deducted the amount assessed against it for its real estate, being \$451,300, and the sum of \$2,500,000 for bonds issued by it, and also \$2,567,000 for further indebtedness incurred by it in the course of its business, thus claiming a total of deduction for indebtedness (including the assessment for real estate, of \$5,518,300,) or almost a million of dollars of debts over assets, and reducing the assessment, of course, to nothing.

It does not appear that any receiver of the company has been appointed or applied for, or that any proceedings have been taken or were contemplated for the winding up of what, by these statements, would appear to be a hopelessly insolvent concern. The president of the company was examined in regard to the assessment of 1893, before the commissioners, and he testified that the company was organized August 27, 1892, less than seven months prior to the making of this statement. The president further testified that the nominal capital was \$5,000,000, \$2,000,000 of preferred and \$3,000,000 of common stock; that \$2,000 in cash were paid into the treasury for twenty shares of its capital stock at par, and that sum was paid out for corporation expenses. He was unable to state whether in issuing the stock at the time the company was organized it acquired anything beyond the tangible assets of the firm or parties whose property was purchased. The first meeting of the directors was held August 27, 1892, and at that meeting its bonds secured by mortgage were issued, and 820 of them, of \$1,000 each, were sold for cash at par, and the money brought into New York and deposited in the bank with which the company did business, and was subsequently used for the purchase of merchandise used by the company. The question was then asked of him: "And the rest of the capital stock and the balance of the bonds were issued in exchange for real and personal property?" and he answered "Yes."

From this statement of 1893, and from the examination of the president of the company, it appears that all but \$2,000 of its capital stock of \$5,000,000, and the \$2,500,000 of its bonds, had been issued in exchange for property, real and personal, between 27th day of August, 1893, and the second Monday of January, 1894, the cash for the \$820,000 of bonds issued having been used for the purchase of merchandise. Further than this, it appears that \$2,567,000 of further indebtedness had been incurred upon its notes for borrowed money, loans to it on collateral and on bills for merchandise. This would make about \$10,000,000 invested by the relator within this short period, and yet it makes a statement that its total gross assets existing on the second Monday of January, 1893, amounted to but

\$4,615,326.07. No explanation is vouchsafed for these seemingly most unfortunate investments. It might, perhaps, be thought there was a mistake in the record from which I have quoted, and that the stock had, in fact, never been issued to any such amount. The statement for 1894 would seem to show there was no mistake of that nature, for it is there stated that the entire share capital, except the twenty shares already spoken of, and the entire issue of bonds, except the 820 sold for cash, were exchanged for property. Ten millions of investments in five months, and at the end thereof less five millions left. In January, 1895, its relative condition was about the same; its gross assets had shrunk from \$4,615,326.07 to \$3,466,919, being considerably over a million of dollars, but its indebtedness was less by \$1,046,500.

And yet this (seemingly) insolvent corporation is paying interest on its bonded indebtedness and dividends upon its stock. These facts call for explanation. There is no doubt that the astute and able counsel for the city would have made the effort to obtain it had not the defendants proceeded upon the theory as to the tax of 1894 that the amount of indebtedness was in any aspect immaterial, and the amount of assets in this State was sufficient for an assessment for 1894, which would be fair if no deduction for indebtedness were allowed. As to the assessment for 1893, in which there was some allowance for indebtedness, the relator claims that the entire face value of three of the items entering into that assessment, viz., for machinery and tools, office furniture and horses and trucks, making a total of over \$800,000, should have been deducted in addition to the amount already allowed by the defendants for indebtedness incurred for the purchase of assets in this State. The decision of the defendants in this regard as to what amount of indebtedness was actually incurred in the purchase of the assets in this State in 1893 was made upon a question of fact, in regard to which the evidences on the part of the relator was by no means of that clear and convincing character which could leave no doubt as to the fact. The assessment itself depended also upon the different kinds of property making up the assets of the relator in this State, and it was not made at all plain as to what the real and true value of such assets was. We do not feel called upon to review and reverse the determination of the defendants as to the true amount for which the relator should be assessed for the year 1893. There was some evidence to support their determination, and that is sufficient for us. It is not plain that any erroneous theory of assessment was adopted.

The orders of the Special and General Terms will, therefore, as to that assessment, be affirmed.

We are now brought to the consideration of the assessment for 1894, founded upon the Thurber-Whyland Company case above referred to.

We think an erroneous use has been made of the decision of this court in that case, and that the assessment now before us for 1894 must be set aside. Upon another examination of the question, carried on by the defendants, commissioners, a more thorough investigation may be made, so far as it shall appear necessary, for an accurate assessment against the relator for all sums invested by it in this State.

The question is as to the true construction to be given those words of the statute which provide that all persons non-residents of the State and doing business herein "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this State," etc.

The case of the Thurber-Whyland Company held that a foreign company having assets in a foreign State could not invest some of its capital here and rightfully claim a deduction from such sum invested of all its indebtedness. That company admitted an investment here of at least \$750,000, and its total indebtedness was over \$1,200,000, consisting of open accounts and of bills payable. There was no claim set up as to the right specially to deduct the specific indebtedness arising upon the purchase of the very assets in New York in regard to which the assessment had been made. Very possibly language was used in that case in the course of the opinion which might be capable of a construction broader than was called for by the facts appearing in that record. If so, it would be but another illustration of the truth and importance of the principle which makes it necessary to construe the language used in judicial opinions strictly with reference to the facts which exist in the case which is decided. It was stated in that case that the Court was of opinion that the act did not contemplate the deduction of debts from the sum invested in this State by non-residents. As then applied, the language was appropriate, although it might well have been more definite and precise.

That company had assets at its home office enough to permit a reduction of all indebtedness asserted, and there was no claim that was argued that any of it had been incurred in the purchase of property in this State, which formed the basis of the assessment. Under such circumstances we held, and, as we think, properly held, that the place for the deduction of general indebtedness was the residence of the person or corporation, and that the sum invested here should not be diminished by a deduction of any part of such general indebtedness.

The question we are now to decide is, what is the sum invested in this State by a foreign corporation which purchases property here and pays cash for a

portion of it, and promises to pay the balance at some future day? This relator is engaged in the business of milling in this State.

Suppose it bought \$100,000 into this State and bought \$200,000 worth of wheat to be manufactured into flour, and paid for it with the \$100,000 in cash, and gave its notes for the balance, the ownership of the wheat passes to the relator by the purchase, and in that sense it can be said it owns wheat to the amount or value of \$200,000. Has it, however, under this statute, invested in this State any sum beyond the \$100,000 which it paid in cash for the wheat? Is its promise or liability to pay the other \$100,000, a sum invested in this State by it, and is it the same as cash for the purpose of taxation? Is the fact that the company has in its possession as ostensible owner the \$200,000 in value of wheat conclusive evidence that the company has invested that sum in its business in this State, when in truth it has paid a sum amounting to but half its value, and has promised to pay the balance at some future time? It seems to us there can be but one answer to these questions. The sum invested is the sum paid, and not the sum which is promised to be paid on a future occasion. It is true the purchaser has in its possession wheat to the value of \$200,000, but it cannot be said to have invested \$200,000 in the purchase of the wheat as long as it has in fact paid but one-half that sum and has simply promised to pay the other half at a future day.

No part of the value of the wheat is lost to taxation by this holding; neither is the sum which was brought into the State by the relator and invested in the wheat. The vendor of the wheat is taxed for the \$100,000 he has received as part payment for the same, and he is also taxed for the \$100,000 of notes he has received from the purchaser of the wheat on account of the balance due for the purchase money, and the relator is taxed the \$100,000 cash it has brought into the State and invested in this wheat, and there is thus an assessment of \$300,000 made between these two, the vender and the vendee of the wheat, and that is all the property that is then subject to taxation. To tax the full value of the wheat in the hands of the purchaser is, in reality, to tax the purchaser on its own indebtedness. Its promise to pay in the future the other \$100,000 is not a sum invested by it here until it has redeemed its promise and paid its notes. The transaction is, in truth, substantially the same, whether the payment has been secured by a chattel mortgage on the wheat or not, although, if the payment have been thus secured, the purchaser has not even obtained an unincumbered title to the wheat until the payment is made. And so long as the property purchased has not been paid for in full, then the amount still due upon it ought to be de-

ducted as not representing any sum invested by the purchaser in this State. Otherwise it is to say that the relator has invested a sum in this State by merely promising to do so at some future day. If after the purchase the wheat should appreciate, the whole of such appreciation would of course go toward swelling the amount invested by the relator in this State, and the contrary would be the case if it should depreciate; the indebtedness being a fixed quantity in both cases, it would not be altered or affected by either event.

The same thing would happen in case the relator purchased the wheat and paid nothing for it, but gave its notes even without a mortgage for the whole amount. In such case the relator could not be said to have invested any sum in its business, assuming, of course, that the wheat was worth no more than its purchase price. Instead of paying, it had simply promised to pay for it. The vendor in such case would be assessed on the notes he took for the price of the wheat instead of for the wheat itself and the relator would not be assessed at all. This would be right, because no more property had been created by the sale than existed before its consummation, and there would be an assessment levied for the full amount that had been levied before or which would have been levied if no sale had been made. The relator would not have invested any sum in its business until it paid something on its notes or until the property purchased had appreciated beyond the purchase price thereof. A gift of the property would be different. In that case while the relator would not have actually taken money or brought it into the State for investment and invested it in the property, yet it would have received the property as absolute owner with no outstanding liabilities to pay for it, and being in such case the owner of the property, it would answer the description of a sum invested in its business and thus be liable to assessment under the act.

This treatment of the question is not in fact to be regarded in the light of a strict deduction of debts from assets; it is construing the meaning of the statute determining what in reality is the sum invested by a non-resident individual or corporation under these circumstances, in the business in which he or it is engaged in this State. It is not adjusting the equities as spoken of in the *Thurber-Whyland* case, which we then held should be done at the place where the corporation was a resident. It is a different thing from ascertaining the general and gross assets of a non-resident to be found within the State, and from that sum deducting all its debts whenever and upon whatever cause incurred. The non-resident corporation investing a sum of money in this State is to be assessed for the full sum it invests here, although it may owe debts

enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result is no part of the sum it has invested in such purchase, and no assessment can be made which includes the amount of that indebtedness. But the stock which a corporation issues in payment for property is not a debt incurred by it. The scrip for the stock is merely a certificate to the holder to certify as to his interest in the property of the corporation, which interest is his share of the property that remains to it after the payment of all its debts.

Construing the statute as we do, it follows that the assessment of 1894 cannot stand. Upon a rehearing of the case by the assessors it will be most appropriate to endeavor to learn what kind of property was obtained in exchange for the stock, bonds and notes of the company amounting to ten millions of dollars; where it is situated, how much it is in fact worth or what has become of it and how it has to the extent claimed disappeared or shrunk in value. It is a case which indeed calls for rigid examination and investigation to learn, if possible, how a corporation seemingly by its prepared statements insolvent, can go on and pay interest on its mortgage debt, dividends on its stock and keep clear of all hostile steps from its other creditors.

Our conclusion is that the orders of the General and Special Terms in relation to the assessment of 1893 must be affirmed, with costs, and those in regard to the assessment of 1894 must be reversed, and the defendants directed to make a new assessment in conformity to the facts and to the views set forth in this opinion.

All concur.

#### INTEMPERANCE OF SPEECH BEFORE JURIES.

The case of *Holden v. Pennsylvania R. R. Co.* in the Supreme Court of Pennsylvania (32 Atl. Rep., 103) once more calls attention to the use of violent and irrelevant language in summing up a case, as a ground for reversal of a judgment. The action was for damages for personal injuries sustained through a railroad crossing accident. Plaintiffs' counsel in addressing the jury employed such expressions as "corruption," "death trap put there for the purpose of taking lives," "a fellow (one of defendant's witnesses) bumming around town," "a ghoul with a human face," "terrorizing witnesses who swear against them," "lying with the hope of being paid," "perjured, the tools of a company," "scoundrels." The Supreme Court assigns, as one of the errors for

reversal, the refusal of the trial judge to withdraw a juror because of such language, which it pronounced offensive and reprehensible, the same not being warranted by any evidence in the case. Whether an error of such character shall alone suffice for reversal is a question upon which different courts have not agreed. The better practice is for appellate courts in all cases to consider the circumstances disclosed by the particular record under review, and to order new trials only in the exercise of a wise discretion, and not unless fair presumptions arise that actual prejudice resulted. Such course has been taken in several cases in various tribunals during the past few years. A certain latitude of comment should be allowed counsel, and average intelligence should be taken for granted in the jury. We have read some judicial condemnations of the use of irrelevant and inflammatory remarks, which were sweeping enough to debar a lawyer from quoting the Bible or Shakspeare, or citing ancient history, or, indeed, alluding to any possible thing outside the record, for purposes of illustration.

Cases of this character should, however, impress upon the counsel the duty of self-restraint. In our judgment fully as many deserved verdicts are lost as unjust verdicts stolen through intemperate cant and abuse. If such style of speech do not actually provoke an adverse verdict, it is at least apt to cause a disagreement. A lawyer at *nisi prius* is necessarily something of a courtier. Of course he should not cajole or flatter any more than he should browbeat or bully. But it is one of his legitimate objects to produce a favorable personal impression of himself and his client on the jury; to inspire them with a friendly and sympathetic as well as respectful feeling.

Now, it is well recognized that reformers as a class are apt to be unpopular in their own generation. The future is the better for their lives and posterity does justice to their memory. But, even where reformers do not condemn particular individuals, but are impersonal in their assaults on existing institutions, a certain prejudice against them is apt to be engendered. They shock comfortable conservatism, and the average man has difficulty in eliminating the personal equation — of disabusing his mind of the notion that the reformer sets himself up to be as good as the ideal he advocates. When it comes to singling out and scourging individuals, the risk of unpopularity is greater. There will always be in many quarters a lurking sympathy for the under dog, no matter how justly he deserves all he gets, and a latent antagonism toward any man who assumes to act the censor and the judge. Intemperate denunciation will often produce a reaction in favor of the subject of attack, when a calmly argumentative arraignment would

have brought an audience into harmony with the speaker's sentiment as well as his opinions. These traits of our common Adamhood are overlooked by an advocate only at his client's peril. A counsel has no calling to discourse on the exceeding sinfulness of sin, or to accuse the opposite party of breaking all the Ten Commandments. A strong case can be won by soberly calling things by their right names, and we do not think that weak cases are often won by passionate and maudlin rhetoric.

In many of the decisions in which this subject has recently been discussed, the language complained of was absolutely maudlin — the mere cant of passionate vituperation. Counsel in the heat of oratory had flung out epithets as meaningless as the vulgar and obscene revilings of teamsters who get in each other's way on the street. Such language really signifies nothing more than that the speaker is beside himself. An Appellate Court should scrutinize the whole record carefully before deciding to reverse a judgment solely because the trial judge did not properly put a halter on a counsel's tongue. Undoubtedly a lawyer has no just cause of complaint if his own misconduct result in the overturning of a judgment in his favor. But the public may be put to needless expense by ordering a new trial of a case that has obviously been determined according to the merits. A trial judge, however, is always under a duty, both for preserving the dignity of the court and averting possible injustice, to restrain intemperate villification. And clients are very shortsighted who retain lawyers of ungovernable temper. We remember one case in which members of a jury, after rendering a verdict in the teeth of bitter invective, remarked to the successful counsel that regret was felt in the jury room because an additional award could not be given for defamation of character. — *New York Law Journal*.

#### NEGOTIABLE INSTRUMENTS AND THE DOCTRINE OF NEGLIGENCE.

THE judgments delivered by the Court of Appeal (Lord Esher, M. R., and Lopes and Rigby, L. J. J.) in *Scholfield v. Lord Londesborough*, 43 W. R. 331, reveal an important difference of opinion as to the liability of the acceptor of a bill of exchange to subsequent holders. The action was to recover £3,500 on a bill of exchange drawn by F. C. S. Sanders and accepted by the defendant, the plaintiff being the holder of the bill in good faith and for value. When the defendant accepted the bill it was a bill for £500 only, and afterward, before indorsement, it was fraudulently altered by the drawer into a bill for £3,500. The bill bore a

£2 stamp, sufficient to cover £4,000, and the drawer had made the alteration of the amount of the bill an easy matter by leaving suitable spaces in the body of the bill, where the amount was stated in words, and by leaving a space between the sign "£" and the figures "500" in the corner of the bill. The exact form of the bill, as drawn for acceptance, can be readily understood from the report. The plaintiff claimed to recover the whole £3,500 from the defendant, on the ground that the latter was estopped from alleging the alterations by reason of his negligence in accepting the bill in the form in which he accepted it, and on the bill stamp on which it was drawn.

To say that the defendant was estopped from setting up the alterations against the plaintiff is equivalent to saying that he owed a duty to the plaintiff, that by his negligent acceptance of the bill he had committed a breach of the duty, and that he was consequently liable to compensate the plaintiff. The case accordingly was treated as raising, first, the question whether the acceptor of a bill of exchange owes any duty to subsequent holders not to be negligent in respect of his acceptance of the bill. Assuming such duty to exist, there were the further questions whether the defendant had been in fact negligent, and whether the negligence was the proximate cause of the plaintiff's loss. Charles, J., answered the first question in the affirmative, but he held that there was in fact no negligence, and under section 64 (1) of the Bills of Exchange Act, 1882, he allowed the plaintiff to recover only £500, the amount of the bill when accepted. In the Court of Appeals Lord Esher and Rigby, L. J., answered all three questions in the negative. There was no duty not to accept negligently; if there was, there was no negligence, and if there was negligence, it was not the proximate cause of the loss. Lopes, L. J., on the other hand, agreed with Charles, J., in holding there was a duty, but he also held that the acceptor had been negligent, and that his negligence was the proximate cause of the loss. Consequently he was of opinion that judgment should be entered for the plaintiff for £3,500. In the result the decision of Charles, J., was affirmed.

The case which is chiefly relied on as showing the existence of a duty under such circumstances as the present, is *Young v. Grote*, 4 Bing. 253. A customer of a bank gave his wife blank cheques signed by himself, requesting his wife to fill up the blank according to the requirements of his business. She caused one to be filled up for the sum of £52 2s., but this was done in such a manner that it was easy for the 52 to be turned into 352. She delivered the cheque to her husband's clerk to be cashed. The clerk made the alteration and re-

ceived £352 2s. from the bank. The bankers subsequently sought to debit the customer with the full amount, and the customer objecting, the matter was referred to an arbitrator. He found that the customer had been guilty of gross negligence and that he ought to make good to the bankers the loss they had sustained. His conclusion was brought before the Court of Common Pleas for review, and was unanimously supported. It was agreed that the customer was to blame, and that upon him, consequently, the loss ought to fall. "We decide here," said BAKER, C. J., "on the ground that the banker had been misled by want of proper caution on the part of the customer."

The principle underlying *Young v. Grote*, has been the subject of much discussion. In *Roberts v. Tucker*, 16 Q. B. 579, Parke, B. said that the customer had, by signing a blank cheque, given authority to any person into whose hands it was to fall to fill it up in whatever way the blank permitted. In *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C. 413, Lord Cranworth, C., put the case upon the ground of estoppel. "The case of *Young v. Grote*," he observed, "went upon the ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for £350; and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is just the same as if he had signed it." In *Ex parte Swan*, 7 C. B. N. S. 446, Williams, J., after referring, *inter alia*, to the two last-mentioned cases, said that it seemed doubtful whether the cases as to the liability of a man who signs a blank bill or note or cheque were founded on the doctrine of estoppel, or on a rule of the law merchant that an actual authority is thereby conferred on the person in whose hands the instrument is.

Estoppel and implied authority are at best technical grounds. In *Swan v. North British Australasian Co.*, 2 H. & C. p. 182. Blackburn, J., referred to "the broader ground \* \* \* that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it;" and in the same case (*ibid*, 190), Cockburn, C. J., pointed out that while, under circumstances such as those in *Young v. Grote*, the customer would be entitled to recover from the banker the amount paid on the cheque, the banker having no voucher to justify the payment, yet the banker would be entitled to re-



cover from the customer for the loss sustained through the negligence of the latter. Possibly therefore, it was to prevent circuitry of action that the banker was allowed to set up the negligence of his customer as a defense in an action by the customer to recover the amount. Or, as was said by Cleasby, B., in delivering the judgment of the Court of Exchequer in *Halifax Union v. Wheelwright* (L. R. 10 Ex. p. 192), the conclusion in *Young v. Grote* "is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we can not help giving effect to in the administration of justice—namely, that a man can not take advantage of his own wrong, a man can not complain of the consequence of his own default against a person who was misled by that default without any fault of his own." The matter may also be put upon the ground that, whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such third person to occasion the loss must sustain it. (*Lickbarrow v. Mason*, 2 T. R., p 70; cf. *Arnold v. Cheque Bank*, 1 C. P. D., p. 587).

In *Baxendale v. Bennett*, 8 Q. B. D. 525. Lord Esher, then Brett, L. J., said that the observations made by the House of Lords in the case of *Bank of Ireland v. Trustees of Evans' Charities*, *supra*, had taken *Young v. Grote*, as an authority, but, as was pointed out by Charles J., in the present case (38 *Solicitors' Journal* 619), the remark seems to be erroneous. Lord Cransworth, indeed, expressly said that the case appeared to have been well decided. In the view of Charles J., the case above cited showed that a person who signs a negotiable instrument, with the intention that it shall be delivered to a series of holders, does incur a duty to those persons not to be guilty of negligence with reference to the form of the instrument. But even if this is so, Lord Esher was of opinion that, under circumstances such as those in *Young v. Grote*, and in the present case, the loss is due, not to the negligence, but to the subsequent crime of the person who fraudulently fills up or alters the instrument, and he seems to have thought that the doctrine of implied authority afforded a safer ground for supporting the decision in *Young v. Grote*. This, however, was not the ground on which that case was decided, and Lord Esher intimated that it ought no longer to be cited as an authority. At the same time the decision itself has been received with general approval, and, if the principle underlying it is not of general application, it is necessary to discover some special ground for limiting it to the case of banker and customer, or rather of principal and agent. This is the course suggested by the judgment of Rigby, L. J. — *Solicitors' Journal*.

## DEATH OF JUDGE THEODORE MILLER.

Minutes of Court of Appeals.

THE death of Theodore Miller, late one of the associate judges of this court, reminds us once more of the inevitable end which awaits us all, and imposes the duty of manifesting that respect for his memory which his long service with us deserves. He died on the 18th day of August last, during our summer recess, and to most of us unexpectedly and without warning; and we are left to that remembrance of him which naturally and surely flows from his constant love for his brethren and his patient and faithful discharge of official duty.

He was elected to a seat in this court November 7, 1874, and began his services with us at the beginning of the next year. He came to his new work with a valuable experience behind him, for he had been a district attorney for his county when the anti-rent troubles tested the nerve and courage of the officers of the law; then, for many years, a justice of the Supreme Court, and for some time presiding judge of the General Term, third department. He had filled these positions with an ability and industry and learning which easily led to his election to the court of last resort. Upon our bench he developed the same vigorous and useful qualities. His chief characteristic, and indeed the one to which his success in life was largely due, was an untiring industry. Few men possessed in greater degree the capacity for patient and laborious study, for deliberative and exhaustive investigation. His opinions exhibited a familiarity with all that had been decided bearing upon the case before him, and a capacity for supplying it logically and with discrimination to the problem awaiting solution. As a consequence, he was firm and courageous in his convictions, adhering to them with some persistence, defending them warmly and yet open to all just arguments, and ready to yield when satisfied that duty required it.

Without seeking to recall the important cases in which he framed the judgment of the court and reasoned out its conclusions, it is due to him to say that his brethren, as they look back upon his opinions in the progress of their own duty, have gained an added respect for the sound judgment and careful study which characterized his judicial work. Near the close of his official career, his health somewhat failed and his sight grew dim, but he surmounted all difficulties with his characteristic courage and patience, and with such success that those who read his opinions are little likely to suspect how much of energy and unflinching will went to their preparation. He retired from the bench at the close of 1886, under the constitutional provision which somewhat abridged his term; but at his

home at Hudson, surrounded by his family and friends, he still followed the action of the court, retaining his interest in its labors, and added to the rest and quiet of his retirement a constant thought of the burdens no longer his.

The end came peacefully at last, and he went to his reward. With respect for his successful labors, for the unbroken friendship of so many years, for his long and able and honorable judicial career, we order this tribute to his memory to be entered upon the records of the court, and that a copy be sent to his surviving family.

### Abstracts of Recent Decisions.

**DEED TO WIFE—CONSIDERATION.**—When persons live together for many years on the mistaken belief that they are husband and wife, a deed from the man to the woman for the consideration of love and affection is not void for fraud or undue influence. (*Edwards v. Thomas* [Penn.], 32 Atl. Rep. 580.)

**FEDERAL OFFENSE—INTERSTATE COMMERCE LAW.**—The act of February 4, 1887, forbidding certain preferences, means preferences in transportation of persons or property. An indictment alleging only the issue of a free written pass, but not alleging any use of the pass, or of transportation under it, is fatally defective in substance, and therefore not a sufficient basis for removal under section 1014, Rev. St. (*In re Huntington* U. S. D. C. [N. Y.], 68 Fed. Rep. 881.)

**JUDGMENTS — PRIORITY OVER MORTGAGES.**—Under the North Carolina Code, which provides, in section 685, that conveyances by corporations, whether absolute or by way of mortgage, shall be void as to existing creditors and torts previously committed, provided such creditors or persons injured shall commence suit within sixty days after the registration of the deed; and, in section 1255, that mortgages by corporations shall not exempt their property from executions on judgments for labor or materials furnished, or for torts by which any person is killed or person or property injured—a judgment against a railroad company for a tort causing injury to the person, is superior to a mortgage executed after the tort was committed, though the action was not brought within sixty days from the registration of the mortgage. (*Boston Safe-Deposit and Trust Co. v. Hudson*, [U. S. C. C. App.], 68 Fed. Rep. 758).

**JUDGMENTS — STOCKHOLDERS IN CORPORATION.**—Persons who, at the time of the commencement of a suit against a corporation and the rendition of judgment therein, hold, as collateral security, stock in such corporation, which has been transferred to

them on the books of the corporation, and who participate actively in the management of such corporation, are so far stockholders as to be privies to the judgment, and estopped to attack it in a collateral proceeding. (*National Foundry & Pipe Works v. Oconto Water Co.*, U. S. D. C. [Wis.], 68 Fed. Rep. 1006.)

**MECHANICS' LIENS — WASHINGTON STATUTE.**—The lien law of Washington (1 Hill's Ann. Code, § 1663) provides that every person performing labor or furnishing materials for the construction of any building, railroad, or other structure has a lien upon the same for such labor or materials, and (section 1665) that the land upon which any building, improvement, or structure is constructed, or the interest therein of the person who caused such building, etc., to be constructed, shall be subject to the lien: *Held*, following the decisions of the Supreme Court of Washington, that a material-man who furnishes materials for the construction of a street railway can obtain no lien upon the structure in the streets of a city. (*Pacific Rolling Mills Co. v. James Street Const. Co.*, U. S. C. C. of App., 68 Fed. Rep. 966.)

**MINES AND MINING.**—The presumptions are all in favor of the validity of a placer patent as against a lode claim located subsequent to its issuance upon part of the same ground, and, where the patentee files an adverse claim against the application for patent to the lode, and brings an action in support thereof, the burden is upon the lode claimants to overcome these presumptions and to show by clear and convincing proofs that the vein on which the lode claim was located, was a known vein at the time of the application for the placer patent. (*Montana Cent. Ry. Co. v. Migeon*, U. S. C. C. [Mont.], 68 Fed. Rep. 811.)

**MORTGAGE—FORECLOSURE—CONCLUSIVENESS OF DECREE.**—Where an administrator was regularly before the court in a foreclosure suit, his successors cannot, in ejectment by him against the purchaser at the foreclosure sale, claim that the foreclosure decree is invalid because the administrator failed to answer, and no decree *pro confesso* was taken against him. (*Hunter v. Shelby Iron Co.* [Ala.], 18 South. Rep. 107.)

**PARTNERSHIP OR LEASE.**—Where an hotel is leased for a certain fixed rental, and the contract further provides that the lessee shall give his undivided attention to the business and that the lessor shall have free access to the premises, and that in addition to the rent, he shall have a share of the net profits, and that a person appointed by him shall keep the books and act as the cashier, it constitutes a partnership, and not a lease. (*Merrall v. Dobbins*, Penn., 32 Atl. Rep. 578.)

## Correspondence.

SPECIAL VERDICT IN INDIANA UNDER A  
NEW STATUTE.

(A CORRECTION.)

*To the Editor of the Albany Law Journal:*

The General Assembly of the State of Indiana, at the session of 1895, made a radical change of the law as to special verdicts. This law has come before the courts for the first time at the Fall sittings. It is as follows:

"That in all cases tried by the jury, the court shall, at the request of either party, in writing, made before the introduction of any evidence, direct such jury to return a special verdict upon any or all the issues of such case. Such special verdict shall be prepared by the counsel on either side of such cause and submitted to the court, and be subject to change and modifications of the court. The same shall be in the form of interrogatories so framed that the jury will be required to find one single fact in answering each of such interrogatories; the jury on retiring, shall take all the pleadings in the case, including the instructions of the court, if in writing, and the interrogatories as approved by the court, and shall answer each of the interrogatories submitted to them."

Under our former practice the courts were required to order the jury to render a special verdict at the request of either party. If no special verdict was required the courts were required to order the jury to answer special interrogatories on request of either party. If the general verdict was not in harmony with the answers to the interrogatories, judgment might be rendered upon the answers to the interrogatories and against the party in whose favor the general verdict was rendered.

This law repeals the law allowing special interrogatories to be propounded, and the only form we now have is the general verdict or special verdict prepared according to the above statute. Each of the Superior Courts and the Circuit Court of this county has had special verdicts rendered under this statute, and the change from the old statute is thought to be very satisfactory, especially in cases where a jury might be more affected by sympathy than by the facts proved.

The practice under this new statute is, after proper request by either party, for counsel on each side to prepare a special verdict in the form of interrogatories. The court takes these forms as prepared and has a new draft made embodying anything pertinent in either form submitted and adding any other interrogatory that seems to be necessary for a finding upon all the facts. This is submitted to the jury as coming from the Court, and they have no intimation as to which side prepared any particular interrogatory. The conclusion of the verdict is in the usual form, that if, upon the above findings, the law is with the plaintiff, then, we find for the plaintiff and assess his damages at — dollars; and if the law is for the defendant, we find for the defendant.

So vital a change in the form of special verdicts can not but attract the attention of the profession at large, and if it should prove satisfactory, other States may be inclined to profit by the example. Until this statute was enacted instructions of the Court were not allowed to be taken by the jury to the jury room.

JOHN A. FINCH.

INDIANAPOLIS, Nov. 4, 1895.

[The above is published as correction of letter of Mr. Finch published in issue of Nov. 2. Several serious errors were in that letter.]

## New Books and New Editions.

WALKER'S AMERICAN LAW, by Timothy Walker, LL. D., late professor of law in Cincinnati college. Tenth edition, revised by Clement Bates of the Ohio Bar.

In this, the tenth edition of this celebrated work, it is apparent that only a few new sections have been added to the text, and some minor alterations and additions appear throughout the work. Since the last edition, in 1887, it is quite apparent that considerable additions to the notes had to be made, as is the case, and it was a difficult performance on the part of the author to keep the volume within the number of pages which it now contains. This has been accomplished by rearrangement throughout. All the citations of importance have been added to date, though, as the author properly states, they have been confined to general principles with such brief notice of any striking applications or theories of the last few years that do not savor of particularizing. The scope of the work is practically the same as in the former edition, and the book is divided into seven parts with various lectures for each part. The first is on Preliminary Considerations, the second is on Constitutional Law, the third on the Law of Persons, the fourth on the Law of Property, the fifth on the Law of Crimes, the sixth on the Law of Procedure, and the seventh is on International Law. The work is well bound, contains a copious index perfectly adequate to such a work, and comprises 900 pages.

Published by Little, Brown &amp; Co., Boston, Mass.

## HAWAIIAN REPORTS, volume IX.

This volume of the reports is published in Honolulu, and contains decisions for the years 1893-94. It is impossible to give all the cases decided, or in fact to pick out any which one would consider of especial interest, because there are many which we would like to comment upon were we not restrained by the small space of this review. The volume concludes with a copy of the rules of the Circuit Courts, of the Supreme Court, and of the Constitution of the Republic of Hawaii. It also contains a memorandum of the resolutions adopted on the death of Charles Lunt Carter, who was very highly esteemed by members of the Bar.

Published by Robert Grieve, Honolulu.

# The Albany Law Journal.

ALBANY, NOVEMBER 16, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in this issue of the Law Journal part of the address of the Hon. James C. Carter before the American Bar Association, and will complete the article in the next issue. Like all the articles from his pen it is replete with knowledge and gives a careful review of the legislation of the different States during the year. It also contains a large number of suggestions which will be of more than passing interest to the members of the legal profession. We notice with pleasure that Mr. Carter has very properly suggested that certain steps should be taken to promote uniformity of State laws. A number of the leading periodicals and many of the most influential lawyers have recently enthusiastically supported the idea of having many of the laws of the different States so amended as to conform to each other and to the decisions of the United States courts. It will indeed be an achievement for any body of men to bring about such a result, and it is becoming more and more recognized each day that such a reform is essentially necessary. Perhaps the most noticeable feature of Mr. Carter's address is the thoroughness with which he reviews State legislation. It is really sad to reflect that so many unnecessary and improper statutes are yearly added in every State.

In perfect accord with what we have written on the subject of too much legislation is an article in the *New York Law Journal* on "Universal Criminality" which, at least from one phase of the subject, gives an idea of the vast amount of unimportant and useless statutes which are yearly passed with no apparent object. With the large increase of the Legislature this year it will necessarily mean a greater number of those anxious to introduce measures and forward them to success. We must, therefore, be prepared to see an increase in the number of laws passed by the next Legislature. It would not be unprofitable for some of the

would-be-statesmen at the capitol in Albany not only to regard the opinion of some of their friends, but to take active measures to aid in crushing out this yearly disease of surplusage of statutory enactments. The article we have referred to is as follows:

"It has recently been forcibly remarked that 'it is a public scandal that in our State the Legislature has made misdemeanors by the hundreds out of facts perfectly innocent in themselves, and often, if not generally, done in complete ignorance of the legal prohibition. Probably no active business man, however painstaking and scrupulous, has reached middle life in this State without rendering himself technically liable to criminal prosecution and to imprisonment under several of these statutes.'"

Occasionally at a mass meeting or other unofficial assemblage a resolution is offered, not that any definite action be taken, but merely expressing the sentiment of the body upon some question before it. It would seem that legislatures sometimes create crimes with no more serious end in view than expressing "the sense of the meeting." This practice is objectionable upon many grounds, two of which may be quite specifically formulated. First. It tends to make the average citizen indifferent to, and even contemptuous of all criminal law, if the statute book create large numbers of nominal crimes for many of which he knows no prosecution would ever be attempted—inherently innocent and vicious acts being indiscriminately ranked together. It must tend to increase the temptations of weak persons, and those of naturally vicious inclinations, to get the impression that the penal policy of the State consists largely of bark with very little bite.

Second. If the community exist in a State of universal criminality, it must necessarily entail large discretionary power upon public prosecutors as to which statutes shall be enforced and which crimes ignored. This might very naturally lead to abuses and favoritism, a State's attorney excusing his supineness as to acts of real moral obliquity, committed by persons he wishes to screen, on the plea that duty requires his energies to be expended in suppressing other evils which in his judgment ar-

more crying. The difficulty of enforcing penal laws against acts which are not essentially vicious, when public sentiment is not united, was probably never more vividly realized than at the present time. Of course the principle cannot be laid down universally that no act not involving intrinsic turpitude shall be pronounced a crime. But such should at least be the general rule, and in no case should penal laws be passed without a rational expectation that they can be enforced.

With regard to many acts involving no question of abstract morality but which public expediency requires to be performed or refrained from, the proper course is, if the effect of the violation of the law be essentially civil, to make the penalty civil also, and of such practical character as to suppress the evil aimed at in the particular case. The granting of actual pecuniary penalties, to be sued for by the aggrieved or damaged person, is measurably efficacious in some classes of cases, and could be made more so if the technical strictness in construction and procedure in the recovery of penalties were relaxed. In *Swords v. Owens*, 34 N. Y. Super. Ct. R., 277, it was held, under the act of 1833 prohibiting persons from transacting business under fictitious names, and making the violation thereof an offense punishable by fine, that contracts made by persons doing business under a firm name, when there were no actual parties to represent the "& Co.," were unenforcible. Decisions of this character are not strictly logical. From one point of view it is strongly argued that the parties may of course be prosecuted penally for the misdemeanor, but that the contract and civil rights thereunder cannot be impaired. What the civil tribunal does in such a case is to apply in a broad spirit a familiar equitable maxim, holding that a litigant may not come into any court without clean hands; that if he has disobeyed an express mandate of the law as to the conduct of his business, the instrumentalities of the law shall not be at his service in the affairs of such business. Express disqualification from bringing civil suits, unless a person has complied with certain statutory provisions for the public benefit, would in many classes of cases be much more effective to procure obedience to the law than perfunctory clauses containing criminal penalties. Other appropriate forms of

civil penalty or disqualification could also be devised, and it is to be hoped that the thoughtless accumulation of nominal misdemeanors will be checked.

The Court of Appeals, in the case of *Casola v. Vasquez*, 147 N. Y. 258, have held that, though a statute of another State, under which an insolvent limited partnership was organized, declared void a transfer of its goods with intent to give preferences, such a transfer, when made in payment of a *bona fide* indebtedness, would not authorize an attachment under section 636, subdivision 2, of the Code of Civil Procedure, on the ground that defendants had disposed of or secreted their property with intent to defraud their creditors. In writing the opinion of the court, Chief Justice Andrews says:

"The application for the warrant of attachment was based on the ground that the defendants 'had assigned, disposed of, or secreted their property with intent to defraud their creditors.' The affidavits wholly failed to establish a case within this clause of the statute. They show simply that the firm of Kugelman & Co., in violation of the Maryland statute regulating the formation of limited partnerships, being insolvent, sold and transferred to the defendant, Francisco Vasquez, or to the firm of Francisco Vasquez & Sons, effects of the firm, in payment of a valid debt owing by the firm to Vasquez, or Vasquez & Sons, with intent to give a preference to such creditors or firm. The *bona fides* of the debt is not questioned, nor is it claimed that the effects transferred exceeded in value the amount of the debt. The Maryland statute declares (sec. 13, art. 73, of the Public General Laws of Maryland) that a transfer made by a limited partnership, under such circumstances, 'shall be void as against the creditors of such partnership.' Vasquez, having been at the time of the transfer a special partner in the firm of Kugelman & Co., became, as is claimed, by accepting this transfer, liable, under the seventeenth section of the act, as general partner. The sale and transfer, although in violation of the limited partnership act, did not bring the case within the attachment law. It was void, but solely by force of the partnership statute. It was not a fraud at common law,

under which preferential payments by an insolvent debtor are permitted. The transaction could be set aside for the benefit of the body of creditors of Kugelmann & Co., because the statute of Maryland declared it to be void, and Vasquez, by assenting to the transfer in violation of the act, may have subjected himself to liability as a general partner. But, to authorize an attachment under subdivision 2 of section 636 of the Code, there must be actual or intended fraud upon creditors; such fraud as was contemplated by the statute of Elizabeth and similar statutes. The violation of the limited partnership act by the preferential payment of an honest debt does not show that the debtor has "assigned, disposed of or secreted his property" with intent to defraud his creditors, within the attachment law.

In *Curlander v. Pullman Palace Car Co.*, Judge Ritchie of the Superior Court of Maryland holds that the purchaser of a section in a Pullman sleeping car for a given trip has the right, on leaving the train before he reaches his destination, to transfer the use of his section to another first-class passenger for the rest of the trip for which it was sold. Martin Curlander and his wife, the plaintiff, left Baltimore for Chicago; another couple, designated as Mr. and Mrs. "X.", boarded the same train at Washington for the same destination. All parties were entitled to a first-class passage to Chicago. Mr. X. bought and paid for the use of section number one on one of defendant's cars from Washington to Chicago, the only condition of which was that it was "good for this date and car only when accompanied by a first-class railroad ticket." During the day the conductor of the palace car took up the ticket and gave Mr. X. a check for the use of the section in question. The check showed on its face the same trip as the original ticket—that is, from Washington to Chicago—and the only limitation was, "this check is good for this trip only." On the same day the plaintiffs bought the upper section of the same car of berth number six. On the next morning it was found that the seats which went with the upper berth, and which the plaintiff occupied, were those which required Mrs. Curlander to ride backwards. This induced a violent at-

tack of nausea. Thereupon Mrs. X. said that she and her husband intended to leave the car at a place before they reached Chicago, and that her husband would give their section to the plaintiffs. This was accordingly done. A little further on the Pullman Palace car conductor, knowing that Mr. and Mrs. Curlander had left the train, sold the section again from that point to Chicago. On going to the section he found it occupied by the plaintiffs. On being requested to return to their former seats the plaintiffs refused and showed their permission for use of the section. As a result of this plaintiffs were ejected from the section. It is admitted that a ticket for a section on a sleeping car is transferable by delivery at any time before the holder enters upon the journey for which it was purchased, but it is contended that if he once enters upon his trip and leaves the train before arriving at his destination, he abandons or forfeits his right to such section for the balance of the trip for which it was sold. The judge shows that, in the absence of authority, the defendant relies upon the analogy between the contract of carriage by a railroad company and the contract for the use of a section on a sleeping car, and invokes the rule of construction which is applied to the contract of carriage. The reasons for such construction are fully stated in *McClure's case*, 34 Md. 532. Continuing the judge says:

When the passenger has selected his train and has called on the railroad company to perform its contract and carry him to his destination, and the company tenders itself ready to perform, furnishes the necessary means and accommodations, there is good reason why he should not be permitted to stop off at one or more intermediate stations, and afterwards resume his journey on the same ticket. Under the contract of carriage, the railroad company must furnish accommodations and has active services to perform, and when it has once responded to the demand of the passenger and has partly performed its duty and stands ready to perform the rest, it would be unreasonable to require it to stand ready again and again to respond to the call of the passenger according as he may please to break his journey. Further reasons stated in the authorities why the

railroad contract is construed to mean a continuous trip by the same train are that the contrary doctrine would impose on the carrier additional duties, the removal of the passenger and his baggage from one train to another, an increased risk of accidents, and a hindrance and delay not contemplated. It is contended that the same reasons, or some of them, prevent the passenger when leaving the train from making a valid transfer of his railroad ticket to some one else for the rest of the trip; and further, that the same considerations require a similar construction of the contract made with the Pullman Company. But from the different nature of the contracts, none of these reasons apply in the case of the sale of a section in a sleeping car, and they do not require that a continuous trip under the Pullman contract should be construed to mean a continuous trip by the same person. The contract being for the use of a given section on a given train, necessarily imports a continuous trip by that train, and the Pullman Company needs no protection against a demand for the use of the same section on the same ticket on a later day; no additional duties are imposed on the Pullman Company by allowing the transfer of his section for the rest of the trip by a passenger who leaves the train; it is not subjected thereby to any additional risks, nor to any hinderance or delay; it handles no baggage, no additional attentions are required, and it makes no difference whether the porter makes up the berth and dusts off the set for one passenger or another. The company sells the use of its section, with the right to some trifling services from its porter from one point to another and is paid in full for the same; it can make no possible difference to it whether the section is occupied by one first-class passenger or another, and whoever may hold it, the company can be called upon to do or furnish nothing that it has not agreed to and been paid for. If the holder leaves the train without transferring his section, it might be inferred that he had abandoned it to the company and it might be resold, but when the company undertakes to sell again what it has already once sold and been paid for, it does so at the risk of trespassing upon the rights of others.

It is held in Searle's case 45 Fed. Rep. 330,

that the purchaser of a section may share its use with any proper persons whom he invites into it; this is because he has purchased the use of the whole section, and as he can bestow on others the right to use part of it while he is there, I can see no reason why he can not confer upon them the right to continue the use of it when he leaves the train before the end of the trip for which it has been sold. It is also conceded, as I have said, that the purchaser may transfer his section before he enters upon his journey. I can see no reason why it should become absolutely non-transferable the moment after he starts. I can see no reason why he cannot transfer it immediately after starting if he chooses to ride in a passenger coach; or why two passengers might not exchange sections; or why after having gone half of his journey, the holder might not then transfer his section for the balance of the trip, and himself withdraw into a passenger coach. It is conceded that he can make such transfers as long as he remains on the train, provided he gives notice to the conductor and gets his assent. But the assent of the defendant to such transfers is not necessary, because there is no condition in the contract which requires it. If the holder of the section, after having gone part of his journey, can transfer it to another for the rest of the trip, he himself continuing on the train but riding in a passenger coach, as I think he can do, he can make a valid transfer on leaving the train, because it makes no difference to the Pullman Company, which has nothing to do with his contract of transportation, whether he withdraws into a passenger coach or leaves the train.

It is further contended that the condition on the ticket that it is good "only when accompanied by a first-class railroad ticket," and the limitation on the conductor's check that it is "good for this trip only," and the fact that the through rate from Washington to Chicago is less than the aggregate rate of a section from Washington to Deshler and then from Deshler to Chicago, imply a restriction against transfer after the holder has once started. I cannot accept this view. The condition on the ticket is simply a designation of the class of persons who alone are entitled to avail of the conveniences of the sleeping car; it would prevent the

transfer of a section to one who did not hold a first-class railroad ticket, but the condition rather implies that such cars are open to all who have such tickets. "This trip" means the trip stated on the face of the check upon which is found the restriction, that is, from Washington to Chicago. No attempt was made to use it on any other trip than the trip for which the check expressly states that it was good. Even if "this trip" under the contract of carriage, would from its nature be construed to mean a trip by the same person as well as on the same train there is nothing, as I have endeavored to show, which would require these words to receive the same construction under the contract in question. To construe this condition as meaning "good for this trip only, and good only in the hands of the holder who starts with it," would be nothing less than interpolating a material condition not in the contract.

There is nothing in the fact of a reduced rate which implies non-transferability. It may well be that the company prefers by one transaction to sell a section for a long trip at a reduced rate rather than chance its sale at higher local rates to several successive purchasers between intermediate stations. It is settled that the usual return coupons of round-trip excursion tickets, which are always sold at reduced rates, are transferable. Carsten's case, 44 Minn. 454; Hoffmann's case, 45 id. 53; Sleeper's case, 100 Pa. 257; and where a through straight ticket over several roads is sold at a reduced rate, the passenger at the end of any one road may transfer any remaining coupons. Nichols' case, 23 Ore. 123. The condition on a railroad ticket that in consideration of a reduced rate it is not transferable is good, but non-transferability will not be implied from the mere fact of a reduced rate. If the reduced rate does not affect the right to transfer the railroad ticket, there is no reason why it should prevent the transfer of the Pullman ticket.

It follows, from what I have said, that, in my judgment, the transfer of the section in question to Mr. Curlander was valid and the ejection of his wife therefrom was wrongful. There being no restriction upon its transfer in the terms of the contract, except as against

such as are not first-class passengers, nor in the nature of the contract, or to be implied from any of its conditions, there certainly are no considerations of public policy or convenience which call on the court to so construe the voluntary contracts of this defendant as to enable it, contrary to the wishes of the first purchaser, to sell the same thing twice.

Whether the ejection of Mrs. Curlander was the act of defendant or of the train conductor, as well as the measure of damages, I will leave to the jury under the instructions to be granted.

When the Court of Appeals handed down its decision in the case of *The People v. Shea*, we had occasion to remark in approving words of the recommendations made by the court of last resort in regard to the presentation before that court of evidence in capital cases. The present method of placing before that court for its consideration all the evidence given before that jury, and in the *Shea* case the questions put to the jury, together with their answers, also, is cumbersome and most onerous and burdensome to the courts to which such facts are presented, and we certainly think that a court which must necessarily perform so many and important functions should be relieved to the greatest possible extent consistent with justice and fair dealing toward the accused. A striking passage in the case of *The People v. Kerigan*, 147 N. Y. 210, which was one of the first capital cases decided after the *Shea* case, is noteworthy and should be considered. The passage referred to is as follows:

"While this court has the power in a capital case to review the facts and to grant a new trial when satisfied that the accused has not had a fair trial, or when injustice has been done, it must observe the rules and principles which apply to all tribunals exercising appellate jurisdiction. It is the province of the jury to determine questions of fact depending upon evidence in any way conflicting and to declare by their verdict what the truth is, and when once determined, upon evidence which is sufficient, even though capable of diverse and opposing inferences, this court has no more right than the trial court to substitute its own judgment in



the place of that of the jury or to usurp its legitimate functions."

This paragraph is one which at least gives an idea of the way the court of last resort regards the present cumbersome method of presenting the evidence on appeal.

#### ADDRESS OF JAMES C. CARTER.

PRESIDENT OF THE AMERICAN BAR ASSOCIATION.

The object of our Association is declared to be "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar."

No happier statement could be made of the purposes which such an Association as ours should have in view. It recognizes the fact that though we are citizens of different States in some degree sovereign, we are yet one people, one immense human society with common interests, common hopes and a common destiny; that among the greatest concerns of that, as of every society, are its jurisprudence and legislation; that that great interest is, in large degree, under the care and control of the members of the legal profession; that it is their duty to reduce it to a science, to develop its usefulness, to simplify it into uniformity, to correct any evil tendencies which may beset it, and to these ends to uphold the honor of the profession and inspire its members with a just conception of their high office.

It is made the especial duty of the President to communicate in the address with which he is charged to open each Annual Meeting "the most noteworthy changes in statute law on points of general interest made in the several States and by Congress during the preceding year." A full and discriminating performance of this duty, involving an intelligent examination of the doings of nearly forty Legislatures, would be an impossible task for a lawyer actively employed in the work of his profession. I have been able to give but hasty and superficial glances over this vast field, and it is those things only which have, as it were, caught my eye upon that general survey which I am able to lay before you. In default of perceiving a better method (if there be a better one) I shall deal with each State by itself, and no order preferable to that of the alphabet occurs to me.

#### ALABAMA.

The wisdom or the folly of Alabama is evidenced by a bulky volume containing 572 acts which occupy 1,244 pages.

They embrace an act designed to give married women more than eighteen years of age the same rights in respect of property and the making of contracts as were before enjoyed by those twenty-one years of age, and to non-resident married women the same rights with residents; also an act repealing a prior act designed to prohibit the employment of women and children in work for more than eight hours a day; an act to prohibit the levying of black-mail by threatening letters and otherwise; and a rather curiously framed act designed to regulate the practice of embalming dead human bodies. It establishes a State board, the members of which are not required to possess a knowledge of physiology and anatomy, but to be "practical embalmers having experience in the business," but they must, nevertheless, find whether applicants for an embalmer's license, which they alone are authorized to grant, are possessed of a "knowledge of the venous and arterial systems, the location of the heart, lungs, stomach, bladder, womb and other organs in the human body; the location of the abdominal, pleural and thoracic cavities; the location of the carotid, brachial, radial, ulnar, femoral and tibial arteries, a knowledge of the science of embalming, etc."

We have also an act to prevent boycotting, and applicable both to employers and workman; certain amendments of the State code, *inter alia*, one confirming and increasing the authority of the Supreme Court to establish rules of procedure both for that court and the Court of Chancery; a proper recognition, as I think, of the wisdom of committing the system of procedure to judicial rather than legislative control; an act appointing a single commissioner "to revise, digest and codify all the statutes of the State of a general and public nature;" an act designed to suppress the fraud of officers of a corporation attempting to depreciate the price of its stocks below its value with intent to buy it in; another, quite inconsistent with the one above noticed, which entrusts the framing and amending of the civil procedure to the Supreme Court, amending certain sections of the civil code and rules of the Court of Chancery relating to the filing and service of interrogatories under a commission to take testimony; another making it a misdemeanor to print, publish or expose for sale any book or pamphlet containing the history of any person popularly known as an outlaw; and an act imposing severe punishment for train robbery.

#### ARKANSAS.

Arkansas contents itself with the modest activity shown by 150 public acts, embracing 257 pages. No one will regret that survival of the doctrine of State sovereignty evidenced by acts not only of this, but other legislatures of Southern States, for the

support from the public treasury of disabled and indigent Confederate soldiers. The employment of convicts in competition with other labor is allowed by another act of this Legislature and marks a difference in the social conditions of the States. Such legislation could hardly be brought about in the more populous Northern and Eastern States. The resolute tendency towards the prohibition of the sale of intoxicating liquors, and its limitations also, find expression in an act making it unlawful to sell or give away any such liquors, including wine, within five miles of Hineman University School, at Monticello, Drew County, except, in the case of wine, by those who make it "from grapes of their own raising and sell it on their own premises." Humanity and decency are gratified by an act providing for the appointment of a matron for female prisoners in cities of the first-class. An act was also passed in obedience to the public sentiment rapidly extending through the country throwing the safeguards of law around the elections for candidates at primary political meetings. But three private acts were passed by this Legislature.

#### CALIFORNIA.

California has passed an act permitting actions generally, including those involving the possession and title of real property, to be maintained by and against executors and administrators in all cases where they might be maintained against their respective testators and intestates,—this seems to introduce an anomaly in respect to real property; an act permitting foreign executors and administrators to satisfy mortgages; another providing for an exercise of discretion by the court to empanel one or two "alternate jurors" to take the place of any regular juror who may die or become disabled during a trial; another for the retirement upon pensions of public school teachers after a service of twenty years; another limiting the liability of inn-keepers, boarding and lodging house keepers; another establishing a non-partisan commission of three persons for the purpose "of revising, compiling, correcting, amending, systematizing, improving and reforming the laws of the State;"—a very broad authority which would produce inestimable benefits, if it were wisely executed, but what is meant by a *non-partisan* commission of *three* is not very clear. The facilities for the union of capital and business interests are made practically unlimited by an act for the formation of co-operative association of five or more persons for the purpose of transacting "any lawful business." The general tendency to relieve married women of their disabilities in respect of property is followed by enactments authorizing them to execute powers of attorney and acknowledgments as if unmarried.

Prompted, apparently, by recent notorious scandals this State has framed legislation requiring the solemnization of marriages and repealing prior provisions of law, under which what are commonly styled "common law marriages" could be easily set up.

At the general election of November several important constitutional amendments were adopted by the people. In one a step was taken in the direction of educational qualification for the exercise of the right of suffrage. It requires, with certain exceptions, the voter to be able to read the Constitution in the English language and to write his name. Others exempt young fruit trees and vines from taxation, make a like exemption in favor of free libraries and public museums, and forbid ownership of real property by aliens.

Other amendments to the Constitution were framed by the last legislature and will be submitted to popular vote at the general election to be held in 1896. One consists of substantially the same educational qualifications as that established by the legislature as already mentioned, but omitting all reference to the male sex, and thus designed to give the right of suffrage to women. Another makes the stockholders of corporate bodies liable to the corporation, or its creditors, to the extent of any unpaid part of the capital stock held by them, and makes the directors liable to the creditors and stockholders for any moneys embezzled or misappropriated during their terms of office by the officers of the corporation.

#### COLORADO.

The legislature of Colorado passed 114 acts embracing the moderate extent of 256 pages. Among these was one designed to secure equal rights and privileges for all persons, without distinction of race or color, in public accommodations and in places of amusement; another requiring *commission merchants* to procure a license before engaging in their business and to give bonds available for the benefit of persons sustaining loss or damage through them,—a rather exceptional interference by government, the grounds of which do not clearly appear. Another act properly associates patriotism with the condemnation of anarchy. It prohibits the display upon any State or municipal building of any flag other than those of the State and the United States, and also prohibits the display upon any such building, or in any street procession, or parade, of the flag of any anarchistic society.

Another act constitutes a board of three commissioners for the promotion of uniformity of legislation throughout the United States.

#### CONNECTICUT.

Connecticut exhibits a record of 350 enactments. Among them is one making an attempt to prevent

the spread of contagious or infectious disease among animals. Another rather novel one, designed apparently to prevent unhealthy progeny, prohibits the intermarriage of persons either of whom, whether man or woman, is epileptic, imbecile or feeble minded, where the woman is under forty-five years of age, under a penalty of imprisonment for not less than three years, and sexual intercourse with women of this character under forty-five, or with any woman under forty-five by any man who is an epileptic, and consent to such intercourse by any woman under forty-five are made crimes punishable with the same penalty. An attempt is made to settle or prevent labor disputes by the establishment of a State board of mediation and arbitration. An election law adopting the methods such as are commonly embraced under the term "Austral-ian Ballot" was enacted. All holidays are made *dies non* in respect to negotiable paper, and when falling on Saturday, the following Monday is fixed for the purposes of presentment, payment, protest, etc., and days of grace are abolished. Rigorous penalties are levelled against the dealing in obscene literature. Building and loan associations are defined and regulated. The adulteration of candy is made punishable. The employment of children under fourteen in factories is prohibited, and other provision made for the protection of children. Sales conditioned to keep the title in the vendor are required to be in writing and recorded. The militia law is revised. Conspiracy to commit a person to an insane asylum is made a punishable offense. The docking of horses' tails is prohibited under a severe penalty. A secret ballot is provided in town elections upon the question of licensing the sale of intoxicating drinks.

#### GEORGIA.

The Legislature of Georgia has contented itself with the passage of ninety-seven acts, which occupy two hundred and eighty-two pages. These indicate that the practice of this State is to deal with large public concerns through the instrumentality of special rather than general laws. There are many acts establishing schools for particular towns, many affecting the registration of voters in particular counties, and numerous special acts relating to particular counties and other political divisions of the State, as well as to municipal corporations.

An act, drawn with apparent care, makes provision against the practice of medicine by unqualified persons. It recognizes three schools of medicine as reputable: the regular, the eclectic, and the homœopathic; establishes three boards, composed respectively of members of each of the schools, and authorizes them to issue licenses to applicants after due examination.

Another act requires the names of white and col-

ored taxpayers to be entered in separate lists on the tax digests of the several counties of the State, a measure which may hereafter afford some indication of the relative progress of the two races.

#### IDAHO.

Idaho exhibits the healthful tendency to secure in elections a just expression of the popular will by an act providing for a secret and uninfluenced ballot.

She has also determined to submit to popular decision the question of giving the full right of suffrage to women, and has made permanent and incurable insanity a ground for divorce, with a wise precaution of a condition that the insane party shall have been confined for six years next preceding the action in the State Insane Asylum.

#### ILLINOIS.

The great and advancing State of Illinois has been active in noteworthy legislation. It has established for cities, subject to their assent by popular vote, a system of appointment to public offices based upon merit; limited the beginning of contests of the validity of wills to the period of two years subsequent to probate; forbidden under penalties the entry at horse races of "ringers" or horses under false names; provided for the pensioning of school teachers after a service of twenty-five years, the pension fund to be raised by a tax of one per cent on the salaries; abolished days of grace on all negotiable paper; provided that all parties liable on negotiable paper shall be equally liable to the holder and may be sued all together and judgment rendered against those found liable, with the privilege to any party paying the judgment to use it to compel reimbursement against any other party liable secondarily to him; provided for the appointment of party committees for the settlement of disputes as to what candidates may have been regularly nominated; enacted a measure for a tax, graduated to some extent, upon property transmitted by will or descent, making the tax in the instances of some beneficiaries other than near relatives as high as six per cent; established a system for the registration of land titles as distinguished from the registration of deeds, and designed to make the public records conclusive to a large degree upon the title to real property; make provision enabling cities to levy a tax for the establishment and maintenance of public libraries made provision for the retirement and pensioning of fire insurance patrolmen; forbidden under penalties the wrongful taking of messages from telephone and telegraph wires; made provision against extortion in the payment of laborers' wages, requiring payment thereof in bankable money; prohibited under penalties the coloring of every substance designed to be used as a substi-

tute for butter or cheese; forbidden the keeping of barber shops open on Sunday; forbidden the employment of children under twelve years of age in theatrical exhibitions; required railroads to erect depots in towns of two hundred people; and has adopted various other measures evidencing a bold, but perhaps not impolitic, estimate of the just extent of the legislative power in growing, thickening and active populations.

#### INDIANA.

Indiana, the neighbor of Illinois, makes similar assertion of general over individual interests. She establishes as her principal mode of raising her revenue a system of property taxation designed to reach property of every description. To make this system effective she pays no attention to clamors against inquisitorial practices or the hazards of encouraging perjury, and frames interrogatories in which every known tangible or intangible thing which may be the subject of property is enumerated, and the citizen is obliged upon the demand of the assessor to answer as to his ownership of any of them. It would be interesting and useful to know how far this attempt to baffle concealment may prove effectual. It would seem certain that the successful enforcement of such a scheme of taxation in some States and not in others would be a potent agency in determining the choice of residence, and greatly increase the list of taxpayers in some at the expense of others. The great legislative problem of the day is that of a just system of taxation.

The Gordian knot of litigation is cut by the statutory sword in twenty-three separate acts legalizing the various oversights and neglects of legislators and administrative officers. The losses and inconveniences of individuals, if any there were, are disregarded, except in some instances where the not very equitable distinction is shown of saving rights which happen to have been made the subject of litigation.

It is enacted that if any railway, corporation or other company in the State shall authorize, allow or permit any of its agents to "black-list" any discharged employee, or any employee voluntarily leaving service, or attempt by words, writing, or otherwise, to prevent any such employee from obtaining other employment, the aggrieved person may have a civil action for damages against the corporation or company. Legislation in favor of the laboring classes is often either through negligence or design very loosely framed. What is "black-listing?" Is the keeping of a list of employees with memoranda respecting their merits, obviously a useful and proper precaution of large employers of labor, a black-list? Or is the exhibition of such a list to other corporations seeking a knowledge of the qualifications of applicants for work an attempt to prevent employ-

ment? Such must be its necessary tendency, and so its presumable purpose; but such legislation seems calculated to favor the unworthy by compelling secrecy in respect to their misdeeds.

A moderate indulgence is extended to publishers of newspapers by requiring notice to be served before the bringing of any action for a libel specifying the defamatory matter complained of. A full retraction protects the defendant publisher against punitive damages. Such legislation seems of very doubtful expediency. The law of libel built up by the wisdom of jurists upon close consideration of all the forms in which reputation is liable to be assailed, is not likely to be improved by legislative action, especially such as is sought for by the modern newspaper press.

A piece of well designed legislation, although somewhat obscure—perhaps necessarily so—is found in an act prohibiting the printing or bringing into the State of "any paper, book or periodical the *chief feature or characteristic* of which is the record of the commission of crime, or to display by cut or illustration crimes committed, or the acts or pictures of criminal, desperadoes, or of men or women in lewd or unbecoming positions or improper dress."

Another act, passed probably in view of the Chicago strike, organizes with apparent care and thoroughness the military force of the State in a manner calculated to make it efficient in the repression of disorder and violence.

In the interest of humanity and labor an act was passed requiring electric street railroads to provide closed cabs for the protection of motor-men against inclement weather.

Another act was passed requiring a license for the sale of goods made by convicts of other States, and compelling such goods to be stamped "convict made," and with marks showing the name of the prison or penitentiary in which they were made.

An attempt is made to prevent the miserable and mischievous results of the scramble for partisan spoils, so far as the charitable and reformatory institutions of the State are concerned, by removing the present heads of those institutions and providing for the appointment of eighteen persons, "all of whom shall be men of good moral character and good business qualifications, and not more than nine of whom shall belong to the same political party," and are elsewhere described as "men of known fitness, probity and high character." Each of the institutions, which are six in number, are to be governed by boards of control composed each of three out of the eighteen trustees just mentioned, and are to be designated by the governor, and no more than two of the same political stripe are to be designated for one board. Three of the institutions will thus be under the control of one political party and

three of the other, and the scramble for the spoils thus sought to be prevented by equally dividing them. The unseemly contest will thus be avoided, except such as may occur in the executive chamber over the appointments of trustees; but will the character of the corps of attendants at the institution be improved? It is to be feared that the prescribed qualifications for these partisan trustees of "fitness, probity and high character," will hardly suffice to prevent the awarding by them of places as political rewards, a system which never has secured, and never will secure, the best, or, in the long run, even good service.

Another experiment is added towards the solution of the liquor problem. Liquors at retail can be sold only on a ground floor exposed to the public, and without screens, and no other business to be carried on in the same place except the sale of tobacco and cigars; no musical or other appliances for attraction are allowed; no one is allowed to enter the place during the time when the sale of liquor is forbidden, and no licenses can be granted in any township or ward against the remonstrances of a majority of the voters thereof. This is a keenly devised scheme; *but*, where is the incorruptible constabulary, or, in its place, the numerous body of ready, willing, indefatigable public-spirited citizens who will stand constantly on the watch to enforce it?

The State has magnanimously permitted itself to be sued upon any money demand in one of its courts designated by the State.

The legislators of Indiana are not without the sense of humor. A curious doubt seems to have arisen as to whether the State had a State seal; but it is now to be resolved, under a concurrent resolution authorizing R. S. Hatcher, the reading clerk of the Senate, to investigate the matter and report to the Senate. It required many reasons set forth by way of recital under an appropriate number of *whereases* to induce the passage of this resolution; among them these, that the constitution of the State required a State seal; that the legislature had never actually provided a design for one, or otherwise established one; that seals purporting to be State Seals had, notwithstanding, been used for a period of eighty years (thus even before Indiana was a State) all of them exhibiting in some form the significant emblems of the setting sun, the buffalo and the woodman felling the tree, but differing in the arrangement of these symbols; that it was demanded by the public business of the State, that Indiana should have a well defined seal in order, among other things, that she "might be fully abreast with the other States of the Union, and lastly, that Hon. R. S. Hatcher, the reading clerk of the Senate, has given the subject of heraldry years of study and investigation, and has thorough infor-

mation upon all seals and coats-of-arms thereof of the different States of the United States, as well as the seals of States and coats-of-arms of foreign countries." Let us hope that all this will result in the establishment of a well defined and appropriate seal for our great sister State of Indiana; but that the familiar emblems of the setting sun, the buffalo and the woodman with his axe, will not under the influence of Mr. Hatcher's antiquarian proclivities be replaced by some device borrowed from the effete despotisms of Europe.

#### KANSAS.

The legislative activity of Kansas is marked by the passage of three hundred and sixty-eight acts, occupying a neatly printed volume of 574 pages. The regular and orderly administration of government in this State seems to have suffered somewhat in prior years by the ascendancy of certain views on social questions called "crazes" by those dissenting from them, and much of the legislation of the past year is aimed at an amelioration of the supposed ill conditions thus produced. Impartial observers would probably agree that a large improvement has been effected.

Official carelessness and neglect are evidenced and remedied by twenty legalizing statutes. The judicial establishment has been largely amended, but by methods, the character of which is so accommodated to special conditions in the State as not to be particularly interesting or instructive to other communities. Sternly repressive laws are enacted against gambling in all its form. A board of irrigation has been established, and scientific and practical tests of the effectiveness of measures to that end provided for. The completion and opening of the important institution of the State Reformatory has been provided for.

A somewhat novel policy, open to much discussion, has been adopted by a law providing that in the case of insurances on lives for the benefit of persons other than the life insured, but who have an interest in such life, moneys paid to the beneficiary shall be exempted from any present or future claims of the person assured, or his representatives, and from the claims of the person effecting the insurance or his representatives, and even from all taxes — a large opportunity for placing property beyond the reach of the law. Other acts of doubtful validity or wisdom have received legislative sanction; among them one compelling railroad companies to furnish free passes to shippers of certain descriptions of property, and another taxing fire insurance companies a certain per cent. of their earning for the support of fire departments in all towns and cities where as much as \$1,000 is invested in fire equipments. The justice of forbidding persons to insure against fire, unless they at the same time contribute

something towards protecting the property of their neighbors who choose to leave their property uninsured is not obvious.

The appearance of a new terror to the farmer is evidenced by a statute designed to arrest the spread of the Canadian or Russian thistle.

#### MAINE.

The work of the last session of the Legislature of Maine contains, in comparison with its bulk, but little matter of general interest. The general public legislation consists mainly of amendments of existing laws. The special and private enactments far outnumber the former, and embrace numerous acts for the creation of corporate bodies — a purpose now effected, and probably better effected, in most States, under general laws.

Prodigious attention is given to the brute creation. Numerous acts, both general and local, were passed for the purpose of preserving beasts, birds and fish of various kinds.

Among the new general laws is one for the prevention of cruelty to animals, and another, quite elaborate, providing for the establishment of a board for the registration of persons authorized to practice medicine and surgery. All must be registered. Certain classes already entitled to practice their art are recognized as entitled to immediate registration. Others must exhibit qualifications to be ascertained by examination. No unregistered person is permitted to practice. But the legislators do not presume to deny the existence of those mysterious agencies for healing which, confessedly transcending human science, appeal in civilized as well as barbarous times to human credulity; for, while they still permit the unfortunate diseased to seek cure or comfort from the apostles of "hypnotism," "magnetic healing," "mind cure," "massage," "Christian science," or any other "method of healing," they put their foot down upon one point, the professors of these occult arts must not attempt to administer dangerous drugs, nor affix the significant M. D. to their names.

The State has, like so many others, imposed rigorously-drawn prohibitions against lotteries in whatever form.

It has also made what seems to be a useful addition to the legislation against fraud by declaring that agreements in contracts of sale that the title to goods sold shall remain in the seller shall be absolutely void unless in writing signed by the party sought to be bound, and void against third parties unless recorded in the manner prescribed.

The rules in respect to the devolution of the property of intestates are modified in some important respects. The tendency to equality as between husband and wife is yielded to, by provisions abol-

ishing estates in dower and courtesy as such, and giving to the widow or widower, as the case may be, one-third of the intestate's land, and, if no issue, one-half.

Maine, after years of effort, seems not yet satisfied that she has discovered the true method of preventing those who love intoxicating drinks from obtaining them. A new and elaborate statute amends her existing legislation, and will prove the ingenuity, or the folly, of those who think that laws can prevent the gratification of the intense desires of men when such gratification does not, of itself, create an interest to enforce the laws.

#### MASSACHUSETTS.

The ancient Commonwealth of Massachusetts displays her legislative industry in six hundred and thirty-six enactments, including one hundred and twenty-seven of what are styled "resolves." They embrace much interesting matter. Among the more noteworthy acts is one designed to make the election laws more perfect; others prohibiting the display of foreign flags on public buildings and providing for the display of the national flag on school-houses — of which legislation instances are presented this year in many other States and indicate a concerted effort; another authorizing judges of Probate Courts to grant leave to executors and administrators to mortgage the real property of decedents to pay debts and legacies; another, and one, it would seem of doubtful expediency not to say validity, by which real estate subject to a vested remainder may be authorized to be sold by trustees appointed by the Probate Court upon the petition either of the party holding the particular estate in possession, or of the remainderman; an energetic act for suppression of what are sometimes called opium joints; an act permitting, but not requiring, Saturdays, not legal holidays, to be treated as *dies non* so far as concerns the presentation and acceptance of negotiable paper and permitting such paper to be presented on the next business day; an act amending a prior act and regulating the manner in which prisoners supposed to have reformed may be released on parole before the expiration of the term of imprisonment; an act providing that no oral or written misrepresentation by the assured in the negotiation of a contract of life insurance shall be deemed material unless made with intent to deceive; an act making the provisions of Massachusetts's statutes imposing penalties and liabilities upon the officers and stockholders of domestic corporations for false and fraudulent statements and returns apply to the officers and stockholders of foreign corporations doing business in the State, and requiring corporations of the latter class to file certain statements and imposing penalties

upon the officers failing to comply with the requirement—a provision in passing which the Legislature may have over-estimated its ability to make criminal law; an act providing for the construction of State highways; an act authorizing the holding of an immediate inquest by designated magistrates upon complaint made that any law relating to the registration qualifications or assessment of voters, or to voting lists or ballots, or to caucuses, conventions and elections, or any matters or things pertaining thereto have been violated and to hold for trial any persons appearing to be guilty; a stringent act for the abatement of the smoke nuisance in the city of Boston; an act requiring every city to make provision for the treatment of indigent persons suffering from contagious or infectious venereal diseases, additional rigorous enactments are made against gambling, lotteries, etc.; also rigorous prohibitions against secular business on the Lord's day, and against being present at any game, sport, play or public diversion on that day; a slight and perhaps innocuous amendment of the law of libel permitting the defendant to prove in mitigation that he published a prompt retraction. The charter of the city of Boston is amended, *inter alia*, by the creation of executive departments for the principal concerns. Discriminations on account of race or color in public places of amusement are prohibited; a commission called the Old Colony Commission is created for the investigation of spots of historic interest in the counties of Bristol, Barnstable, Plymouth, Norfolk and Nantucket, and the collection of historical information relating thereto; an act is passed for the establishment of textile schools in manufacturing cities; a hospital for epileptics is established; an elaborate act is passed extending the regulation of law to the proceedings of political caucuses; elaborate provision is made for the inspection of domestic cattle; an act for the preference of veterans in public employments was passed over the Governor's veto; a hospital for consumptives is established; in sentences of imprisonment to the State prison, other than for life, and in the case of habitual criminals, the court is not to fix the term, but to name a maximum and a minimum term, and after the expiration of the minimum, the prison commissioners may issue to the prisoner a permit for his liberty subject to such conditions as they may choose to impose, and subject to revocation and reimprisonment.

No further protection is extended to the codfish; but in lieu thereof one hundred dollars is to be expended in taking down, painting and resuspending the time-honored image of that useful denizen of the deep which has so long hung in the chamber of the House of Representatives.

No one can fail to observe even in a cursory and

superficial glance, such only as I have been able to give at this legislation of Massachusetts, without being impressed with its conspicuous features. It shows many of the traits of her early settlers still persistent, notwithstanding the abundant immigration from other and different peoples; a rigorous self-discipline, a belief in the efficacy of positive enactments, and an unhesitating readiness to assert the supremacy of the general good over individual interest. Nor can one fail to be impressed with the superior clearness and elegance which mark the framework and language of the laws, an evidence at once of the general cultivation of the people and of their discernment in the selection of their representatives.

#### MICHIGAN.

A printed synopsis of the laws of the last session of the Legislature of Michigan, the only source of information accessible to me, exhibits, in divers forms, a disposition to meet social changes and modern beliefs with appropriate legislation.

Street railway companies are required to protect certain employes from exposure to inclement weather by having the platforms of cars enclosed. A general act makes provision for the incorporation of divisions and clubs of American Wheelman as they style themselves. Further enactments are made for the protection and welfare of children. The concerted movement for the display of the national flag on public school houses is favored by an enactment. Judges of Probate are permitted to authorize executors and administrators to mortgage the property of the deceased in order to raise money to pay his debts. Townships, cities and villages are permitted, if they so elect, to use Meyer's automatic ballot machine in all elections. Provision is made for the compulsory education of children, and the punishment of truancy. The protection and regulation of law are extended to political primary meetings in cities of not less than fifteen thousand inhabitants. Fire insurance companies are prohibited from limiting their liability. An attempt is made to render the law respecting acknowledgment of written instruments uniform with that of other States. It is made unlawful for delegates to any political convention to appear by proxy. A State Examining Board is established for the admission of lawyers to the bar. Juries are required in finding verdicts in suits for libel to separate their findings for injuries to feelings from those for actual damages. The Governor is authorized in certain cases to liberate convicts on parole. The capacity of packages for the shipment of fruit is required to be marked. The age at which females may marry without the consent of parents or guardians is raised from sixteen years to eighteen.

Building and loan associations are placed under the supervision of the Secretary of State.

#### MINNESOTA.

The Legislature of Minnesota has given much attention to the revision, amendment and consolidation of the laws in relation to cities, and has in many other important particulars revised the domestic policy of the State, especially in relation to its charitable and educational institutions. It has made an elaborate codification of the laws relative to insurance companies; made an attempt toward the destruction of certain designated noxious weeds, making it unlawful for the owners of land to allow such weeds to go to seed, and allowing the entry of public officers upon private lands for the purpose of destroying them.

A provision, quite novel in this country, is enacted permitting either party to an action triable by jury to have a struck, or special, jury at his pleasure, the expense thereof being chargeable to the party demanding it. Another novel provision, the purpose of which is not immediately obvious, is found in an enactment that when a verdict is given for damages for personal injuries arising out of the negligence of a co-employee, the name or names of such co-employee or co-employees, when appearing by the evidence, shall be found and stated by the jury in their verdict. Elaborate and rigorous legislation was enacted to prevent corrupt practices in elections. It includes a limitation of the amounts which may be expended by, or for candidates, and of the ways and purposes in and for which they may be expended, and requires verified and itemized accounts. The regulation of law is also extended to political primaries.

#### MONTANA.

Montana appears in a brand new suit of codes, embracing a Political Code, a Civil Code, a Code of Civil Procedure and a Penal Code. Inasmuch as the leading idea is to have no unwritten law, or as little as possible, the framers of the system have very properly sought to furnish an abundance of the written variety. According to the numbers of the sections there would appear to be upwards of sixteen thousand in the four codes, which is pretty well for a young State; but some gaps are left in the enumeration between the different divisions upon the supposal, apparently, that experience will show the necessity of many additions, and to enable them to be made without disturbing the order of enumeration.

The matter of these codes is in large measure borrowed from the legislation of California, New York and some other States, although much, as I am officially informed by a distinguished lawyer of Montana, has been "evolved from her own inner

consciousness." The work gives evidence of much labor, learning and ability. The arrangement is orderly and the language appears, in general, to be concise, well chosen and perspicuous. If the previous condition of the law of the State was as chaotic, as I am informed it was, I should suppose that much benefit would be derived from the new system. Of course it would be impossible within the limits to which this address must be confined, or with the time at my disposal to review this huge mass of legislation; nor would it, for other reasons, be appropriate. Most of it, as already observed, has been heretofore enacted elsewhere.

Those who doubt the expediency of attempting to reduce the suggestions of common sense, the rules of logic, the dictates of reason, and the teachings of good morals into abstract statutory form—in other words, to attempt to state the *law* regulating private transactions apart from the *facts* will find much in the Civil Code which they would say might well have been omitted as being more likely to raise new questions than to settle those now existing. The unwritten common law was the horror—the *bête noir*—of Bentham. He would have absolutely extirpated it, and solemnly advised the original States of our Union to adopt that policy. Some of his followers have imbibed this antipathy and made efforts to carry it into effect. The proposed Civil Code to establish which in New York such earnest efforts were once made, contained a provision in these words, "In this State there is no common law in any case where the law is declared by this Code." The framers of the Montana Code have borrowed and adopted the declaration; but have exhibited their wisdom, if not their consistency, by adding provisions which not only preserve and continue the whole body of the common law, but nullify their own codification of it. They say (section 4653 of Civil Code), "The provisions of this Code so far as they are, substantially, the same as existing statutes, or the common law, must be construed as continuations thereof, and not as new enactments." Therefore, all the Montana lawyer has to do, or will do, under this Civil Code is to ascertain, when he is in doubt, what the common law is upon any subject in the same way which lawyers have always followed. He must, however, before his inquiry is finished, consult the Code to learn whether it may not have been designedly changed. Codification of this description is simply digest-making. As *legislation* it is absolutely ineffective; for if correctly done, it adds nothing to existing law, and if incorrectly done, it is to be disregarded. What sort of legislation is that which leaves to the judicial power the right to sit in judgment upon the legislator and inquire whether he has properly performed his work? Bentham



clearly saw that codification committed a plain *felo de se* unless it started with the assumption that there *was* no other law save that created by the written word; and, with a courage corresponding to his conviction, he proposed to strip from the judicial mind its prerogative of inquiring what was right, and limit it to the mere office of declaring what was written. The Montana codifiers have not thus chosen to bid defiance to nature and her laws.

Some attempts are made in this code to introduce into the province of the common law some doctrines which the masters of that system have not hitherto found occasion to employ. An uncaught wild animal is made the property of the person upon whose land it may happen to be, if he chooses to assert it to be such; but what property amounts to which may pass from one to another a hundred times a day against the will of the owner is not very clear. Moreover, its definition of property omits the requisite of *utility*, and thus makes ferocious wild animals, such as caught rattlesnakes, the subject of property. A title is devoted to the formulation of rules for the interpretation of contracts, and among them is this: "If the terms of a promise are in any respect ambiguous or uncertain, it *must* be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." (Civil Code, sec. 2,214). Of course it is implied that in such cases the misunderstanding of the two parties is or may be different, that is, that there is no meeting of minds, and the prime requisite of a contract is, therefore, wanting; and yet this meeting of minds or consent is made by a prior section of this code an essential to every contract. But it may very properly be said that this is of no consequence, and that an exception may be introduced if in accordance with justice. Let us then see what sort of justice is effected by this novel doctrine. The case aimed at evidently is that of a supposed roguish promisor, but let us suppose an instance in which the rogue, as is often the case, is not so shrewd as he imagines himself to be, and that he is mistaken in his notion of the understanding of the promisee, and also in that of the true interpretation of the contract, which is correctly apprehended by the promisee and very much to his advantage. On the doctrine here enacted into law, the promisee, although perfectly honest, is deprived of this advantage, the true interpretation of the contract is set aside and another engagement, not desired by the promisee, substituted in its place upon which it is conceded the minds of the parties never met. The law of partnership is enriched by some novel additions. One styled "Renunciation of Partnership," permits any partner, even though the association is to continue for a fixed time, to exonerate

himself from all future liability to third persons by giving notice to them. After this he cannot claim any of the profits of the partnership, but yet it is not dissolved, unless his co-partners choose to make this renunciation a ground for dissolution. This seems to give a man the privilege of violating his contract at pleasure. What the renouncing partner had agreed with his co-partners to do was to furnish his responsibility for a definite period. It may be said that the exercise of the privilege of renunciation is not a violation of the contract, but an act in pursuance of it. But where is the wisdom of precluding persons from agreeing to be liable for each other's acts for a definite period if they wish. It may be said that an express agreement not to renounce would still be effective. If this view be taken of the section, it amounts to nothing more than to say that the mere fixing of a term for the continuation of a partnership shall not mean what it has ordinarily been understood as meaning. In the definition of the mutual obligations of partners it is declared that "they are trustees for each other within the meaning of chapter 1 of the Title on Trusts;" now all trustees mentioned in that chapter are subject to *removal* for cause, and *new trustees* may be appointed in their places which would be a novel procedure in the case of co-partners; but as the framers of this code have, as already observed, enacted that they are not always to be taken to mean exactly what they say, no other harm is likely to arise from this provision than the litigation requisite to an authoritative declaration of its meaning.

The framers of systems of law do not always sufficiently remember that so far as respects the ordinary doctrines of the common law, an innumerable host of cultivated human intellects, many of them of transcendent ability, have been studying and reflecting for a thousand years upon what is just, fit, and expedient in all the ordinary affairs of life. The final conclusions reached by this process are not likely to be amended by the work of a few revisers giving comparatively brief attention to each particular topic. Anything new that may be thus suggested in the field thus long and diligently explored will be likely to be found erroneous. It is only where changes have occurred in life and affairs, that is, in the subject-matter to which laws are applied, that the prior conclusions may be in some respects re-shaped or supplemented.

#### NEBRASKA.

This State has enacted a law regulating admission to the bar, prescribing examinations by a commission of three or more persons appointed by the Supreme Court. The qualifications are two years study with a practicing attorney or graduation at the Law College of the State University, and satis-

factory examinations. Another for the supervision of State banks on the general plan of the National Banking Act; another allowing guarantee companies as sureties on public bonds, a policy which convenience, or the industry of the companies, appears to have extended into many of the States during the year; a law permitting agreements in contracts for the sale of the rolling stock of railroads that the title to the property shall remain in the vender until payment, the agreement, however, to be in writing and filed for record with the Secretary of State; an act regulating the practice of dentistry, and a series of acts for the purpose of establishing a system of irrigation.

#### NEW JERSEY.

The legislation is of chiefly local interest, but exhibits tendencies in accord with some general features of recent American legislation. An effort is made to rescue municipal elections from the dominating influence of partisanship by providing for elections in the spring. A step is taken toward some control by law over private insane asylums. Extensive provision is made for the establishment of parks in cities. The movement in which our association is so much interested is favored by the continuation of former legislation in relation to a commission upon the subject of uniformity in legislation, looking to consultation with commissioners of other States. Women are made eligible for commissioners of deeds. The State has also essentially modified her judicial establishment; though in a manner interesting only to her own citizens.

*(Continued in next issue.)*

### Abstracts of Recent Decisions.

#### NEGOTIABLE INSTRUMENTS -- ALTERATION. --

Where a note was altered after delivery by an agent of the payee, without the maker's knowledge, by an interlineation of the words "with interest at six per cent," which occupied only half a line and appeared to have been interlined, no recovery could be had thereon by a subsequent holder for value of either interest or principal alone. (*Gettysburg Nat. Bank v. Chisolm*, [Penn.], 32 Atl. Rep. 730.)

**PRINCIPAL AND AGENT -- TRUSTS.**—The executors of one D filed a bill for an accounting against C, alleging that he had obtained control of the affairs of D, an inexperienced woman, and had misappropriated her property, and failed to account. C denied the charges, and, on the hearing, there was a failure to prove that D was under C's control; and it appeared that while she had had full opportunity for ten years, while free from C's influence, to ob-

ject to his management, she had never done so, and that C held vouchers for his most important transactions. (*Halsey v. Cheney* [U. S. C. C. of App.], 68 Fed. Rep. 763.)

#### TAXATION -- EXEMPTION -- PUBLIC CHARITIES. --

Farms purchased and permanently used by a hospital for hospital purpose, as part of the hospital plant, and as an open-air sanitarium, in actual operation for such purposes, and incidentally for profit to reduce expenses, though separated from the main hospital, and used for hospital purposes only during the summer months, are exempt from taxation. (*Contributors to Pennsylvania Hospital v. Delaware County* [Penn.], 32 Atl. Rep. 456.)

### New Books and New Editions.

**HALL'S BANKING LAWS.** By Charles R. Hall, of the New York State Banking Department.

This work has recently been published and contains the revised and amended statute laws on this important subject, including the banking laws of New York relating to banks, individual bankers, savings banks, trust companies, co-operative savings and loan associations, mortgage, loan or investment, and safe deposit, corporations, together with the national bank act. It also contains the statutory construction, general and stock corporation laws of the State of New York, and other constitutional or legislative provisions of the United States or of the State of New York pertinent to this subject. There has been for a long time a feeling that just such a work as this should be published, and it can be said without fear of contradiction that the experience and ability of the author, together with the knowledge gained from experience in the banking department of the State of New York, makes the work one that will be appreciated throughout the State, even outside of the members of the legal profession. The work is divided into thirty-six chapters, together with a part devoted to the national bank act, which is divided into eight chapters. Under each chapter there are a number of articles which are subdivided into sections. The arrangement is most pleasing in that the citations and references are added at the end of each section. The form of this book and the way in which it is gotten up is, we believe, more popular than the text-book. After the chapters giving the statutory provisions we have referred to and the National Bank act, comes suggestions and instructions in regard to the management and organization of national banks, issued by the comptroller of the currency. This in itself is valuable and gives the proper and recognized forms now in use. Following this are the official forms for the organization of monied corporations under the New York State

**Banking Law.** These are the ones now in use by the banking department of this State, and show brevity and clearness. Following this are over 100 pages devoted to the text of decisions of the general subject, which is followed by an excellent index in general and one for the State laws as well as one for the National Bank Act.

Published by Matthew Bender, 511-513 Broadway, Albany, N. Y.

**NEGLIGENCE OF IMPOSED DUTIES.** BY CHARLES A. RAY, LL.D., EX-CHIEF JUSTICE OF INDIANA SUPREME COURT, AUTHOR OF NEGLIGENCE OF IMPOSED DUTIES, PERSONAL; AND CARRIERS OF PASSENGERS, AND CONTRACTUAL LIMITATIONS..

This text-book is divided into twenty-two chapters and contains over a thousand pages devoted to the subject above referred to. The first chapter is devoted to Liability and Duty to Provide Safe Transportation. Following this are chapters on Limitation of Liability by Contract and by Statute; Acceptance of Goods by Carrier; Bill of Lading; Validity of Bill of Lading; Act of God; Perils of the Sea; Fire Clause; Freight Charges Regulated by Value of Article; Transportation of Cattle; Packing and Stowing Goods; Deviation from Route, Delay of Transportation of Goods, Negligent Loss or Illegal Capture of Cargo, Transportation by Carriers over Connecting Lines, Liabilities, Charges, Facilities, Connecting Carriers, Combinations; Interstate and State Commerce; Competition, Discrimination and Continuous Carriage; Unjust Discrimination; Freight Charges; Delivery of Goods; Action against Carrier of Goods; Insurance; Presumption; Statutory Limitation of Liability.

The arrangement of this book, with the foot-notes at the bottom of each page, makes it very easy for reference, while the reference and citations are numerous and from every State in the Union, as well as from the United States courts. As a general text-book it should receive the careful consideration of the bar. Its facility of reference by means of the index makes it a valuable book for a lawyer's library.

Published by The Lawyers' Co-Operative Publishing Company, Rochester, N. Y.

**AMERICAN DIGEST, 1895, annual.**

The appearance of this work gives another large volume to the editions which have preceded it, while it is sufficient to say that the Digest is apparently of all the decisions of the different courts of this country. Naturally, we have been unable to thoroughly examine the work than to have any other assurance that it was published by the West Publishing Company. The volume contains over five

thousand pages. After the index is found a table of cases digested. The volume is bound in sheep and is published by the West Publishing Company, St. Paul, Minn.

**FRENCH CIVIL CODE.** Translated by Henry Cachard, B. A., counsellor-at-law of the New York bar.

This book is one of the most valuable additions to the list of English law books which has been made for many years, and will find a welcome place from the members of the bar in English speaking countries. It will be valuable not alone to the practising lawyer but will be of great literary importance and worth to students of general literature. It will be easily remembered that many foreign courts when called upon to decide questions of French law have almost uniformly rendered decisions not in accordance with the law of that country and this work will, at least, give easy access to English speaking courts to the Code which now exists in France with all its amendments and changes to date. Aside from this practical value which the work has, it will be entertaining to lawyers and students alike when it is remembered that Napoleon, when presiding over the meetings at which the articles were discussed, showed the greatest aptitude and cleverness in assisting and framing many of the provisions of the code now found in the present work. The Napoleonic craze of the last few years, which has induced so many writers to enter upon a discussion of more or less of Napoleon's life, have, perhaps, wearied many by the ceaseless prattle on the one well-worn subject. To them this work comes as a fresh and entirely new evidence of Napoleon's ability and natural gifts and as such will be most gratifying to many who have become wearied of so much that has been written. To New Yorkers it will be peculiarly interesting when it is recalled that one of the efforts of one of the greatest lawyers of this State, David Dudley Field, was largely devoted to the framing of the Civil Code and to attempts to have the same made part of the statute law of this State. It will also give some idea to many lawyers of the value of codification of some of the common law and will give a definite plan of what might be comprehended within statutory limitations. As will be remembered the code is divided into three books. The first of these books contains eleven titles, the second four titles, and the third twenty titles. The first book deals with persons, the second book with property and the third book deals with the different ways of acquiring property. The present work covers over five hundred pages devoted to the text of the code, and an index of one hundred pages is added. Published by Banks & Brothers, New York and Albany.

# The Albany Law Journal.

ALBANY, NOVEMBER 23, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ON the 19th of November, 1895, Attorney-General Hancock of this State gave out his decision in the case of C. A. Whelan & Co. against the American Tobacco Company, a proceeding preliminary to the commencement of an action to prohibit the American Tobacco Company from doing business in this State. It is claimed that the attorney-general in granting this petition has taken the first step in the movement against the different trusts which do business in this State. The action from now on will be productive of great interest among lawyers of all the States and will probably be conducted by the most distinguished counsel in the United States. In view of the numerous interests which are involved from a financial standpoint, not to speak of the legal principles which must be settled, it is proper that we should publish the full opinion of the attorney-general, which is as follows:

"Application has been made to the attorney-general to commence an action in the name of the people against the American Tobacco Company to obtain a judgment restraining the company from transacting the cigarette business in this State and to cancel the certificate of authority heretofore granted to the company authorizing it to carry on business in the State of New York. It appears from the papers presented upon the hearing that the American Tobacco Company is a New Jersey company, incorporated on or about Jan. 20, 1890, with a capital stock of \$35,000,000."

After referring to the company's receipt of a certificate authorizing it to do business in this State, the attorney-general continues: "An action is now pending against the company in the State of New Jersey, in which it is alleged in substance that the company was organized for unlawful purposes; that the incorporators of the company originally consisted of firms and

corporations transacting the same kind of business in different States as competitors and entirely independent of each other, manufacturing and selling among other products ninety-nine per cent of the cigarettes manufactured and sold in the United States; that said firms and corporations, for the purpose of preventing competition among themselves and in order to obtain a monopoly of the manufacture and sale of this particular line of goods, and to arbitrarily fix and maintain the prices of that commodity, entered into an agreement to organize a corporation to be known as the American Tobacco Company, in which they should respectively become stockholders, receiving full paid stock in payment for the purchase of them, by said company, of the property used by each of them in the business in which they were then engaged; that said company was thereupon organized and its stock divided among the various corporations and firms entering into the agreement; but that the incorporators never intended to establish any factories or depots in the State of New Jersey, and that neither they nor any of them, nor the company itself ever had any place of business in that State, but that the original corporations and individuals continued to transact business in their respective localities as before, and that the object of the organization of said company was to restrain trade, prevent competition and to secure a monopoly in the manufacture and sale of cigarettes. Various other allegations are contained in said complaint, charging a conspiracy and unlawful combination. Substantially the same statements are contained in the papers presented to me, all of which are specifically denied by the officers of the company, and are the subjects of controversy in the New Jersey suits. The allegations charging a conspiracy and unlawful purpose and combination upon the part of the organizers of the company in obtaining its charter, are properly matters to be investigated by the courts of the State where the original articles of incorporation are filed."

Reference is made to the illegality of combinations made to control prices and produce a monopoly, after which the opinion states the tobacco company's method of doing business as follows: "The general plan adopted by the company appears to have been to constitute

the dealers handling and selling the cigarettes furnished by the corporation, its general agents for the disposal of that particular commodity, and to issue to its so called agents what are designated as selling lists. The agreement entered between the company and those dealing with it provides, in substance, among other things, that cigarettes of the various brands manufactured by the company are to be sent to the dealer and received, sold and accounted for by him; that the goods are not to be sold at lower prices than those fixed by the company, the dealer to guarantee all sales made by him, all cigarettes to remain the property of the corporation until sold by the dealer. Commissions for selling and expenses of the dealer are allowed on all goods sold at not less than \$2.50 per 1,000, provided the dealer shall fully comply with all the conditions herein contained and shall co-operate with the company and promote its interests and handle its cigarettes to its satisfaction. It is further stipulated that if the company becomes informed and believes that the dealer has directly or indirectly sold cigarettes at lower than the fixed prices, or has not complied with the conditions of the agreement, the company shall have the right to determine and declare that the dealer has forfeited all claims to commissions. It appears to be the fact that, with the exception of certain cheaper brands, the company has refused since March 1, 1892, to sell directly to dealers, but has disposed of this line of goods through its agents appointed in the manner and upon the terms above stated.

In brief the evidence and papers submitted to me are to the effect that the wholesale dealer, jobber or whoever he may be that obtains this commodity from the company for the purpose of commerce is, with the exceptions I have before stated, at once turned into an agent of the company, and subjected to its direction and control as to the terms and manner in which he shall dispose of this particular line of goods. It is claimed upon the part of petitioner that the real object and purpose of this arrangement and method of doing business is to compel jobbers and dealers to refrain from selling any cigarettes except those manufactured by the company, and that if they handle other brands the company refuses to

consign any further goods to them, and that inasmuch as much the larger part of the cigarettes manufactured and sold are produced by the factories of the company, such a withdrawal results in great injury to, if not a destruction of the business of said dealers. Various affidavits have been presented and depositions of witnesses have been read tending to establish the claim of the petitioner. In my judgment a corporation doing business in this State, and having substantial control of the market ought not to be permitted to impose as a general perquisite upon the purchasers of its commodities, whether designated as agents or not, that they shall obtain goods from no other source. The enforcement of such a condition must necessarily operate as a restraint of trade and prevent competition. To carry out such a rule to its logical sequence would enable the wealthy corporation which has obtained a monopoly of the market to continue the monopoly and to drive out of business poorer and less fortunate competitors. The purchaser under such an arrangement and contract has been made party to a scheme which has really a tendency to give control of the market to the vendor to the exclusion of all competitors. I think such a method of transacting business under the circumstances disclosed is against public policy and would not receive the approval of the courts of the State in the case of a domestic corporation. Why then should it be permitted in a foreign corporation?

I have examined this application with care, believing that corporations acting within the law are entitled to the protection of the courts, and that actions should not be commenced except for good and substantial reasons. Large interests and immense accumulations of property are represented by companies incorporated under foreign and domestic statutes. I have no sympathy with any disposition upon the part of private citizens or public officials to attack the existence of a corporation because of temporary financial embarrassment or trivial and unintentional deviation from chartered powers. Applications made for purposes of speculation, to redress private grievances or to promote the interests of rival corporations, are unworthy of consideration. I am of the opinion that sufficient evidence has been produced upon the

hearing to authorize the commencement of an action to determine whether the American tobacco company is not transacting its business in the State of New York in an unlawful manner, in restraint of trade and to prohibit it from further transaction of such business. The application is granted and an action may be commenced upon filing a bond sufficient in form and amount to indemnify the people against costs of suit.

On reading the opinion, it is important to notice that part in which the allegation of the petition that a monopoly exists is discussed. It is especially in relation to the words, "in my judgment a corporation doing business in this State and having substantial control of the market ought not to be permitted to impose as a general prerequisite upon the purchasers of its commodities, whether designated as agents or not, that they shall obtain goods from no other source." Applying this principle by analogy the Attorney-General declares that, as domestic corporations would not be allowed by the courts of this State to do business in a manner clearly against public policy, foreign corporations should not be allowed that right.

A decision in admiralty jurisdiction recently made in the United States District Court for California in *Herman v. Port Blakely Mill Co.* (69 Fed. R. 646), is worthy of careful consideration. In the case in question it was held that where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the *locus* of the damage and not the *locus* of the origin of the tort. The tort complained of was that a laborer working in the hold of a vessel was struck and injured by a piece of lumber sent without warning through a chute by a person working on the pier. As the *locus* of the damage was on board the vessel, the court held that it was within admiralty jurisdiction.

The court said, in part: In the case of the *City of Milwaukee v. The Curtis, The Camden and The Welcome* (37 Fed. 705) a libel *in rem* was filed by the City of Milwaukee against the vessels named for injuries to a bridge. The libel was dismissed for want of jurisdiction. The proposition involved there was counter to that in the case at bar. It was for an injury to land, and not for an injury originating on land.

Nevertheless, the remarks of Judge Jenkins as to the locality of the damage being conclusive of the question of admiralty jurisdiction are in point. He says:

"In cases of tort, locality is the test of jurisdiction in the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on the water, yet, if the consummation and substance of the injury are on the land, a Court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury (*Ex parte Phenix Ins. Co.*, 118 U. S., 610, 7 Sup. Ct., 25). Within this settled principle, a tort is maritime, and within the jurisdiction of the admiralty, when the injury is to a vessel afloat, although the negligence causing the injury originated on land. (*The Rock Island Bridge*, 6 Wall, 213; *Leonard v. Decker*, 22 Fed., 741.) In the former case it was ruled that an action *in personam* would lie against the owners of the bridge, because the injury was consummated upon navigable waters, being inflicted upon a movable thing engaged in navigation, but that a proceeding *in rem* against the bridge was not maintainable, because a maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. And so an injury happening through default of the master, to one upon a vessel discharging cargo at a wharf to which she was securely moored, is within the admiralty jurisdiction (*Leathers v. Blessing*, 105 U. S., 626), but otherwise if the injury occurred to one upon the wharf. (*The Mary Stewart*, 10 Fed., 137.) In the latter case there is an inadvertent remark to the effect that both the wrong and the injury must occur upon the water—a proposition not sustained by authority. It suffices if the damage—the substantial cause of action arising out of the wrong—is complete upon navigable waters. (*The Plymouth, supra.*)"

Counsel for respondent relies greatly upon *The Mary Stewart* (*supra*), and particularly upon the remarks criticised by Judge Jenkins in the case just quoted, as indicating that the tort must be complete on the water before a

Court of Admiralty will take jurisdiction. That was a case involving the proposition counter to the one at bar, viz, the *tort* there originated on the water, but the consummation and the injury were sustained on land. The facts of the case were, briefly, that one, an employe of the stevedore engaged in loading the vessel, was injured, while standing on the wharf, by a bale of cotton, which was being hoisted aboard the ship, which fell before it reached the ship's rail. It was contended that a Court of Admiralty could not take jurisdiction. The district judge correctly held that jurisdiction, could not attach, but, in sustaining this contention, went a little further than the facts justified him. He said:

"It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of *tort*, the locality alone determines the admiralty jurisdiction. Only those *torts* are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. (The *Plymouth*, 3 Wall., 20.) This springs from the well-known principle that there are two essential ingredients to a cause of action, viz., a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water. Now, the injury in the case at bar happened on the land."

This language must, of course, be taken subject to the facts of that case, and to the question of law which the learned judge was then considering. I do not think that he meant to lay it down as a general principle that "the wrong must originate on the water," for that would be to make the test of admiralty jurisdiction depend upon the locality where the tort originated—a proposition not countenanced by a single authority or dictum. I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action, otherwise it would be *damnum absque injuria*.

With reference to other cases cited by counsel for respondent, they may be disposed of with the statement that, discarding scattered and isolated expressions, and reading the opinions cited as a whole, they rather make for than against the jurisdiction of admiralty. While, as previously stated, I have been unable to find any case on "all fours" with the one at bar, yet there are many authorities upon the counter proposition—viz., where the tort has its origin on water, but is consummated, and the injury sustained, on land—which seem to me to furnish convincing authority for the jurisdiction of the court in this case. In those cases, where the facts showed that the tort originated on water, but was consummated, and the injury sustained, on land, it is held that courts of admiralty have no jurisdiction. The authorities even go further, and hold that where the tort originates on water, and results in injury to land, as wharves, piers, bridges, &c. (e. g., a vessel colliding with a wharf, etc.), libels for damages sustained by such wharves, etc., will not be entertained in admiralty, because the injury took place, to all intents and purposes, on land, and not on water, and the fact that the agent causing the injury was afloat made no difference. (The *Plymouth*, *supra*; The *Neil Cochran*, *supra*; The *Ottawa*, *supra*; The *Arkansas*, 17 Fed. 383; The *Professor Morse*, 23 Fed. 803; The *John C. Sweeney*, 55 Fed. 540; The *Mary Stewart*, *supra*; The *H. S. Picklands*, 42 Fed. 239; The *Mary Garrett*, 63 Fed. 1009; The *Rock Island Bridge*, 6 Wall. 213.) But it is held, on the other hand, that if a vessel sustain injury by colliding with wharves, piers, etc., they may maintain an action *in personam* against the owners thereof, the damage having been sustained on water. (*Greenwood v. Town of Westport*, 53 Fed. 824; *id.*, 60 Fed. 561; *Hill v. Board*, 45 Fed. 260.) The central idea found running through all these cases is, so far as jurisdiction over torts is concerned, that the admiralty law looks to the place where the injury was suffered, and not to the locality of the agent causing the injury. If this be the correct doctrine with respect to cases where the tort originates on water, but results in damage to land or on land, I see no valid reason why the same test of jurisdiction is not applicable to cases where the tort originates on land, but

result in damage on water. Applying this criterion to the case at bar, it will be readily conceded to be conclusive in favor of the question of jurisdiction.

In *Hite v. Metropolitan St. Rwy. Co.*, decided in the Supreme Court of Missouri in July, 1895 (32 S. W. R. 33), it was held that where, in an action for injury from being thrown from a cable car while rounding a curve, the evidence clearly shows that the accident was caused by a lurch of the car on account of its speed, and that such speed was necessary to carry the car around the curve, a demurrer to the evidence should be sustained.

The court said: "It is insisted by plaintiff that the evidence adduced by her made out a *prima facie* case, which entitled her to a verdict, unless overcome by defendant, which was a question for the jury. This is unquestionably the law where there is any substantial evidence introduced on the part of a plaintiff to sustain the allegations in the petition, as the authorities cited by counsel for plaintiff in their brief abundantly show, but it is not the law where the facts necessary to be proven in order to entitle the plaintiff to recover are merely inferential or conjectural. The evidence clearly showed that the only way the cars could be operated around the curve where the accident happened was by the speed of the cable, and that the lurch or lunge which precipitated plaintiff from the car was incident to its operation, and could not be avoided. These facts were undisputed. Therefore, the demurrer to the whole evidence should have been sustained. There is no evidence upon which to predicate the verdict, and it was the plain duty of the trial court to have sustained the demurrer thereto, as well, also, as to have set the verdict aside, on motion of defendant, because of the want of evidence to support it. The interposition of the demurrer at the close of the case requires us to review the evidence taken as a whole (*Hiltz v. Railway Co.*, 101 Mo. 36, 13 S. W. 946); and, when this is done, there can be but one conclusion and that is that the plaintiff was not entitled to recover. 'When the evidence is of that character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative

to interfere before submission to the jury and direct a verdict for the defendant.' (*Jackson v. Hardin*, 83 Mo. 175; *Powell v. Railroad Co.*, 76 Mo. 80; *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573.) We have carefully considered the motion for a rehearing filed by plaintiff and all of the authorities cited in support thereof, but see no reason for departing from our original opinion. The motion for rehearing is overruled."

#### ADDRESS OF JAMES C. CARTER.

PRESIDENT OF THE AMERICAN BAR ASSOCIATION.

(CONCLUDED.)

NEW YORK.

The most interesting legislative experience of New York during the past year is that of its Constitutional Convention, held under the provisions of the Constitution of 1846, which requires a revising convention every twenty years. The convention appears to have wisely accepted the leadership of a number of members, which it fortunately possessed, of large abilities and temperate wisdom. The result is shown in the rejection of most of the temptations offered to it to indulge in ordinary legislation, and to make the fundamental law (which ought always to be confined to the sure results of experience) an instrumentality for the introduction of untried experiments.

We find, consequently, in its work, very little in the way of radical change. Most of its new provisions are rearrangements of some of the details of governmental organization such as were called for by the special conditions of that State. Such changes as have been introduced are conceived and expressed with caution and prudence, and much benefit may reasonably be expected from them. The provision for preventing the application of public moneys to sectarian purposes under the guise of charity, without, at the same time, repressing charitable effort, deserves general attention. A precaution promising much benefit in special municipal legislation is found in the requirement that special city bills must be submitted to the mayors of the cities affected for their approval, in default of which the bill cannot become law unless re-passed by the legislature.

The legislative session in New York was under the domination of personal and factional influences to such a degree as to obstruct useful attention to real public business — one of the deplorable consequences which follow where the people permit busy self-seekers to assume the leadership of political parties. The most notable pieces of legislation con-



sisted of measures relative to the municipal government of New York city designed mainly to summarily remove from office incumbents supposed to be unworthy. Nothing can justify legislation of this character except a very grave emergency. It renders permanent and orderly administration impossible. Such an emergency perhaps existed in this instance; certainly the loud public voice proclaimed it, but there is great danger that such precedents will be imitated without adequate occasion. Official unfaithfulness and the public demand are easy to be alleged as a pretext under which personal and party schemes may be carried into effect.

One act was passed which well illustrates what seems to be a sort of passion, which many persons with the best intentions have, of seeing their particular views enacted into law. They imagine, apparently, that when this is done the benefit with which they conceive their views to be fraught is already accomplished. This law requires that "the nature of alcoholic drinks and other narcotics and their effects on the human system shall be taught \* \* \* for not less than four lessons a week for ten or more weeks in each year in all grades below the second year of the High school in all schools under State control or supported in whole or in part by public money." All pupils must continue the study until they have passed satisfactory examination. All regents' examinations in physiology and hygiene "shall include a due proportion of questions on the nature of alcoholic drinks and other narcotics and their effects on the human system. All pupils who can read shall study this subject from suitable text-books, but pupils unable to read shall be instructed in it orally by teachers using text-books. \* \* \* For students below high school grade such text-books (presumably on physiology) shall give at least one-fifth of their space, and for students of high school grade, shall give not less than twenty pages to the nature and effects of alcoholic drinks and other narcotics. \* \* \* No text-book on physiology not conforming to this act shall be used in the public schools." \* \* \*

What the effects of an excessive use of alcoholic drinks are, is a matter of common observation and need not be taught in the schools; but what the particular physiological effect of alcohol upon the human body is, is a matter about which men of science most competent to judge inform us that there is as yet no settled knowledge. What this act would accomplish, if it were obeyed, would be to devote a vast amount of the time of the young to the study of the dogmatism, probably the error, of scientists; and there can be no well grounded belief

that the effort will ever impress the young with an aversion to an indulgence in liquors or narcotics. As to the text-books, doubtless there are some publishers who have on hand some which alone will answer the requirements of the statute and will thus exclude all others.

#### NEVADA.

The Legislature of Nevada has contented itself with the passage of one hundred and eleven acts, mostly brief ones, occupying but one hundred and twelve pages. The discrepancy existing between opinions in this State on the subject of money and that which moulds the policy of most nations is made very manifest, not only in the enactments, but also in many concurrent resolutions of this session. The latter exhibit an almost frantic sincerity, and condemn the opponents, and applaud the supporters, of the doctrines avowed with something like delirious intensity.

Among the enactments I observe one designed to promote purity in elections, containing some stringent requirements which, if enforced, would prove very beneficial. It limits the amount of money which may be expended by candidates or other persons in elections, and requires itemized statements of the expenditures. Another permits the disposition of property by holographic wills, to be proved in the same way as other private writings.

#### NEW HAMPSHIRE.

New Hampshire exhibits few marked changes in legislative policy. A considerable step is taken in favor of the policy of providing for the incorporation of private companies under general laws rather than by granting special charters as heretofore. The prohibitory policy relating to intoxicating drinks is retained and made in some respects more rigid. The day prior to Memorial Day is set apart and required to be devoted in the public schools to exercises of a patriotic character. The demands of labor are acceded to in a requirement that suitable seats shall be provided in factories for female operatives.

An act drawn up with great apparent care provides for the establishment by private companies of street railroads. They are rigidly subjected to public supervision and control, and a wise provision limits the amount of capital stock to be issued to actual needs as determined by public authority. Further advances are made towards conferring upon State railroad commissioners a just authority and supervision over railroads.

#### NORTH DAKOTA.

This State exhibits a commendable parsimony in legislation. Her one hundred and twenty brief acts are comprised in one hundred and seventy-six

pages. One of these makes an endeavor on a large scale to do away with the trouble, acerbities and expense of legal controversy over small matters by providing for the election, concurrently with justices of the peace, of four commissioners of conciliation, in all towns, villages and cities, whose beneficent services may be called into play on the consent of both the contending parties at any time after the issue and before the return-day of the summons in any civil action before a justice of the piece,

North Dakota has also provided herself with a new suit of codes, but, by express provision, they are not printed with the other acts of the session and I have not been able to obtain them.

Cigarette smoking is subjected to severe restrictions. No one is permitted to sell, give away or use any cigarette containing any substance "*foreign to tobacco*," and deleterious to health. This intimation that tobacco is not regarded as seriously deleterious to health has a comforting tendency. The selling or giving to persons under seventeen years of age of cigarettes, cigars or tobacco of any kind is also punished; but the boys themselves may smoke *ad libitum*, if they can procure, as they probably will, the cigars and cigarettes containing no substance *foreign to tobacco*.

On second thought the Legislature seems to have concluded that it might be somewhat difficult to prove the composition of a cigarette after it had been smoked, and the next act passed by it is one absolutely prohibiting the sale of cigarettes "of any kind or form."

The humane dispositions are gratified by an act for the prevention of cruelty to animals. It is not surprising to find that the chief products of a State find protection in its legislation, and that where dairies abound the substitutes for butter and cheese should not be allowed to be palmed off for those articles. Still it seems fair that the makers of these substitutes, provided they are wholesome, should be allowed the common privilege of naming their wares, if they do not usurp names appropriated to other things. But North Dakota compels the manufacturer of a substitute for butter to stamp upon the packages "Patent Butter," a name perhaps which he would not himself prefer; and whoever sells substitutes for the historic butter or cheese must furnish the purchaser with a card stating correctly the different ingredients of the article, a requirement which the vendors of compound substances are not usually subjected to.

The advancing civilization of this State is manifested in several acts for the promotion of comfort and decency in and about school-houses, the prevention of the circulation of obscene literature, and the creation of a Historical Commission. An at-

tempt is made at the destruction of the Russian thistle and other noxious weeds. The doctrine of *Munn v. Illinois* is vigorously asserted by an act relating to elevators and warehouses.

The effect of rigorous attempts to tax personal property are strikingly manifested by an act permitting county treasurers at any time after the taxes upon personalty have become due, if they have reason to believe that the person against whom they have been assessed is about to remove himself or his chattels from the county, to immediately seize and sell sufficient personal property to pay the tax. Something is wrong in Denmark when the inhabitants of a taxed district seek to leave it to escape the taxes.

#### NORTH CAROLINA.

A numerous array of acts is exhibited in this year's volume of the laws of North Carolina. The most noteworthy which I have observed among them are two, one dealing with the subject of taxation and the other with that of elections. The former nearly exhausts human ingenuity in contriving as many different forms of taxation as possible, instead of seeking to make them as few and simple as possible. Property is taxed, incomes are taxed, licenses in multiplied forms are required for carrying on occupations. This formidable machinery involves the creation of nineteen distinct penal offenses. That such a complicated system can be operated with efficiency, harmony and justice seems impossible.

The election law seem to be an elaborate revision and amendment of the prior law, but I do not discover in it any novel features of interest to other communities.

#### OREGON.

A contest for the election of a United States Senator so far occupied the attention of the Legislature as to leave comparatively little time for attention to other public business.

A quite novel piece of legislation is shown in an act giving the right to take lands for the construction of railroads, skid roads, tramways, chutes and flumes for the purpose of transporting lumber and other products, the facilities thus provided being declared to be for the public use. All persons can use them upon paying reasonable compensation. The public necessity declared by the act as the justification of such legislation and of its immediate operation, is that of speedily developing the mineral and other material resources of the State—a rather liberal application of the right of eminent domain.

A policy adopted by several other States during the past year is followed in the establishment of irrigation and dyke districts for irrigating lands in some places and securing against overflows in

others. These districts are authorized to assess upon the inhabitants the expense of the works constructed, but lands not needing irrigation cannot be included against the will of the owners.

The practice of medicine and surgery is regulated in a manner similar to that adopted this year in several other States, by requiring licenses from a board of experts after examination. Three schools are recognized, regulars, eclectics, and homœopaths. A rather large demand is made on the Oregon Railway and Navigation Company by an act providing that when any person or company anywhere between certain designated points on the Columbia River shall build and grade a side track, it shall furnish iron for the track, and cars for the transportation of freight, and maximum rates of freight between those points are fixed by the act. The only security which the Company has for reimbursement or compensation for laying down rails and furnishing and running cars, is the probability that no one will construct and grade a track except where there is a prospect of a considerable amount of transportation. It would appear however that if the Legislature can compel a railway company to do this, it might also compel one to extend its line beyond the termini mentioned in the charter.

#### PENNSYLVANIA.

This great Commonwealth has distinguished itself by rejecting much proposed legislation of a novel character, and called communistic by those who do not approve of it.

It has exhibited exceptional liberality towards institutions for the higher education, bestowing upon the University of Pennsylvania the sum of \$200,000.

It has recognized the sad neglect which has hitherto been shown in relation to a great public interest by enacting a general forestry law, making provision for the preservation of forests from which much good may be expected.

It has made a probably useful change in the law of evidence by permitting the comparison of genuine with alleged simulated signatures; prohibited the wearing in any public school by any teacher of any religious garb, badge or symbol, and greatly enlarged the powers of bank examiners.

#### RHODE ISLAND.

Several pieces of wisely suggested legislation have been enacted in this State.

An odious exception from the penal law which permitted the practice of betting on horse races, where the track was owned by an incorporated agricultural society, was repealed. The widely spread tendency to regulate the practice of medicine and surgery was yielded to in an act providing for exam-

ination and license. The patriotic movement against the display of foreign flags on public buildings was seconded by legislation for that purpose. The advantage which fire insurers are supposed to enjoy in dictating the form of their engagements was done away with by an act prescribing the form of policies, and a step in the right direction was taken by an act providing for the construction of public roads in certain cases by the State.

#### SOUTH CAROLINA.

The violent political dissensions in this State do not appear to have left any conspicuous mark upon its legislation at the last session, unless it be in the provisions of the act providing for a constitutional convention and a registration of voters to that end. The latter has been declared unconstitutional by the United States Circuit Court.

The most noteworthy permanent legislation is an act rigorously forbidding in any form, direct or indirect, the consolidation of competing lines of railroad.

A patriotic interest in the history of the State is evidenced by an act creating a commission for the purpose of collecting and publishing matters of interest connected with such history.

#### SOUTH DAKOTA.

This State establishes a State Board of Health with extensive powers; amends her tax laws with the determined purpose, common to so many States and equally sure to be defeated, of taxing everything which passes under the name of personal property, and insists upon taxing many things of this sort twice by taxing all credits, so that if one of two men who are worth, each, one thousand dollars in money and other personal property, lends five hundred to the other and takes the note of the latter for it, the transaction adds five hundred dollars to the taxable property of the State! She yields to the universal movement inaugurated, I should guess, by guaranty companies, allowing such companies to become sureties on official bonds; creates the office of county examiner to examine the books, accounts and funds of the treasurer of each township in the county. This is one of the arid States and provision is made for the sinking of artesian wells at the public expense for irrigation and other purposes. The ancient institution of the grand jury is boldly dispensed with in all cases unless the judge of the Criminal Court directs one to be summoned. The substitute is an information filed by the legal representative of the State against persons supposed to be guilty of crimes. Provision is made for county mutual fire insurance companies authorized to take risks only on property within the county. Those who practice pharmacy

are required to obtain a license. Prize fighting is rigorously forbidden. Very large additional powers are conferred upon the railroad commissioners appointed under existing laws. The recent afflicting droughts in this State are evidenced by legislation empowering public officers to procure and furnish to those otherwise unable to obtain it seed grain.

#### TENNESSEE.

Tennessee enacts a law removing from witnesses the disabilities of unbelief. She also introduces a change into the law of adverse possession by providing that an adverse holding shall not be effectual unless under a recorded assurance of title; bestows upon a particular county the very unusual power to subscribe to the capital stock of "any domestic or foreign manufacturing company;" follows the example of other States in protecting butter against simulated substitutes; extends favor to guaranty companies by authorizing the acceptance of them as guarantors of public bonds; destroys preferences in assignments by debtors in failing circumstances and makes such assignments enure equally for the benefit of all creditors; provides measures for arresting the spread of contagious or infectious diseases among animals, and abolishes the convict lease system and provides for the utilization of convict labor upon farm and coal lands owned by the State.

#### TEXAS.

This vast commonwealth has enacted a goodly number of laws most of which are of local interest only. Some new policies, however, are favored. Married women over twenty-one years of age are no longer to have an advantage over others in actions for the recovery of real property; they are subjected to the operation of the statute of limitations. A tentative effort is made in the direction of establishing boards of arbitration for the settlement of disputes between employees and employers. An act is passed for the registration and protection of trademarks, which my official correspondent in that State wisely suggests may serve rather than to distract attention from the broad and sufficient rules of the common law, than to further elucidate the subject. The subject of irrigation has received additional attention, as in other States containing large arid regions. A law is passed preventing the abatement of actions for personal injuries not resulting in death, by the death of either party; another making the perpetration of frauds at primary elections criminal; another taxing all national bank notes, United States legal tender notes and other notes and certificates of the United States intended to circulate as money. There seems to be a singular inconsistency in legislation like this by States loudly complaining of the insufficient amount of the

circulating medium. Laws like this, if enforced, would powerfully tend to aggravate the evil by still further keeping out of the State that very facility of the want of which so much complaint is already made.

#### VERMONT.

This conservative State moves with characteristic precaution in legislation. It passes an act authorizing towns, cities and incorporated villages to establish public libraries at the public expense; discourages a resort to it for the purpose of obtaining divorces by requiring a year's residence by the moving party before suit, and adds to the causes of divorce at the instance of the wife, the gross, or wanton and cruel, neglect of a husband having sufficient pecuniary or *physical* ability to provide an adequate support for her. Other legislation authorizes the appointment of a married woman as executrix, guardian or trustee; compels towns to pay into the State treasury a share of the profits made on the sale of liquors under the prohibitory law; regulates the practice of pharmacy by requiring licenses upon examination; authorizes the quarantining and killing under certain circumstances of domestic animals believed to be infected with bovine tuberculosis, and makes the right of the owner to payment in such cases depend upon whether upon a *post mortem* examination it turns out that the animal really had the disease or not. It also makes the adulteration of candy or the sale of adulterated candy a punishable offence.

#### WASHINGTON.

Much disposition was shown by the legislature at its last session to take action along the true line of progress. The subject of admission to the bar was newly regulated; the magnanimous policy of subjecting the State to suit in her own courts was adopted; the equality of civil rights was assured by legislation securing the full and equal enjoyment not only of all public accommodations and places of amusement, but also — a debatable policy — of such places as lodging and eating houses and barbers shops. Provision was made for the thorough and effective organization of the military power. The regulation and protection of law was extended to the proceedings of political primary meetings. An attempt was made to repress the supposed mischiefs of cigarette smoking. The hours of labor of street car employees were limited to ten. A quite novel expedient for the protection of stockholders in corporate bodies was adopted by an act which enables the stockholders at any time to expel a director from office; very properly this is not done on charges. It is the mere *sic volo* of the principal dismissing his agent. The proceeds of fire insurance upon property exempted from the reach of creditors

is also exempted; and, what seems to me a very questionable policy, the proceeds of life insurance on the life of a deceased person, are exempted from liability for his debts. A policy on the subject of irrigation similar to that adopted in several other States is sanctioned, by which irrigation districts may be established and irrigation be furnished at the expense of such districts.

#### WEST VIRGINIA.

Much of the legislation of this State at its last session was of a local and special character and I observe little which possesses interest for other communities. A fatal blow is dealt at all assignments by persons in insolvent circumstances preferring creditors. The assignment is left to stand, but must be treated as for the benefit of all creditors alike.

#### WYOMING.

An act is passed in this State allowing verdicts to be rendered upon a concurrence of three-fourths of the jurors. An attempt is made to preserve the few remnants of the race of buffalo by an absolute prohibition of the killing of that animal. A party producing a witness is allowed to impeach him by proof of prior contradictory statements. A form of municipal government is devised for cities of the first class which are made to consist of cities of more than 4,000 inhabitants. Provision is also made for the organization of the voluntary military force.

#### CONGRESS.

The last national congress exhibited for the first time for more than a quarter of a century an ascendancy — a bare one, however, in the senate — of the Democratic party. It is, perhaps, due to the latter circumstance that the action of that party in carrying into effect its own principles was in some degree halting and irresolute. Notwithstanding this, three notable pieces of legislation were carried through. One abrogated the singular and mischievous policy of a purchase by the government of an enormous annual amount of one of the products of industry, paid for by an issue of government obligations having the quality of legal tender. Another made a large, though not a radical, modification of the longer established policy of attempting to protect native industries by burdening imports from foreign countries with heavy duties. The third abrogated the supervision by the national government of elections. The first cannot be regarded as a party measure, having been both supported and opposed by large numbers in each party. In a political atmosphere still highly charged with partisan heats and ambitions, useful comment upon the other two is at present hardly possible. Perhaps the public mind is settling into a general con-

viction that simultaneous attempts by two distinct sovereignties to regulate elections held at the same time and place are a hazardous policy which great necessities alone can justify. If the apprehensions upon which the repeal of the Federal elections laws was resisted shall turn out to be unfounded, all patriots will rejoice that the national statute book no longer contains any enactment founded on a distrust of the good faith or loyalty of any of the States.

In concluding this very cursory and imperfect review of the more noteworthy features of the legislation of the several States, I may be indulged in some observations concerning the purpose for which our constitution requires it, and the conditions under which it may be made useful.

One of the declared objects for which our association was formed was "to promote uniformity of legislation throughout the Union;" but I take it that *uniformity*, merely as such, and irrespective of the character of the legislation, is not what was intended, but a uniformity to be brought about by a general acceptance of the best forms of legislation. To advance the science of jurisprudence is also among our declared objects, and our constitution provides for the appointment of a standing committee on Jurisprudence and Law Reform. I take it that the terms "jurisprudence" and "law" were here employed in their larger import as including positive legislation, and that general legislative improvement is one of the objects which this notice of the statutory action of the several States required by our constitution was designed to subserve. But why is it that we, more than others, should charge ourselves with the duty of laboring for general legislative improvement, and how are we to make this knowledge of the legislative action of numerous independent States subservient to that end? Is this knowledge, of itself, instructive for the purpose in view, or must something more be known in order that it may be turned to good account? There are some thoughts touching these questions which may usefully receive some attention.

If we conceive, as we justly may, an independent society of men as one body apart from the individuals composing it, with a separate and distinct conception of its own existence and interests, and conscious of a power to affect them by a predetermined line of action, the statutory laws of such a society become analogous to the voluntary resolutions of a person for self-improvement. Rightly interpreted, they correctly represent the character of the society, and the best side of its character, that is, the side exhibited by its resolutions for self-amendment. The observation by individuals of the examples, lives and characters of their fellow-men is one of the chief means of individual improvement; and, in like manner, the observation by one people of the

laws, that is to say, the character, of another people may, be made a means of social improvement.

But this is a study which belongs to the sociologist and the reformer, rather than to the mere lawyer. The latter, indeed, may have a special interest in those laws of other societies than his own which relate to the practice of his particular art, or to the interests of his profession; but these comprise a small and comparatively unimportant part of the body of legislation in any State. Upon other subjects it is his business to know what the laws of his own State are, and this knowledge is not greatly aided by an inquiry into the legislation of other communities.

But in our country the members of our profession are not universally mere lawyers. They are everywhere relied upon as the principal legislators. Their studies must necessarily qualify them to a certain extent for this work, and it is the traditional custom of American society to call upon them as well for advice concerning the proper subjects for legislation, as for their skill in fashioning the will of the people into appropriate enactments. It is this which enlarges the area of the lawyer's interest and duties and makes everything which bears upon the problem of legislation important to him. The study and comparison of the legislation of different communities is one of his duties, or at least one of the duties of those who are willing to accept, or who aspire to reach, a place in legislative bodies.

But how is this study to be turned to useful account? Imitation of well conceived laws is the ready suggestion; but how are we to know what is well conceived? It is plain that a mere knowledge of the legislative work of others is not, of itself, sufficient. I have said, and I think the observation just, that the laws of a people are analogous to the resolutions of an individual for self-improvement; but are the laws executed? Do they represent the resolutions of a wise and self-controlled man which are actually carried out and show their fruit in life and character, or those abortive resolves which serve only to indicate a man conscious of error but incapable of reformation? A community of tiplers may be very willing to prohibit the sale of intoxicating drinks; but they mean nothing by it, and nothing will come of the prohibition. The statute books of States, like the experience of individual lives, abound in broken promises of repentance.

It is very manifest, therefore, that something more is required than the mere knowledge of the legislation of other communities in order to turn that knowledge to good account. Something must be known from other and independent evidence of the character and actual condition of the people whose legislation is studied. We must learn whether the

laws are actually executed, and if not, whether the fault is to be found in the frame work of the laws, or in the character of the people themselves; and if they are executed, the effects are to be studied that we may know whether they are beneficial or otherwise.

The study of comparative legislation, must, therefore, in order to be useful, be made a large one; but this is no reason why it should not be taken up, but an incentive to its diligent prosecution. The lessons of wisdom are taught by the experience of others as well as by our own. Progress will be slow, indeed, if we wait until our own misfortunes impress their lessons upon us.

And the practical far exceeds the academic importance of the study. It is a part of the study of the *general* subject of legislation, than which nothing is more necessary and scarcely anything more neglected. When we consider the amount of the talent, skill and training which is called into requisition to satisfy those needs which are most immediately felt by individuals, as in business affairs and those with which the learned professions are concerned, and compare it with that to which the all important task of framing our laws is entrusted, the spectacle seems almost ludicrous. What a difference the face of society would present if our laws were conceived and framed with the same knowledge of the work and the same skillful adaptation of means to ends as is exhibited in the construction of a modern steamship, the argument of a well instructed lawyer, or the treatment of a wound by an accomplished surgeon; and yet legislation is in its nature a science as susceptible, however more difficult the task may be, of subjection to principle and rule as the professional work I have mentioned.

I am not unaware of the difference in point of excellence between public and private work. In a democratic society, particularly, it is not likely that the selection of legislators can ever be made with uniform wisdom; but a great step in advance will be made when those who aspire to the office of legislator, or are likely to be called upon to accept it, begin to seek that knowledge which a just performance of the office requires.

Never so much as at the present time has the need of competent legislators been manifest. The vast increase of our population, the great changes produced by the increase of manufacturing industries, the vastly greater proportional increase of urban populations, the prodigious activities of modern societies, the enormous revenues which the public service requires, have all combined to raise most difficult questions of legislation, many of which are now pressing for better solutions.

Take the great question of taxation, a problem

which, quite aside from the point upon which parties are divided, is every year assuming larger and almost ominous proportions; in nearly all our States we find a forest of intricate legislation aiming at the impossible task of finding intangible and non-visible property, and exacting from it a tribute which, in a vast number of cases, would amount to confiscation if it were really collected. The unsuccessful efforts are followed by additional enactments of increased vigor, bristling with penalties for evasion, and, in most instances, the only results of the more stringent laws are to increase perjury and diminish the actual revenues received. It is amazing to think that enlightened States, abounding in productive wealth, which would easily afford an ample revenue, if properly tapped, should persist in retaining an intricate system of taxation, even after it has proved to be abortive for its avowed objects. And yet this is what is everywhere exhibited. The failure to fully reach the real fund of annual production necessitates an exorbitant charge upon what is reached, and the alternatives offered to many are confiscation, emigration or perjury, the latter being the one most frequently accepted. It seems incomprehensible that a people adopt a policy which fosters the increase of crime, contempt for the law, and the debasement of character. In some communities, notably in the city of New York, the impossibility of a general and equal enforcement of the law, and the revolting injustice of a partial effort have had the effect of leading the executive officers to wholly abandon any serious attempt at a rigid enforcement. And yet these worse than useless results of legislative action seem nowhere to lead to any serious inquiry into the real nature of the difficulty with the view of establishing legislation upon a more enlightened basis in accordance with the principles of human nature and the teachings of economic science. Great States, for the want of legislators properly instructed in the weighty business of legislation, are left to stand as spectacles of bewildered imbecility.

The condition of what are called sumptuary laws in the various States is equally discreditable to our knowledge both of the science of legislation and the teachings of experience. The common notion that, somehow, laws execute themselves seem to hold its sway over the public mind, and even over that of legislators, in the face of a thousand demonstrations to the contrary. Multitudes will busy themselves with the work of securing the passage of laws under the illusion that plenty of human instruments may easily be found who will undergo the labor of enforcing them against the passions, the beliefs and the interests of other multitudes. Such tasks can be accomplished only by a despot armed with unlimited power. The result is that our

statute books are bristling with penal enactments which have little effect in repressing the practices against which they are aimed. The common mode of attempting to make such legislation more effectual is simply to make still further and more rigorous laws, that is, to administer heavier doses of a remedy already proved to be ineffectual. Were we to take an account of the moderate amount of repression actually effected by such legislation and of the evasion, false swearing, private animosity and contempt for law engendered by it, the balance would be found wofully on the side of public mischief.

I do not intimate that public reformation may not in many instances be aided by restrictive or prohibitory legislation even in such matters as indulgence in intoxicating drinks, but reason and experience unite in proving that such legislation cannot be made effective for its purpose, unless it represents the deliberate resolve of the overwhelming mass of the community. A society which has not the moral energy to enforce its will in any particular case should never embody that will in the form of a statute. A law, in order to be efficacious, must always be preceded by a corresponding degree of moral education extending through the community.

There are other directions in which laws become agencies for mischief rather than good because they are framed to regulate matters which are not fit subjects for legislation. There are large numbers in all free societies with whom law-making amounts almost to a passion. Legislation is the source of so many advantages that many fall into the error of thinking that it is a blessing *in se*, and not, what it more correctly is, a choice among evils, and it is so easy among us to procure the passage of laws which do not immediately conflict with some private interests that many find pleasure in the work, and fancy when engaged in it that they are public benefactors in devoting their time and talents to this form of public service. In our legislatures, too much engrossed with party and personal schemes, it is not difficult to induce acquiescence in proposals for new laws which are plausibly presented. The statement of expected benefits is received with easy credulity. Little inquiry is made concerning the possible mischiefs which may follow from the adoption of a proposed measure, and if no one offers energetic opposition it is apt to pass. It is here that the ambitious experimenters and reformers, not to say cranks, find their opportunity, and they are never satisfied until their whims are enacted into law.

A good illustration of the disposition to which I have alluded, and of its operation, is found in the law passed at the last session of the legislature of New York which I have noticed, requiring four

lessons a week for ten weeks in each year, in the public schools of that State upon the physiological effects of alcohol and other narcotics upon the human system, and prescribing text books and making other requirements. The mind that framed this law, carried away with the unfounded notion that everything upon this subject was known to science and taught in books, probably supposed that the whole generation of the youth of the land would be impressed, as she or he had been, by a study of the subject and would be forever armed against the temptations of indulgence. The notion that intricate and abstruse physiological truths could be made interesting and taught to young minds by the ordinary public-school teacher, quite unable himself to adequately comprehend them, is sufficiently absurd. It is enough to say that those whose interest lies in the sale of intoxicating drinks saw no danger to their welfare in this proposed enactment. In a legislature in which this class always has a goodly number of guardians, no one thought it worth while to offer opposition. It passed, I believe, unanimously.

Another illustration of the mischief flowing from this same passion for law-making is found in the present condition of the law of judicial procedure in some, perhaps many, of our States. Judicial procedure embraces the various successive steps by which a court clothed with jurisdiction over a particular subject matter and the interested parties advances to a final judgment. It should, of course, be methodical and known to those who are required to practice under it, and should, therefore, be regulated by rules; but these rules, being merely machinery for the accomplishment of an end, should not be made superior to the end itself and should, consequently, be capable of being relaxed where a rigid observance would, as it often must, in consequence of the neglect, ignorance or oversight of the parties, defeat justice. They should be clothed as little as possible with the form of inexorable law. Surely none are so well qualified for the work of framing and moulding these rules as the courts which are called upon to administer them; and none so ill-qualified as legislative bodies composed of non-professional members, for the most part. The obvious conclusion from this is that judicial procedure, except to a certain very limited extent, is not a fit subject for legislative action, but should be governed by rules of court.

Let me point out some of the miseries which a different view of this matter has brought upon the State of New York; and I venture the prediction that if they are not already felt by other States which have, to a greater or less extent, followed her example, they sooner or later will be. Something more than fifty years ago the Legislature of that

State was induced to believe that substantially the whole system of judicial procedure in her superior courts, including all the successive steps in an action, should be enacted into regular law; and it was done by the framing and adoption of what was called a Code of Civil Procedure. I say nothing here concerning the merits of the particular system thus adopted, for the eventual result would, I believe, have been nearly the same whatever its character. What is certain, however, is that by this step procedure was made the subject of ordinary legislation, and all subsequent amendments, or enlargements, of the system were consequently to be made by legislative action. Numerous defects were soon found in this code, as would have been the case with the best of such schemes, and no legislative session was held in which attempts were not made to cure them. Besides this, from time to time, some lawyer, generally not very competent, would conceive that he saw some point on which the system might be improved, and some others would see how a point in some of their own litigations could be carried if a change in practice could be effected. These were continually busy, and usually successful, in procuring amendments. At the same time the courts were burdened with the resolving of the multitude of questions which arose upon the interpretation of new provisions. The work of legislative amendment and judicial interpretation, thus constantly proceeding *pari passu*, after the lapse of some years increased the volume of legislation and comment to such an extent as to call for thorough and systematic revision. This task was committed to hands far less skillful than those which first contrived the scheme, and resulted in the production of a text of prodigious volume, dismaying to the student and disgusting to the practitioner. The original author of the Code denounced it an abomination, and yet it was enacted. The work, however, of legislative amendment and judicial interpretation still went on, and still goes on, making the practice of the law more and more uncertain and hazardous. The profession throughout the State is now calling out loudly for some form of relief, and no one seems able to suggest a hopeful remedy. The judicial decisions interpreting the provisions of this confused system, if collected together, would fill many more than 100 ordinary volumes of reports, representing an amount of forensic strife and professional and judicial labor—all unnecessary—far exceeding that which many whole States have required for all the purposes of their judicial establishments. If we should compute the amount of money lost and wasted in employing the judicial and professional force engaged in this work, added to the losses of time by clients, and the defeats of justice, the sum would be amazing. And I do not believe that any



of those who have heretofore thought that this experiment in judicial procedure was worth trying could point out a single substantial benefit which has come from its adoption. There is a ready proof of the fundamental error of the whole scheme. Take the New England States in which the old practice has been retained, or superseded by some simple scheme confined, so far as legislation is concerned, to a few general outlines and leaving all the details of practice to be regulated by rules devised by the court; the judicial decisions in none of them for the entire period during which the New York Code of Procedure has been in operation would scarcely occupy space more than that of an ordinary volume of reports, and we hear no substantial complaint from their lawyers or their people that justice is defeated or delayed by the requirements of formal procedure. The significance of these facts is unmistakable.

I attribute these errors in legislation upon which I have been commenting, principally to the two causes already mentioned, and which are closely allied with each other; *first*, the common passion—the *cacoethes*—which afflicts so many, of framing new laws; and *second*, the disposition, or the willingness, common to all legislatures of acting upon matters which are not proper subjects of legislation at all. I know of nothing more needed among us than a deepened conviction that the sphere of legislation, like that of other forms of human activity, has its proper limits which can never be exceeded without mischief, and a sufficient knowledge of what these limits are.

This association now has an exceedingly important, able and diligent committee upon the subject of legal education. I respectfully invoke the attention of that committee to the inquiry whether, considering the various functions which the members of the bar are called to perform in American society, a knowledge of the science of legislation ought not to be regarded as an appropriate, if not an indispensable, part of that education, and adequate provision be made for it in our schools for legal instruction. The article of our Constitution which makes it my duty to review the new legislation of the several States properly implies that we are not alone interested in such legislation as concerns our profession, but in all noteworthy legislative action. Existing legislation is in large measure the work of our profession, and it is in our power in a corresponding degree to shape and mould the legislation of the future.

In urging the increased study by our profession of the science of legislation, I mean that science in its broadest extent. It should embrace, as I conceive, two principal branches; one relating to the

just limits of the province of legislation, that is to say, determining what subjects are really fit for legislative action, as distinguished from those which should be left to the disposition of courts, or to the discipline which proceeds from the moral agencies of society. I am not unaware of the extent of the field of inquiry thus embraced. It includes the fundamental elements of economic science, and the principles upon which sociological inquiries are generally agreed. I do not mean that these sciences must be mastered in their details; but that their main features should be known so far as to enable the student to avail himself of their results and to employ their methods. The other important branch is the study of the proper manner in which subjects fit for legislative action should be treated, that is to say, the art of framing appropriate and effective laws. The ordinary training of the lawyer goes far to qualify him for this work, but there should be added to it a study of the various legislative devices of different communities and of the degree of efficiency with which they operate. I can scarcely set any limit to the public benefit which would flow from the presence in our legislative bodies of even small numbers of conscientious lawyers well exercised in these two branches of legislative science.

I must not omit to notice another aspect in which the review which I am called upon to give of the legislation of the several States is designed to be useful. I refer to the effort which is now receiving so much attention, and in which our association takes much interest, to bring about a certain measure of uniformity in our laws.

The laws of a people should, of course, be devised and shaped in accordance with their traditions and their character, and so far as these differ, it is neither possible nor desirable to have entire uniformity in them. But the resemblances in character and traditions between the people of the States of the Union are far greater than the differences, and this renders uniformity in many particulars practicable. And where mutual relations are so close and intercommunication so general and constant, the difficulties and embarrassments arising from different systems of law are numberless. If a beneficent despot had absolute rule over our sixty-five millions, his ambition, and perhaps his duty, would be to *force* a certain measure of uniformity in law everywhere; and if our national government had the constitutional authority to effect the same result, that authority might perhaps be appropriately exercised to that end. There are none who, even for such a blessing, would accept a master, and few who would be willing to surrender the greater advantages which are supposed to flow from the division of our country into separate States, sove-

reign for the purposes of domestic legislation. But is there no way in which a people essentially one in fact, if not in form, can secure to themselves the obvious and prodigious benefits which would arise from a uniformity in the legal rules which they are required to observe? Our unwritten law is already substantially the same, and that I have always regarded as an impressive reason for abstaining from any attempts to reduce it into written forms, which would at once (being made by different legislatures) tend to plunge it into diversity. Whatever can be done to secure this desired uniformity must be done by voluntary concerted action. The attempt is a bold one, but the tendencies all favor it, and much may be accomplished by taking advantage of them. The appointments made by several States during the last year of commissions designed to forward this effort afford us much encouragement.

This subject has aspects not limited by the boundaries of States and nations. The marvelous utilization by science of the forces of nature has correspondingly developed facilities and desires for commercial and social intercourse among nations. A necessary consequence is a tendency towards the obliteration of the sharper features of national distinctions and a gradual assimilation in manners, customs and moral standards, which begins to seek, and will more and more seek, a uniformity in general law. All efforts to help forward this uniformity must begin with a study by each State of the legal establishments of the others. The jurists of other nations are beginning to turn their attention in this direction. A society for the study of comparative legislation has been recently formed in Great Britain, and we have reason to know that it is desirous of opening communication with our Association with the views of co-operation in the common object.

More suggestive than all else is the eager embrace by ancient eastern peoples, waking up from the intellectual sleep of ages, of the ideas and institutions, both of peace and war, of western civilizations, wrought out and fashioned during their long slumber. The recent treaty between the United States and Japan by which we agree to submit our persons and property within the territory of the latter power to the same justice which is meted out to her own people, is an impressive recognition of the beneficent influence of uniformity in law.

So far as the unwritten law is concerned, so far as the law consists of the simple dictates of right reason applied to human affairs, this uniformity will be approached as rapidly as should be desired by the operation of the unconscious forces of human society. The distant ideals are unchangeable and everywhere the same, and as the nations advance towards them they fall, or rather rise, more and

more into identity. It was this ideal law which the great Roman orator and writer declared, in a burst of immortal eloquence, "was not one thing at Rome and another at Athens," and the universal cultivation of the science of unwritten jurisprudence will eventually produce the same plant on every soil. But the positive legislative determinations of nations can be assimilated, or reconciled only by conscious and concerted action. Much has already been accomplished in this direction by treaties, and by those concurrently adopted regulations operative upon the sea, the common domain of all nations. The wise furtherance of this beneficent work depends upon the intelligent oversight and co-operation of the enlightened jurists of the world.

### Abstracts of Recent Decisions.

**TRADE-MARKS AND TRADE-NAMES — INFRINGEMENT.**— A decision of the high court of chancery in England, granting to defendant, against complainant's opposition, the right to register as a trademark the words alleged to be an infringement, is no bar to a suit here for an infringement by using such words. (*City of Carlsbad v. Kutnow* [U. S. C. C., N. Y.], 68 Fed. Rep. 794).

**TRUST AND TRUSTEE — CONSTRUCTIVE TRUST.**— On the death of a person in possession of lands under a contract of purchase, leaving a widow and minor son, his father with his widow's consent, took possession of the property, sold the personality, paid the debts, and by virtue of the contract, paid the balance due for the lands, and took title in his own name: Held that he or any one purchasing from him with notice of the facts, took the title in trust for the heir, whether the money to complete the purchase was paid from the proceeds of the son's personal estate or from the father's own fund. (*Roggenkamp v. Roggenkamp*, U. S. C. C. of App. 68 Fed. Rep. 605).

**TRUSTS— FOLLOWING TRUST PROPERTY.**— Where trust funds have been wrongfully invested by the trustees in securities which remain in his hands, the owner of such funds is entitled to follow the same, in the form into which they have been converted, and impress a trust thereon for his benefit. (*City of Spokane v. First Nat. Bank of Spokane* [U. S. C. C. of App.], 68 Fed. Rep. 982.)

**WILL—CONVERSION.**— Where a testator orders his lands to be sold, the conversion will unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will, and consequently, if those purposes fail or do not require it, it will, in equity, be considered land, and be given to the heir. (*Moore v. Robbins* [N. J.], 82 Atl. Rep. 379.)

## New Books and New Editions.

**LAW OF JUDICIAL WRITS AND PROCESS IN CIVIL AND CRIMINAL CASES.** By William A. Anderson, of the New York Bar.

This is a practical treatise on a subject upon which there has been very little written and it is prepared in a most careful and painstaking manner as is evident from its arrangement and style. The historical introduction in the first part and the clear manner in which the various kinds of process are distinguished are presented in such a manner that it is valuable to the practitioner as well as to the student of law. The second part of the work is divided into twenty chapters, and deals with issue of Process, Its Sufficiency, Validity, Alteration and Amendment. This part of the work combines the common law procedure as well as that under our codes and those States of the Union which have codes. The third part deals with the Service and Execution of Process and is divided into ten chapters, while part four deals with the return of process, and part five with criminal process. It has been particularly entertaining to the reviewer of this book to be able to have within one volume a comprehensive digest, as it were, of the different systems and kinds of writs under the common law and statutory practice within the proper limitations which would otherwise take a great deal of laborious works and research to obtain.

Published by Baker, Voorhis & Co., 66 Nassau Street, New York city.

**HAND-BOOK FOR THE LAW OF TORTS.** By Edwin A. Jaggard, A. M., LL. B., Professor of the Law of Torts in the Law School of the University of Minnesota.

The first principle of this work, which is published in two volumes, is to establish and apply such portions of what is known as jurisprudence as are especially relevant to the subject of torts. It also has for its primary cause the statement of the primary principles of law, broad and general in their scope, yet qualified and distinguished by the citations which appear in great number at the foot of each page. The tremendous number of decisions which are ground out by courts of justice make it necessary for an active practitioner to have a general work from which he may start with a general principle and then refine the knowledge he has obtained to meet the facts of the case under deliberation. The development of the law has naturally made many qualifications and refinements and the text book that deals with general principles and contains

such a large number of references and decisions of the various States must find an appreciative welcome from members of the bar. This work also stands as a means of comparing the decisions on the subject of torts and is useful on that account. The first volume is divided into nine chapters on General Nature of Torts, Right to Sue, Liability for Torts committed by and with others, Discharge and Limitation of liability for Torts, Remedies, Wrongs affecting Safety and Freedom of Person, Injuries in Family Relations, Wrongs affecting Reputation and Malicious Wrongs. Volume two is subdivided into five chapters on Wrongs to Possession and Property, Nuisance, Negligence, Master and Servant, and Common Carriers. Volume two also contains a table of cases cited and comprises over one hundred and fifty pages. Here, also, is found the index which contains over fifty pages, arranged well and with reference to both volumes.

Published by West Publishing Company, St. Paul, Minn.

**A TREATISE ON LAND TITLES IN THE UNITED STATES.** By Lewis N. Dembitz of the Louisville Bar, author of a Treatise on Kentucky Jurisprudence.

We realize the task which the author of this work had before him, when he began to compile the work, for the American law of real estate is indeed in its practical workings the creature of statute. Under these circumstances, and appreciating the difficulty of Kent when he dealt with this subject, there then being fewer States, it can easily be realized how difficult was the undertaking of Mr. Dembitz. Even a glance at the list of statutes referred to, reveals the enormity of the task. The work is divided into two volumes, the first containing eight chapters on Introduction, Description and Boundary, Estates, Title by Descent, Title by Grant, Title out of Sovereign, Title by Devise, and Incumbrances. The second volume includes seven chapters on Title by Marriage, Power, The Registry Laws, Estoppel and Election, Judgments Affecting Land, Title by Judicial Process, and Title by Prescription. This volume also contains a list of cases cited which contains over one hundred pages of matter. Here, also, is found the Index, full and complete, comprising nearly a hundred pages. The work itself is a thorough collation of the statute law on the subject of land titles in the United States. Its value as a means of readily ascertaining the law of another State will be acknowledged by all members of the legal fraternity, as it is a work both practical and easy of access.

Published by West Publishing Company, St. Paul, Minn.

# The Albany Law Journal.

ALBANY, NOVEMBER 30, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in this issue of the LAW JOURNAL the opinion of Judge Follett, of the General Term, First Department, in *Bowen v. Sweeney et al.* It is not only clearly expressed and terse in its phraseology, but it is also important to show the cumbersomeness of our present practice, a subject on which we are ever ready and willing to write. Judge Follett shows that after an elaborate trial of the issue of testamentary capacity in a proceeding before a surrogate for probate, and an adjudication in favor of the will, the heirs of the testator, although parties to the former proceeding, may still re-litigate the question of the validity of the will in an action of ejectment or for partition. It is shown that a similar anomaly in the law of England was abrogated by statute in 1857, it being then provided that a decree of a probate court, admitting to probate a will which relates to realty and personalty, is binding on the heir in case he had notice.

It would seem as though it has become necessary for the courts to point out the unfortunate condition of our practice and to demonstrate that simplicity is a much-to-be-longed-for end. The thought of entering into litigation is dreaded by the public, who recognize the cumbersomeness of our prevailing mode of practice and the delays to be encountered. This feeling is one which reacts on the legal profession and not on the members of the bench, who, however, reveal their interest in their calling by again and again pointing out what, at present, constitutes its greatest detriment. Would it not be beautiful to read the address of the President of the American Bar Association at the next annual meeting if he could show that the legislatures of the different States had stopped passing new laws and were endeavoring to simplify those which had already been passed? The influence of the bar

should be strong enough to encourage such a healthy change. Let this be done, and to their advantage as well as to the public will it redound. If they do not, or if the movement is left for a few to accomplish, simplicity in procedure will never come, or else some fellow in the future will reap the advantage of the slow change. The desire to have such a modification as we have suggested is not by any means new. The promoters of this scheme have done what they could in the past. Bar associations have attempted it. But it is really pitiful to contemplate the few who have such a beneficial desire sufficiently to actively urge these measures.

An important decision in regard to banks and banking, assignments for the benefit of creditors and following a trust fund has been made in the District Court of Chisago county, Minn., in the the Matter of the Assignment of James F. Kingsland. The court holds that a bank which makes collections from time to time and at stated intervals remits the proceeds thereof, is a mere debtor of the owner of the moneys collected, and not a trustee. And where, upon the insolvency of such bank, it cannot be shown that among the moneys turned over to the assignee are the identical moneys collected by the bank, the creditor will not be treated as a *cestui que trust*, and the moneys in the assignee's hands as trust funds, but such creditor will have to share with the other creditors in the dividends of the estate. The opinion by Judge Williston is as follows:

Upon the hearing of the order to show cause, no proof was offered tending to show that the moneys so collected formed any part of the moneys received by the assignee, nor was any proof offered tending to show what disposition said assignee made of any such money.

In this proceeding the petitioner prays that the assignee be directed to pay over to it the moneys so collected, deducting the agreed commission thereon due the assignor for making the collections; in other words, it claims that it is to be treated as a preferred creditor.

It bases its right to be so treated as a preferred creditor upon its claim that the insolvent stands in the relation of a trustee for the petitioner; that the moneys collected by him were at all times the property of the petitioner, held

in trust for it by the insolvent; that, as trust funds, they came into the hands of the assignee, who holds them impressed with the trust; and that, wholly ignoring the rights of the other creditors, the petitioner is of right entitled to be paid in full out of the moneys in the hands of the assignee. For anything to the contrary appearing, the moneys so received by the insolvent may have been used by him in paying his debts, or in some other manner been wholly dissipated prior to the assignment.

The petitioner is not entitled to such a preference for:

*First.* The relation existing between it and the insolvent was that of debtor and creditor. It appears from the contract between the parties that it was not by either party intended that the identical money collected should be remitted to the petitioner, or that it should by the insolvent be kept separate and distinct from the funds used by him in his general banking business; on the contrary, it does appear that it was the intention of each party that the moneys collected should become a part of the common banking fund and moneys of the insolvent, to be held and used by him in the same manner as the moneys deposited with him by general depositors. The language of the contract is:

"All that we expect you to do is to receipt the pass-book for the collection and enter the amount collected on the duplicate collection sheets, one of which you will retain and the other you will mail to this office once a month, with draft to cover collections, less your one per cent commissions." The construction of the contract is, that the bank should upon or near the last day of the month remit to the petitioner the amount due it for all collections made during the month, or, if the remittance should not be made until after such last day, but in the early days of the next month, then that such remittance should cover all collections made for the preceding month that the bank should remit, not the identical money by it received or any moneys by it substituted therefor, but by its draft, and that intermediate such collections and remittance the bank should hold and treat the moneys so collected as an ordinary deposit made by the petitioner. That would be according to the usual course of collection

and banking business in like matters. *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 58, bk. 37, L. Ed. 560, 367; *Henry v. Martin* (Wis.), 60 N. W. Rep. 269; *Westfall v. Mullen* (Minn.), 59 N. W. Rep. 633.

*Second.* Admitting that the relation of *cestui que trust* and trustees did exist between the parties, the petitioner is not entitled to the relief demanded. The principle is not questioned that whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or *cestui que trust*, and that such right ceases only when the means of ascertainment fail. The touchstone of the right of the owner of the trust property to be indemnified from any property or fund which represents the original property or fund is the trust fund, into the property or fund out of which the indemnity is demanded; the identification not appearing, the right does not exist. *Story's Eq. Jur.* (6th Ed), §§ 1257, 1259; *Perry on Trusts*, § 636; *Cook v. Tullis*, 85 U. S. (18 Wall.) 332, bk. 21, L. ed. 933; *Union Natl. Bank v. Goetz* (Ill.), 27 N. E. Rep. 907.

A general assignment for the benefit of creditors does not pass a trust estate. In such cases it requires special words to vest the estate in the assignee. If the assignor has converted the trust estate into other property, the *cestui que trust* may follow it into the hands of the assignee, so far as he can identify the particular property obtained by breach of the trust; but if the trust property has become so amalgamated with the general mass of the bankrupt's estate that it cannot be traced or identified, the *cestui que trust* must prove his claim. *Perry on Trusts*, Sec. 345; *Hill on Trustees*; *Neely v. Rood* (Mich.), 19 N. W. Rep. 920.

In the case at bar, if the relation of *cestui que trust* and trustee ever existed, the trust moneys have become so mixed and mingled with other moneys of the trustee that it is impossible to trace or identify any of them as forming a part of the funds received by the assignee, and, by reason of such mingling, the petitioner is not entitled to the relief demanded.

In *Little v. Chadwick*, 151 Mass. 110; S. C. 28 N. E. 1005, the court say: "The court

will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it can not be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court does not say that the money is to be found somewhere in the general estate of the trustee that still remains. He may have lost it with property of his own, and in such case the *cestui que trust* can only come in and share with the general creditors."

There is nothing to the contrary in *National Bank v. Insurance Co.*, 104 U. S. 54, 66, 71; bk. 26 L. Ed. 693, 695, 700; or in the *Matter of Haller's Estate*, 18 Ch. Div. 696, 708.

See also *Ferris v. Van Hooten*, 73 N. Y. 113; *Cavin v. Gleason*, 113 N. Y. 256; *Atkins v. Rochester Ptg. Co.*, 114 N. Y. 168; *Appal Hopkins (Pa.)*, 9 Atl. Rp. 867; *Engler v. Offutt*, 70 Md. 78; s. c., 16 Atl. Rep. 497; *Union Natl. Bank v. Goetz (Ill.)*, 27 N. E. Rep. 907; *Sherwood v. Millford State Bank*, 44 Mich. 78; s. c. 53 N. W. Rep. 928; *Anheuser-Busch Brewing Co. v. Clayton*, 6 U. S. C. C. A. 108; *Nonotuck Silk Co. v. Flanders (Wis.)*, 58 N. W. Rep. 283; *Bank of Commerce v. Russell*, 2 Dillon's C. C. R. 215.

The failure of the bank to remit was a breach of duty on its part, but it does not follow that other moneys subsequently received by the bank, and which may have come into the hands of the assignee, became impressed with a trust or charge which would give the petitioner a preference on distribution of the funds received by the assignee.

A trust creditor is not entitled to preference over general creditors merely on the ground of the nature of the claim: *Freiburg v. Stoddart (Pa.)*, 28 Atl. Rep. 1111; *Cavin v. Gleason*, 105 N. Y. 256; *North Dakota Elevator Co. v. Clark (N. D.)*, 53 N. W. Rep. 175.

The case of *Westfall v. Mullen*, determined by the Supreme Court of this State and cited above, is decisive of the matter at bar. The language of the late chief justice in that case is equally applicable to this, that "to allow such claims to be paid in full out of the assets when all claims can not be paid in full, would give a preference to such claims. There is nothing in the insolvency law justifying it."

In this case it might further be said that

there is no principle of common law or of equity justifying the granting of the relief demanded by the petitioner.

A knowledge of human nature is, perhaps, as essential to the practicing lawyer as a thorough appreciation of the law, its statutes, decisions and general principles. For years past in England as well as in this country the New Woman has caused agitation and discussion by her demands for equality of the sexes, reform of the marriage laws and other similar measures. In England the movement has been somewhat more pronounced than elsewhere and has extended to a different class of people from those interested here, who are given more to other subjects, such as socialism, than in the main question of the right of women to vote and to have absolute equality with the members of the sterner sex. It is true that very little that was tangible has been accomplished beyond the production of a vast amount of unsavory literature and a long series of problems against which the public appetite has already commenced to revolt. In England especially there were signs that the whole movement was losing its impetus and that society was relapsing into the old-fashioned ideas about woman's sphere, when all at once there flashed on the horizon a woman whose remarkable theories and principles extend beyond any formerly advanced. It was only three weeks ago that one lone woman made a declaration that set all England ablaze with controversy, which finally landed its author in a lunatic asylum, from which she was finally rescued by extraordinary processes of law, and which is, perhaps, the most conspicuous stand which any woman has publicly and notoriously taken. The woman we have referred to is Miss Edith Lanchester, who is said to be very attractive and to come from a family of means and social position, in fact from a conservative English family. Miss Lanchester was thoroughly educated and became interested during her term of study in many socialistic problems which brought her more or less into contact with others who were likewise concerned in the advancement of the same theories. Her interest in the problem of socialism led her to leave her family and take lodgings, and it was at this time that the

theories and principles which we have referred to as most remarkable were first advanced. Miss Lanchester had formerly been regarded as a sincere, high-minded girl of little more than legal age, and had never attempted or threatened to violate any of the conventionalities of life; but, in proportion to the increasing interest which she took in socialistic problems, came, also, an added concern in the principle that man and woman might love each other, but in order to remain as individuals and as equals no marriage service of any kind should occur. Falling in love with a man, Miss Lanchester advanced her ideas and proceeded to carry them out, having in mind at all times a definite time when she should begin her relations with the man of her choice. Shortly before the time set by Miss Lanchester for the commencement of her relations with the man in question, her father and brothers, under the Lunacy Act, sued out a process to enable them to confine her in a lunatic asylum as an alleged insane person. After more or less legal controversy and wrangling Miss Lanchester was at last released from the asylum and started on the career which she herself had marked out. The case is extremely interesting from many standpoints. To the lawyer, at least, it illustrates the many deficiencies and errors which exist in the marriage laws, as well as calls attention to a case which may be followed by other women who may discover that the lack of uniformity between the laws of our different States and the absence of respect for the decrees of another court has made the relation and forms of marriage of very little value, at least in the eyes of many who enter wedded life and seek divorce with practically the same sense of obligation.

Recently it has become a familiar practice with legislatures and governments of municipalities to attempt to regulate the price of various commodities which are sold to the public at large. Especially in the legislature of this State it has frequently been the case that attempts have been made to regulate the price of gas, and the same general practice has obtained in the different cities of the State. In a case entitled *In the Matter of Pryor*, decided by the Supreme Court of Kentucky (41 Pac. Rep. 958),

it appeared that in 1886, Iola, a city under the Constitution of Kentucky, rating as of the third class, granted to the Iola Gas & Coal Company, its successors and assigns, the right to lay gas pipes and mains in the streets and public grounds for the purpose of supplying the city and its inhabitants with gas. In the charter no rates were prescribed, except that the company should not charge the city more than one dollar per thousand cubic feet of gas for lighting the public buildings. It appears from the facts that on September 12, 1889, the company with the assent of the city, assigned all its rights and interests to one W. S. Pryor and another, their heirs and assigns, one of the conditions being that said assignees would furnish private families with gas at the price not exceeding \$2.50 per stove per month and forty cents per month per burner for illuminating purposes; and for some years past, said assignees have been furnishing natural gas to the city and its inhabitants. On May 10, 1895, the city enacted an ordinance providing, among other things, that it should be unlawful for any person, firm or corporation furnishing gas in said city to charge anything in excess of the prices therein fixed, which were very much lower than those named in the assignment, and lower than those received from consumers. The Supreme Court held that such an ordinance is inoperative and void as to said Pryor and his partner, their heirs and assigns, in so far as the same purports to establish prices for gas furnished by them to private consumers. The theory of the decision to us appears to be sound and proper. The franchise originally only limited the company as to the price they should charge the city, and their assignees should properly only be limited in the same manner as predecessors, especially in view of the fact that the city consented to the assignment. We believe that it is dangerous for legislatures and municipal governments to attempt to limit the price of commodities unless the parties furnishing the materials or products have an exclusive monopoly of the business. In any State the excessive abuse of the powers granted to a corporation, firm or individual, will result in the commencement of the same kind of business by others and the natural laws will at once begin to operate. We fear that too often legislatures and other law-

making bodies are induced by peculiar ideas to attempt legislation which is unfair to those who have risked money in some enterprise. In the Matter of Pryor the court said:

"The only question arising upon the record is whether the city of Iola had authority to fix the rates to be charged for natural gas furnished to private consumers by Pryor & Paullin under the circumstances above stated. In this country municipal corporations (except the city of Washington) are the creatures of the States in which they are located. They derive their powers from the Constitution and the statutes. In *Anderson v. City of Wellington* (40 Kan., 176; 19 Pac., 719) this court has said: 'The power to pass a city ordinance must be vested in the governing body of the city by the Legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted; and must be essential to the declared purposes of the corporation; not simply convenient, but indispensable.

\* \* \* Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" (See, also, 1 Dill. Mun. Corp., 4th ed., § 89.) The act providing for the organization and government of cities of the third class contains no express grant or power to fix or regulate the prices of gas, water or any other article of necessity or luxury. General authority is given to enact ordinances for the good government and welfare of the city (Gen. St. 1889, pars. 958, 991), and such cities may provide for and regulate the lighting of streets, and they have power to make contracts with any person, company or association to erect gas works, with the privilege of furnishing gas to light the streets, lanes and alleys of the city for any length of time not exceeding 21 years (Id., par. 984.) The respondent relies principally upon a section of the Corporation law of 1868 relating to gas and water corporations, and published as paragraph 1401, Gen. St., 1889, which reads as follows: "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city, town or village where located, for public or private buildings or for other purposes; and such corporations

shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, lanes, alleys and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe." Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water. Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not now inquire. Consent was granted by Ordinance No. 268 to the Iola Gas & Coal Company, its successors and assigns, without annexing any condition as to rates, except that no more than one dollar per 1,000 cubic feet of gas should be charged for lighting the public buildings. In certain cases the State may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the State, except in express terms, or by necessary implication. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation to so use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged. In *Lewisville Natural Gas Co. v. State* (135 Ind. 49; 34 N. E. 702), it was held that municipal corporations of Indiana have no power at common law to fix by ordinance the price at which natural gas shall be supplied to consumers, and that the act of March 7, 1887, providing "that the boards of trustees of towns and the common council of cities \* \* \* shall have power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished; overruling the case of *City of Rushville v. Rushville Natural Gas Co.* (132 Ind., 575; 28 N. E., 853). In the opinion the court says: "To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be sup-



plied is another and a different thing." In *City of St. Louis v. Bell Tel. Co.* (96 Mo., 623, 10 S. W., 197) it was held that neither under its authority to regulate the use of streets, nor, the power to license, tax and regulate various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances not inconsistent with the provisions of the charter or the laws of the State as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. In the opinion the court says: "We are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incident to the power to regulate the use of streets, and the ordinance cannot be upheld on any such grounds." Under the section of our statute hereinbefore fully quoted a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and under such regulations as they may prescribe, but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes, and supplied to consumers. Counsel for the respondent cite the leading case of *Munn v. Illinois*, 94 U. S. 113, and others of like character, to the effect that, where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. But in these cases the control was exercised by the Legislature either directly or through municipalities or agencies clothed by it with the power. In the present case the legislative authority is wanting. We must therefore hold that said Ordinance No. 368 is inoperative and void as to said Pryor & Paulin, their heirs and assigns, in so far as the same purports to establish the price for gas furnished by them to private consumers.

Surrogate Fitzgerald of New York city, in the Estate of Cheeseborough, has decided in

disapproving terms of investments in so-called "mortgage participation certificates" used by the Title Guarantee and Trust Company of New York city for trust purposes. In his opinion the surrogate says:

"Each certificate represents that the Title Guarantee and Trust Company has received \$1,000 from the purchaser thereof for investment in the purchase of an undivided interest in a certain described bond and mortgage made to said Title Guarantee and Trust Company, bearing four and a half per cent. interest, payable semi-annually. The mortgage is upon improved real estate situate in this State. The bond and mortgage are deposited with the guarantor, as well as policies of fire insurance of a certain designated amount, which amount the guarantor agrees to keep continuously in force until the payment of the bond and mortgage. In said certificate it is mutually agreed between the holders thereof and the holders of all the other certificates and the title company, first, that the title company is appointed irrevocably the agent and attorney of all owners of certificate for the purpose (a) of collecting the interest and principal of said bond and mortgage and of satisfying and discharging the same in its own name on receiving full payment; (b) of deciding when and how any provision of the bond and mortgage shall be enforced and of enforcing it accordingly; (c) of granting any extension of time of payment of the bond and mortgage.

Further, the title company is to determine whether any action is to be brought respecting the certificates, and in case it decides that an action is to be brought they are to be transferred to the company, which issues a trust receipt in return therefore. Such agreement further provides that if the company elects to extend the time of payment it shall at once notify the holders of certificates and shall be bound to take an assignment of all certificates, which shall, within thirty days thereafter, be tendered to it and pay for the same in cash, and that out of the moneys collected by the company it shall pay semi-annually interest, at the rate of four per cent per annum, to the holders of certificate coupons, and any excess of interest collected it shall retain as compensation for its services. The original bond and mortgage contains the following covenant: 'No payment

or release of the principal of said debt or of any part thereof, or of the mortgage security therefor, shall be valid as against any subsequent debt, unless the fact of the payment or release is indorsed on said bond, save that full payment shall be sufficiently evidenced by the delivery of a satisfaction piece in proper form to discharge the record of said mortgage. This covenant shall be binding on and inure to the benefit of the parties hereto and their heirs, successors, representatives and assigns; and any assignee of the whole or any part of said debt, on taking such assignment, may rely upon the indorsements on said bond and upon the absence thereof.' This clause, while protecting a subsequent assignee, under the circumstances stated, against the previous release of the mortgage debt or of the mortgage security, seems to recognize the right of the company to release the debt or the security after making an assignment thereof, and thus limit the protection of the assignee to the unsecured obligation or liability of the company and its guarantor."

Substantially similar schemes have been adopted by real estate companies in other cities to enable investors to speedily obtain slices of a mortgage where they have not sufficient funds to take the whole loaf. But it would seem that, in any such form of investment, there must be so much discretionary power of control retained in the holder of the mortgage, and so little right of management and freedom of action in the different assignees of interests therein, that, under the surrogate's decision, this general field is not open to trustees.

We are not prepared to advocate statutory extension of the classes of trust investments sanctioned in New York. (See *Smith v. Smith*, 4 Johns. Ch. 281; *King v. Talbot*, 40 N. Y. 76; *Mills v. Hoffman*, 26 Hun, 594; *Ormiston v. Olcott*, 84 N. Y. 339; *Judd v. Warner*, 2 Den. 104; *Laws of 1889*, Ch. 65.) Nevertheless, the restriction to first mortgage loans and public securities makes it exceedingly difficult for trustees in this city to obtain advantageous investments for comparatively small funds.

The average lawyer is constantly called upon to draw wills of persons who have accumulated a respectable competency, which, when divided among a considerable family of children, will

give a comparatively small portion for each beneficiary. To tie up such shares in trust simply on general principles is a great mistake, which, unless there be some positive reason, should be advised against. An insignificant fixed annual income will not be as advantageous to a beneficiary as the absolute ownership of the principal, wherewith, for instance, to acquire the equity in a home of his own. Of course, there is the chance that the beneficiary may be improvident and lose the money; but, if the objects of a testator's bounty be fairly prudent persons, it would seem better in the long run to take such risk, than to certainly debar them from substantial benefit from their portions.

Where, however, testator's are determined, either with or without special reasons, to create small trusts, the restriction of the field and the practical difficulty of investments should be brought to their minds, and it should be ascertained whether they wish to widen the field by special authority in the will.

The courts lean toward restricting a trustee to legal investments, and toward holding him responsible for loss if other investments are made, whenever the language of a will admits of doubt as to the scope of his power. In *King v. Talbot*, *supra*, it was held that committing the investment to the "discretion" of the trustee gives no additional authority as to the class of securities; that the discretion is controlled by the rule and must be exercised within its limits. Words authorizing investment "in such manner, and upon such securities as to (the trustee) shall seem advisable," do not enlarge the usual power. *Matter of Keteltas*, 1 Connolly 468. The language, "in such suitable manner as may be for the best interests of my estate to be determined by my said executors," does not authorize an investment on personal security. (*Matter of Cant*, 5 Dem. 269; see, also, *Adair v. Brimmer*, 74 N. Y. 539; *Matter of Petrie*, 5 Dem. 352; *Pray's Appeal*, 34 Pa. St. R. 100.)

But when the language used is specific and unambiguous, it would seem safe to act upon its authority. In *Matter of Wolfe* (1 Connolly, 102), the will provided that the trustees might continue to hold the testator's estate in the form in which it was invested at his death, and they were "in view of the express language,"

exonerated from liability for losses incurred by reason of stock bought by testator selling for less than its inventoried value. In *Clark v. Ry. Co.*, 58 How. Pr. 21, the court said: "When a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of trustees shall be invested, and how, until so invested, they shall be held, the court cannot by its judgment, defeat the intentions of the creator of the trust and the beneficiaries thereunder by directing other investments." To the same effect is *Burrill v. Shiel*, 2 Barb. 457, where a testator directed an investment to be made in England, and the court declared it had no power to divert the investment from that country.

In order to render it safe for trustees to make investments other than those expressly sanctioned by law, authority should be given by mentioning other securities, or at least the general nature of permissible securities.

Speaking of uniformity in State laws a recent case decided by the Supreme Court of Alabama demonstrates the absolute necessity for some such scheme, and that it should be done at the earliest possible moment. In the case of *McCreery v. Davis*, it appeared that a citizen of South Carolina had married in New York a citizen of that State and immediately thereafter the parties continued to reside in South Carolina, until the wife left the husband and went to live in Illinois. In that State the wife obtained a divorce entirely in accordance with the laws of Illinois, but without personal service or the appearance of the husband, and on a ground not recognized in either New York or South Carolina as a cause for divorce. In South Carolina in the case under discussion, it was subsequently held that the Illinois judgment was void and that article 4, section 1, of the United States Constitution providing that full faith and credit shall be given in each State to the judicial proceedings of every other State, and the act of Congress providing that records and proceedings thereof, properly authenticated, shall have full faith and credit given them in every court of the United States, as they have in said State from whence they came, does not prevent an inquiry into the jurisdiction of the court which rendered the judgment. The position of Mrs. McCreery, owing to this de-

cision, is somewhat peculiar. It is apparent that under the laws of Illinois she is single, and may again marry. Under the laws of South Carolina and under the laws of New York she is still Mrs. McCreery. This may at first seem to be a most *ultra* case showing the unfortunate result of lack of uniformity in State laws, but many similar decisions may easily be found which illustrate the necessity for some immediate and radical action.

#### DECREE OF SURROGATE'S COURT ADMITTING WILL TO PROBATE BINDING ONLY AS TO PERSONALTY.

ACTION FOR PARTITION OF REAL ESTATE MAINTAINABLE BY HEIR IN WHICH QUESTION OF VALIDITY OF WILL MAY BE LITIGATED DE NOVO.

Supreme Court — General Term, First Department. October, 1895. Present: Hons. Charles H. Van Brunt, P.J.; David L. Follett and Alton B. Parker, JJ.

Michael Bowen, respondent, v. Michael Sweeney and Catharine Gallagher, appellants, impleaded with others.

Appeal from an order denying a motion to set aside the verdict, from the interlocutory judgment entered on said verdict and on a decision of the Special Term, and from the final judgment entered on the report of a referee to sell in an action of partition.

August 27, 1885, Mary T. Hatton died seized in fee simple of a piece of land situate at the northwest corner of First avenue and Thirteenth street, which is 43 feet and 3 inches wide on the avenue, and 80 feet long on the street. She left a last will, executed April 17, 1880, by which she devised and bequeathed all of her estate to Michael Sweeney and Catharine Gallagher, to be divided equally between them. The will was admitted to probate October 18, 1886, by the Surrogate's Court of the city and county of New York (3 N. Y. St. Rep. 213). August 20, 1887, the decree of the Surrogate's Court was reversed by the General Term of the Supreme Court (10 N. Y. St. Rep. 19), which ordered the following issues to be tried before a jury in the Court of Common Pleas:

First. Whether the decedent ever saw the paper propounded for probate as her last will and testament until it was presented to her for execution.

Second. Whether the paper propounded for probate, as the last will and testament of Mary Teresa Hatten, was read by her or anyone aloud in her hearing previous to the signing thereof.

Third. Whether the decedent at the time of sign-

ing the paper propounded for probate as her last will and testament had full knowledge of the contents of the said paper.

Upon the trial of these issues all were answered in the affirmative by the jury. On the 16th of November, 1888, the proceedings upon the trial were returned to the Surrogate's Court, and on that date a decree was entered confirming the probate of the will. The litigants in this action were parties to the proceedings in the Surrogate's Court and appeared on the trial in the Court of Common Pleas. No appeal was taken from the final decree of November 16, 1888, of the Surrogate's Court. October 10, 1888, this action was begun to partition said real estate, pursuant to § 1537 of the Code of Civil Procedure, upon the theory that the plaintiff was an heir at law of Mary T. Hatton, and that her apparent devise of the property to Michael Sweeney and Catherine Gallagher was void.

The contesting defendants, Michael Sweeney, Catherine Gallagher and Francis Gallagher, her husband, denied in their answers that the devise was void, and set up as a bar to the action the final decree of the Surrogate's Court admitting the will to probate. The other defendants who answered admitted the allegations in the complaint.

In November, 1889, the action was tried at Circuit, before a jury, and the following questions submitted:

(1) Did Mary T. Hatten know that the paper she executed was a last will and testament?

(2) Was Mary T. Hatten procured to execute the paper, purporting to be a will, by the conspiracy of Michael Sweeney, Catherine Gallagher and others?

(3) Had Mary T. Hatten capacity to make a will?

The first two questions were answered in the affirmative and the third question in the negative by the jury. Thereafter the trial was concluded at Special Term, the verdict confirmed and a judgment of sale ordered, in accordance with which a judgment was entered September 22, 1890. Upon an appeal to the General Term this judgment was reversed, and a new trial granted, on the grounds that the Circuit erroneously allowed the complaint to be amended, and excluded competent evidence. (68 Hun, 224.)

In March, 1892, the plaintiff, pursuant to leave granted, served a second amended complaint, and the issues joined thereon were tried at Circuit in June, 1893, and the following questions submitted to the jury:

1. At or immediately after the time when Mary Teresa Hatten signed the said paper writing, dated the 17th day of April, 1880, purporting to be her last will and testament, and mentioned in the complaint herein, did she publish and declare the same to be her last will and testament?

2. Was the said paper writing obtained from said Mary Teresa Hatten by undue influence exercised upon her by the defendants Michael Sweeney, Catherine Gallagher and Francis Gallagher, some or one of them?

3. Was the said paper writing obtained from said Mary Teresa Hatten by a conspiracy entered into by the defendants Michael Sweeney and Catherine Gallagher and some other person or persons for the purpose of fraudulently procuring a will in favor of said Michael Sweeney and Catherine Gallagher, in pursuance of which conspiracy they procured the said paper writing to be signed by the said Mary Teresa Hatten?

4. Was the said testatrix, Mary Teresa Hatten, at the time she executed said paper writing, of sound mind?

5. Is or is not the said paper writing executed by the said Mary Teresa Hatten the last will of the said testatrix?

The first question was answered in the affirmative by the direction of the court, the second and third, in the affirmative, by the jury, and the fourth and fifth, in the negative, by the jury. Upon the rendition of the verdict a motion was made in behalf of Michael Sweeney and Catherine Gallagher to set it aside, which was denied, and an order entered. Thereafter the trial was continued at Special Term, by which the verdict was confirmed and a decision rendered directing an interlocutory judgment, which was entered July 13, 1893, adjudging that the property be sold. By the interlocutory judgment it is adjudged that the plaintiff is entitled to one-fourth of the premises; Thomas Bowen, defendant, Michael Bowen, Fanny McQueeney, one-twelfth each; Patrick Ford, Francis Ford, Michael Ford, Thomas Ford, one-sixteenth each; Mary Ann Cane and Catharine Ward, one-eighth each.

In June, 1894, a motion for a new trial was made on the judgment roll and a case at General Term in behalf of Sweeney and Gallagher for a new trial. The motion was dismissed for want of jurisdiction (79 Hun, 349), and an order entered which was affirmed by the Court of Appeals (143 N. Y. 349). February 7, 1895, the property was sold, pursuant to the interlocutory judgment, for \$51,000, and on filing the report of sale a final judgment was, March 4, 1895, entered.

William H. Arnoux for appellants; Flamen B. Candler for plaintiff, respondent; S. B. Chittenden and William J. Kelly for certain defendants, respondents.

FOLLETT, J.—As all of the litigants assume that Mary T. Hatten died seized in fee simple of the whole of the premises, we shall rest our judgment

on that assumption, without considering its validity.

All of the litigants in this action were parties to the proceedings in the Surrogate's Court to probate the will, to the appeal to the General Term and to the trial before the Common Pleas. The first question presented is whether the decree of the Surrogate's Court, affirming the original probate, entered on the verdict rendered in the Court of Common Pleas, is a bar to this action. At common law the probate of a will in an ecclesiastical court was not conclusive against the heir, and a judgment in an action at law, at the suit of the heir, that the testator was incapable of making a will, was not conclusive against the executor as to the personalty, who, notwithstanding the judgment at law respecting the realty, might, if he could, establish the will as to the personalty in an ecclesiastical court. (*Montgomery v. Clark*, 2 Atk., 378; *Hume v. Burton*, 1 Ridg. P. C., 277; *Bogardus v. Clarke*, 1 Edw. Ch., 266; 4 Paige, 623.) Lord Hardwicke said, in *Montgomery's* case: "I have often thought it a very great absurdity that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the ecclesiastical court, because they have a jurisdiction on account of the personal estate disposed of by it." By chapters 77, 20 and 21 Victoria (1857), the rule of the common law has been changed in England, and a decree of a probate court admitting a will to probate, which relates to realty and personalty, is binding on the heir in case he had notice. (Sec. 62, chap. 77, 97 Pick. Stat. at Large, 420-437.) The rule of the common law arose from its tenderness to heirs and from the idea that none should be deprived of land, except by a judgment of a court of law after trial of the issues of fact before a jury. Under the first Constitution of this State, wills relating to realty might be proved in the Court of Common Pleas (1 R. L., 1801, 178), and after 1813 in the Supreme Court or in the Court of Common Pleas (1 R. L., 1813, 364), and surrogates had the power to admit to probate wills relating to personalty and to real estate so far as it was necessary to authorize the issuing of letters testamentary. (1 R. L., 1801, 317; *id.*, 1813, 444.) Persons aggrieved by any decree of a surrogate were authorized to appeal to the Court of Probates (1 R. L., 1801, 325; *id.*, 1813, 454). Under the second Constitution the Court of Probates was abolished, and persons aggrieved by the decree of a surrogate were authorized to appeal to the chancellor (chap. 70, L. 1823). But the Court of Chancery could not by its decree bind the heir in respect to the validity of a will unless the question of fact had been determined in a court of law on the issue *devisavit vel non*—an issue directed by

a court of equity to be tried by a jury in a court of law to determine the validity of a will. (*Rogers v. Rogers*, 3 Wend. 505.) *Vanderheyden v. Reid* (1 Hopk. 408) was an appeal from a surrogate's decree admitting a will to probate, which related to real and personal property, and turned upon the question of the sanity of the testator. The question arose as to whether this issue could be sent by the Court of Chancery to a court of law to be determined by a jury. In discussing this question the learned chancellor said: "Thus, a will of personal and real estate may be there adjudged both valid and void by different tribunals. This result of an artificial division of jurisdictions can never be proper where it may be avoided. That a will should be adjudged valid, because the testator who made it was of sound mind, and that the same will should be adjudged void, because the same testator was insane, is a result which should never take place under one system of laws. But still more singular would be the anomaly, if the same court were, in the case of a contested will of real and personal estate, bound to send the disputed question to a jury, in respect to the land, and also bound to decide the same disputed question, without a jury, in reference to another species of property.

"Such an incongruity is avoided by taking one course of investigation, whether the bill is of real or of personal estate, or of both comprised in one instrument. This court now having jurisdiction of wills of personal goods, and also of wills of land, it may most fitly apply the same method of investigating facts to both cases."

This language seems to indicate that the chancellor was of the opinion that a decree entered upon the verdict would be conclusive upon the heirs. This judgment was, however, reversed (5 Cow., 719); but not upon the point discussed in the foregoing quotation.

In *Brick's Estate* (15 Abb. Pr., 12) and in 1 E. D. Smith's Rep. XVII, will be found a learned and instructive history of the Probate Courts of this State, prior to the Revised Statutes, by Charles P. Daly, the accomplished chief judge of the Court of Common Pleas.

Under the Revised Statutes wills of real and personal property, or both, were provable before the surrogate of the proper county (2 R. S., 57, sec. 7; *id.*, 60, sec. 28). Any person deeming himself aggrieved by the decree of a surrogate was authorized to appeal to the circuit judge of the Circuit (2 R. S., 66, sec. 55), who, in a case of a reversal upon a question of fact was required to formulate issues of fact and order them tried before a jury (sec. 57), which were to be tried in the same manner as issues awarded by the Court of Chancery, and new trials could be granted by the

Supreme Court (sec. 58). By section 59 (2 R. S., 67) it was provided: "The final determination of such issue shall be conclusive as to the facts therein controverted *in respect to wills of personal estate only*, upon the parties to the proceedings." In case the decree of the surrogate was affirmed or was reversed on questions of law, by the circuit judge, an appeal could be taken to the Court of Chancery (2 R. S., 609, secs. 97, 100). Under these statutes it is clear that a judgment entered on a verdict, establishing a will, after a trial of issues of fact before the Circuit, was not conclusive upon the heir, to whom the right remained to contest the validity of the devise in an action of ejectment, and by chapter 288, L. 1853, he was authorized to contest the validity of a devise by an action in partition.

Under the Constitution of 1846 the statute authorizing an appeal to a Circuit judge was changed and an appeal was authorized to be taken to the Supreme Court, and in case the decision of the surrogate was reversed upon a question of fact, the questions were directed to be tried before a jury (sec. 12, chap. 280, L. 1847). The statutes remained in this condition until the adoption of the Code of Civil Procedure, by which the Surrogate's Court is made a court of record and is vested with the power to probate wills relating to realty and personalty. By section 2626, C. P., the decree admitting a will to probate is conclusive as to the personalty, unless it is reversed on appeal or revoked by the surrogate; but the decree is not conclusive upon the heir, but is presumptive evidence only of the validity of the devise. (Code Civil Procedure, section 2627.) When an appeal is taken to the Supreme Court it may affirm or reverse the decree, and, if modified or reversed upon a question of fact, a trial before a jury of the issues of fact must be awarded. The provision of the Revised Statutes, that the decision to be entered upon the issue so awarded shall be conclusive as to the personalty only, is not continued by this code, nor do we find any provision stating the effect of a judgment so rendered.

By section 1537 of the Code of Civil Procedure the provisions of chapter 288, L. 1853, were continued in force, and an heir of a deviser is authorized to maintain an action for the partition of land apparently devised to another upon the ground that the devise is void. In addition to these provisions any person interested in a will which has been admitted to probate in this State may maintain an action to cause the validity thereof to be determined (Code of C. P., sec. 2653A, enacted in 1892; Long v. Rodgers, 79 Hun, 441). It is apparent that under our boasted reformed procedure a will relating to realty and personalty may be declared void be-

cause of the insanity of the testator, or for any other cause, in respect to one species of property and valid in respect to the other kind of property, upon the ground that the testator was sane, and so there may be two final adjudications, both supposed to be verities, one affirming a will to be valid and the other affirming it to be void. And in case a will relating to realty and personalty is admitted to probate in the Surrogate's Court and the decision is reversed by the Supreme Court and the issues are tried before a jury, which are found in favor of the validity of the will, upon which an adjudication is entered by the Surrogate's Court decreeing the probate to be valid, the heir may, notwithstanding, retry the question as to the realty, and possibly, as in the case at bar, obtain a verdict and a judgment that the will is invalid. But the remedy for this incongruous and absurd procedure by which judgments diametrically opposed to each other may be recovered in respect to the same will, does not lie with the courts but with the Legislature. We are compelled to hold that the decree entered upon the verdict of the jury in the Court of Common Pleas is not a bar to this action.

This action was not brought under section 2653A, Code of Civil Procedure, enacted in 1892, but was brought four years prior to its enactment, under section 1537 of the Code, and the provision of section 2653A, that "the party sustaining the will shall be entitled to open and close the evidence and argument," is not applicable to this case, and the court did not err in denying the appellant's motion to be given the right to open and close the case.

It is urged that the court erred in refusing to direct the jury to find the second, third, fourth and fifth issues of fact in favor of the contesting defendants. Upon reading the evidence, we are of the opinion that it required the court to submit every one of these issues to the jury, and that no error was committed in refusing to direct a verdict, or in denying a motion for a new trial on the ground that it was contrary to the evidence. The learned trial judge instructed the jury fully and carefully in respect to the law relating to the issues submitted, and it was not error after the delivery of his charge to refuse to reinstruct the jury on these issues in the language of counsel as expressed in nearly fifty requests. The ninth and tenth requests, at folios 1020 and 1021, are typical of all. By these requests the court was asked to instruct the jury in respect to the rules of law relating to undue influence, which requests were declined. The court had already carefully instructed the jury upon this issue at folios 966 *et seq.*, and it was not error to refuse to reinstruct the jury on the same subject in the language of counsel. Under sections 970 and 1544 of the Code of Civil Procedure the

verdict of the jury was not merely for the information of the court, but was conclusive until set aside or a new trial granted, and the Special Term, upon its continuation of the trial, had no power to set aside the verdict and find the facts contrary thereto. (*Jones v. Jones*, 120 N. Y. 589.) Our attention is called to thirteen exceptions to the admission and exclusion of evidence in the appellants' twelfth point. To discuss each one of them and show why they were not well taken would unnecessarily prolong this opinion, and it is, we think, sufficient to say that none of them calls for the reversal of this judgment, entered upon the conclusion of a prolonged and carefully conducted trial.

The judgments and order should be affirmed, with costs.

All concur.

#### LIABILITY OF COMMON CARRIER FOR TORTS OF SERVANTS.

GOODLOE v. MEMPHIS & C. R. R. Co., 18 S. R. 166.

A CASE in which a general discussion of the liability of a common carrier for torts of its employes is decided by the Supreme Court of Alabama in *Goodloe v. R. R. Co.* The facts in substance were that the plaintiff was injured, after having purchased a ticket at the defendant's office for transportation over its line, by a servant of the defendant who was scuffling on the platform of the depot. As the action of the defendant's servants was not incident to the employment, the court held that the company were not liable. The opinion contains an interesting discussion on this subject of the liability of a master for the torts of his servant, and the material part is as follows:

"The question presented has been well considered by this and many other courts. It was recently before us in the case of *Lampkin v. Railroad*, 17 South. 448, in which, as the result of the authorities there cited, it was stated, as the well settled rule, that the carrier's obligation was to protect its passengers against the violence and insults of its own servants and of strangers and co-passengers; that a contract exists between a common carrier and its passengers to use all reasonable exertion to protect them from injury from fellow passengers and its agents in charge of the train. In an earlier case it was said that 'the clearly established doctrine now is that railroad corporations are liable for all acts of wantonness, rudeness, or force done or caused to be done by their agents or employes, if done in and about the business or duties assigned to them by the corporation; and the rule of vindictive or punitive damages against such corporations for abuse by their employes of the duties and powers confided to them is the same as that which

applies to natural persons who are guilty of such misconduct. It is confined, however, to abuses perpetrated in the line of duties assigned to them, and does not extend to any tort, wantonness, or wrongful act the employes may commit in matters not connected with the service of the railroad corporation. In the line of their assigned duties they stand in the place of the corporation; without that line the corporation is bound by nothing they may do.' *Railroad Co. v. Whitman*, 79 Ala. 325. The same principle had been differently but very clearly expressed in *Gilliam v. Railroad Co.*, 70 Ala. 268 — 'that if the employe, while acting within the scope of the authority of the employment, do an act injurious to another, either through negligence, wantonness or intention, then for such abuse of authority conferred upon him or implied in his employment, the master or employer is responsible in damages to the person thus injured. But if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master is not.' The principle settled in these and many other similar adjudications is not disputed, but its application to the cases as they occur gives rise to continued disputations. What is meant by the words 'while acting within the range of the authority of the employment of the servant,' is made the ground for contention in each case. But that seems, also, to be well settled on authority; and while it is often a matter of nice adjustment to the facts of a case, it has been made clear enough not to be of very difficult application. It is said, on the point under consideration, that the rule of the responsibility of the master for the acts of his servants, 'does not apply simply from the circumstance that at the time when the injury is inflicted the person inflicting it was in the employment of another; but that, in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, it must be an act which is fairly incident to the employment; in other words, an act which the master has set in motion. \* \* \* And generally, where the injury results from the execution of the employment, the master is liable.' (2 Wood RR., Sec. 316.) In explanation of the rule, this court long ago held, as the result of the authorities examined and cited, that when the servant is in the performance of his master's orders, or authorized acts, and in the doing thereof, conducts himself so negligently or unskillfully, that injury results to another, then the doctrine of *respondet superior* applies, and the master will be liable in an action on the case; but that for the acts of the agent, willfully and intentionally done, without the command and authoriza-

tion of the master, the servant, and not the master, is liable; and that the rule has no application when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. (*Cox v. Keahey*, 36 Ala. 340.) So we find it held, that where a slave, being a passenger on a steamboat, was wounded by a gun negligently discharged by the second engineer of the boat, the captain, in an action against him for the injury, was held not to be liable, because the discharge of the gun by the engineer was not an act done in the course of his employment or in the discharge of any duty connected with the service. (*McClenaghan v. Brock*, 5 Rich. Law, 17.) And where a servant employed to light fires in a house, lighted furze and straw in order to clean a chimney that smoked, and the house caught fire therefrom and was destroyed, it was held, that the act of cleaning the chimney in the manner stated was one outside the scope of her employment, and the master was not liable. (*McKenzie v. McLeod*, 10 Bing. 385.) And still again, in a recent case, where an employe who, being behind in his accounts, was suspected of setting fire to the building in which he was employed, in order to destroy the evidence of his default, we said that there was no evidence tending to show, if the employe did set fire to the building, that it was a negligent act of his, done while in the performance of his duty; and that, if he did it at all, it was his own tortious, wicked act, done outside the line of his employment, in which the defendant did not participate, or, afterwards, in any manner ratify, and for which it was not in any manner responsible. (*Collins v. Railroad Co. (Ala.)*, 16 South. 142.)

### Abstracts of Recent Decisions.

#### BANKS AND BANKING—VOLUNTARY ASSESSMENT.—

The F National Bank suspended business for lack of funds, and was placed in charge of a bank examiner, who required that \$50,000 should be raised and placed in the bank before it could resume business. The stockholders, including one B, the president, thereupon raised this sum in amounts equal to 50 per cent of their stock, and placed it in the bank. The examiner caused entries to be made on the books indicating that this contribution was a voluntary assessment subject, after one year, to the liabilities of the bank, and permitted the bank to resume. B, at a meeting of the directors subsequently held, protested against these book entries, but afterwards signed reports in which the \$50,000 was included as surplus. At the time of the advance the bank held two notes of B, and discounted

another note of his a few days before the expiration of a year from the advance. Shortly after the expiration of the year, the bank again suspended payment: *Held*, that the advance to the bank was a voluntary assessment and not a loan, and could not be set off by B in an action against him on the notes by the receiver of the bank. (*Brodrick v. Brown [Cal.]*, 69 Fed. Rep. 497.)

CONTRACTS -- COLLUSIVE BIDDING.—A secret contract between persons proposing to bid upon the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the public work, and has executed the same, and received the profits. (*McMullan v. Hoffman*, U. S. C. C. [Oreg.], 69 Fed. Rep. 509.)

CRIMINAL LAW—MURDER AND MANSLAUGHTER.—Defendant was tried for murder, in killing one of two persons who attempted to arrest him without a warrant, and when there was no charge against him—probably mistaking him for another. The court, at defendant's request, charged that if such were the case, and the killing was done while resisting such arrest, it would be, not murder, but manslaughter, but added that if the killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose, it would still be murder: *Held*, that the modification was erroneous, as permitting the jury to return a verdict of guilty of murder merely because of the manner of the killing, even if they believed that otherwise the case was one of manslaughter only, whereas the proper inquiry was whether, at the time of the shooting, such circumstances were present, taking them altogether—including the mode of killing—as made it a case of manslaughter, and not of murder. (*Brown v. United States [U. S. S. C.]*, 16 S. C. Rep. 29.)

FEDERAL COURTS -- ACTIONS BY NATIONAL BANK RECEIVERS.—The Federal courts have jurisdiction of actions brought by the receiver of an insolvent national bank to realize its assets, irrespective of the citizenship of the parties; and it is immaterial to such jurisdiction whether the action is brought in the receiver's own name, as receiver, or by him in the name of the bank. (*Linn County Nat. Bank v. Crawford*, U. S. C. C. [Oreg.] 69 Fed. Rep. 532.)

FEDERAL COURTS—CONCLUSIVENESS OF STATE DECISIONS.—A single verdict and judgment in ejectment in Pennsylvania not being conclusive in



the State courts, a decision by the Supreme Court of the State upon the construction of a will, in a first ejectment suit, is not conclusive in a Federal court, but is entitled to peculiar regard as a precedent. (*Barber v. Pittsburgh, Ft. W. & C. Ry. Co., U. S. C. C. [Penn.], 69 Fed. Rep. 501.*)

**FEDERAL OFFENSE — INDICTMENT.**—An indictment which charges that the defendant did aid in buying, receiving and selling a draft, "knowing that said draft had been stolen and embezzled," is insufficient, under Rev. Stat., § 5470, which imposes a penalty for aiding in buying or receiving articles of value stolen or embezzled from the mail, since it fails to allege any offense; the acts of stealing and embezzling being distinct, and inconsistent with each other. (*United States v. Thomas, U. S. D. C. [Cal.], 69 Fed. Rep. 588.*)

**GUARANTY — NOTIFICATION OF ACCEPTANCE.**—N, an Iowa merchant, having been refused credit by complainants in Chicago, procured from defendant a letter addressed to them, and offering to guaranty payment of such purchases as N might make for his fall and winter trade. On the strength of this letter, plaintiffs sold N goods, and, on the same day, wrote to defendant, acknowledging the receipt of his letter "guarantying whatever N may purchase of us for his fall and winter stock," and saying, "His purchases up to this time amount to \$3,890.50, which we are getting ready for shipment." *Held*, that, in view of the situation of the parties, this letter was a valid notice of acceptance of the offer of guaranty, so as to make the guarantor liable for the amount of the purchases. (*Hart v. Minchen, U. S. C. C. (Iowa), 69 Fed. Rep. 520.*)

**MORTGAGE FORECLOSURE — APPOINTMENT OF RECEIVERS.**—Under a statute declaring that a mortgage of real property shall not be deemed a conveyance so as to enable the mortgagee to recover possession without foreclosure and sale (Gen. Laws Or. 1845, 64, p. 228, § 323), the mortgagee has no right to take the rents, profits and crops before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation, to give him such right. Therefore, a provision in a mortgage of farm lands that, in case foreclosure proceedings are instituted, a receiver may be appointed to take the rents, profits and crops, and apply them on the debt, in no wise enlarges the mortgagee's rights. In a proper case, the court will appoint a receiver without any such stipulation; and, in any other case, it will not appoint one, whatever the parties may have agreed. (*Thomson v. Shirley, U. S. C. C. [Oreg.], 69 Fed. Rep. 484.*)

**LANDLORD AND TENANTS — DEFECTIVE PREMISES.**—A landlord letting a house with a warranty of the safety and sufficiency of the ceiling is liable (not on the warranty itself, but on the ground of negligence) for an injury to the tenant's infant child, resulting from the fall of the ceiling upon it. (*Moore v. Steljes, U. S. C. C. [N. Y.], 69 Fed. Rep. 518.*)

**LIFE INSURANCE — SUICIDE — INSANITY.**—If one whose life is insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequences, and effect, his self-destruction will not, of itself, prevent a recovery on the policy. But by capacity to understand the "moral character of his act" is to be understood a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family and others, and to comprehend the wrongfulness of the act, as a sane man would. (*Ritter v. Mutual Life Ins. Co. of New York, U. S. C. C. [Penn.], 69 Fed. Rep. 505.*)

**PUBLIC LANDS — HOMESTEAD RIGHTS.**—A homestead settler whose land has been included by the government in allotments made to Indians in fulfillment of treaty stipulations, but who has not perfected his right by making proof in the land office of full compliance with the law, is not entitled, in a suit against certain Indians and an army officer, who threatens to put them in possession, to a decree declaring him to be the owner of the land, and quieting his title. But, as a *bona fide* settler and owner of the improvements, he is entitled to an injunction protecting him in his possessory rights until the questions of law involved can be determined in a court of competent jurisdiction. (*La Chapelle v. Bubb, U. S. C. C. [Wash.], 69 Fed. Rep. 481.*)

**RAILROAD COMPANIES — NEGLIGENCE.**—A railroad company is not excused from taking other proper precautions by compliance with statutory requirements as to giving signals at crossings. (*Clark v. Canadian Pac. Ry. Co., U. S. C. C. [Vt.], 69 Fed. Rep. 548.*)

**RAILROAD COMPANIES — NEGLIGENCE.**—The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its track, not at a crossing or other public place, is not wantonly and unnecessarily to inflict injury upon them after its employes have discovered them. It owes them no duty to keep a lookout for them before they are discovered. (*St. Louis & S. F. Ry. Co. v. Bennett, U. S. C. C. of App., 69 Fed. Rep. 525.*)

**RAILROAD FORECLOSURES — RIGHT OF REDEMPTION.**—Where a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and a sale is ordered in default of payment, declaring the senior mortgagee's right to redeem forever barred, a similar order as to the right of redemption by the junior mortgagee is not substantially or even formally necessary. He will have a right to redeem without such order, but, if he fail to assert the right, and stand by while the sale is made and confirmed, he must be deemed, in equity, to have waived his right. (*Simmons v. Burlington, C. R. & N. Ry. Co.*, U. S. S. C., 16 S. C. Rep. 1.)

**RAILROAD MORTGAGES.**—Where a railroad mortgage is expressly to secure interest as well as principal, and both are equally within the positive terms of the condition, a default in payment of the interest gives the mortgagee a right to bring a foreclosure suit, especially where, by the express terms of the instrument, he is forbidden to proceed for the collection of interest by ordinary judgment and execution at law. (*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Philadelphia & R. R. Co.*, U. S. C. C. [Penn.], 69 Fed. Rep. 482.)

**RES JUDICATA — ACTION TO RECOVER REAL PROPERTY.**—In an action to recover real property, brought under the Code of North Dakota, which has abolished the fictions of the old action of ejectment, the judgment is a bar to a subsequent action only when the titles and defenses are the same, and is therefore not a bar where the defense is founded on a title acquired subsequent to the judgment, and which was not and could not have been set up in the earlier action. (*Northern Pac. R. Co. v. Smith*, U. S. C. C. of App., 69 Fed. Rep. 579.)

**SALE ON CONSIGNMENT.**—A shipment of goods "on consignment" to one to whom plaintiff had previously been selling, to be held as the property of plaintiff and subject to his order until sold, the price at which they were listed to the consignee to be remitted as fast as they were sold, and when he took notes in lieu of cash, these notes to be remitted as collateral for his account, does not constitute a sale. (*Vermont Marble Co. v. Brow* [Cal.], 41 Pac. Rep. 1031.)

**TRUSTS — FOLLOWING TRUST PROPERTY.**—The owner of trust property intrusted to another, by whom it has been misapplied, is not entitled to a general lien upon the assets of the trustees for the value of such property, and can only follow the same so far as it can be traced, either in its original

form or in other forms into which it has been converted. (*Spokane County v. First Nat. Bank of Spokane* [U. S. C. C. of App.], 68 Fed. Rep. 979.)

**WATER COMPANIES — REASONABLENESS OF REGULATION.**—A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use, and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant, for water furnished, the same price it charges every other inhabitant for the same service under the same or similar conditions. (*American Water-works Co. v. State* [Neb.], 64 N. W. Rep. 71..)

### New Books and New Editions.

**TEXT BOOK OF LAW AND PRACTICE IN THE FORM OF QUESTION AND ANSWER.** By Charles T. Boone, author of "Law of Corporations," "Real Property," "Mortgages," "Code Pleading."

The foundation of this work is a series of questions propounded by the Supreme Court of California during the last decade to candidates for admission to practice in the courts of that State. The answers to the questions which have been prepared aim at accuracy and endeavor to cover the points involved in the question submitted. In addition to this most valuable feature of the work is the citation of authorities after each answer. The work is of convenient size, comprehensive, and covers all the general principles of law. The arrangement of the book is excellent and the citations after the answer aid the student to turn from a mere everyday matter of learning so much and enables him to obtain a reason for everything which the book contains. The work is divided into fourteen chapters, and contains a table of cases cited. The work contains over two hundred pages of questions and answers and has a very complete index.

Published by Reuben's Old Law Book House, San Francisco, Cal.

COMMENTARIES ON THE LAW OF CORPORATIONS.  
Volume 5. By Seymour D. Thompson, LL. D.

We have already given considerable space to the review of the first four volumes of this work, and it is only necessary to say that the high praise bestowed upon the other volumes may properly be accorded to this one. No work of any time has been so large and tremendous as the series which we are now reviewing, and the entire volumes are really representative of the life work of the eminent and distinguished author. This volume begins with title 12, and the chapters begin with chapter 127 and end with chapter 172. Title 12 deals with Corporate Powers and the Doctrine of Ultra Vires. Title 13 deals with Corporate Bonds and Mortgages, and is subdivided into six chapters on different parts of the subject. Title 14 is in relation to Torts and Crimes of Corporations, and is divided into eight chapters which are respectively on Civil Liability of Corporations for Torts, Liability for Trespass and Malicious Injuries, Liability for Frauds, Liability for Negligence, Rules of Damages, Unlawful Trusts for the Control of Corporations and the Prevention of Competition among them, Indictment of Corporations, and Contempt by Corporations. Title 15 is on Insolvent Corporations and is divided into four chapters on Assignments for Creditors, Preferring Creditors, Fraudulent Conveyances by Corporations, Selling Out to a New Corporation, and Creditors' Suits. Title 16 is in relation to the Dissolution and Winding Up of Corporations, while Title 17 deals with Receivers of Corporations. This last title of volume 5 adds one more to the volumes of this most exhaustive and important work.

Published by Bancroft-Whitney Company, San Francisco, Cal.

TREATISE ON THE ENGLISH LAW OF CONTRACT, AND OF AGENCY IN ITS RELATION TO CONTRACT. By Sir William R. Anson, Bart., D. C. L. of the Inner Temple, barrister-at-law, warden of All Souls' College, Oxford, 8th edition. First American copyright edition edited with American notes, by Ernest W. Huffcut, professor of law in the Cornell University of Law.

The object of this authorized American edition of Sir William Anson's well-known treatise on Contract is to give parallel references to selected American authorities where the American law corresponds with the English law as stated by the author, and to indicate clearly the points at which the American authorities either disagree wholly with the English law, or are strongly divided among themselves. It is easily seen at the first glance that no attempt at exhaustive citation of American authorities has been made, as the simplicity and conciseness of the author's treatment would be marred by a large number of citations of cases, while the book would be to that extent less useful to the student. The scope of this work may not be thoroughly known to practitioners though its value as a text-book is conceded. For this reason it is well rather to give the subject-matter than to attempt any minute criticisms of the book. The work is divided into four parts, each of which is subdivided into one or more chapters. Part one deals with the Place of Contract in Jurisprudence. Part two considers the Formation of Contract and is divided in chapters on Offer and Acceptance, Form and Consideration, Capacity of Parties, Reality of Consent, Legality of Object. Part three is on the Operation of Contract and includes chapters on The Limits of the Contractual Obligation and the Assignment of Contract. Part four deals with the Interpretation of Contract and contains chapters on Rules relating to Evidence and Rules relating to Construction. Part five deals with the Discharge of Contract and is subdivided into chapters on Discharge of Contract by Agreement, Discharge of Contract by Performance, Discharge of Contract by Breach, Discharge of Contract by Impossibility of Performance, and Discharge of Contract by Operation of Law. Part six deals with Agency, containing chapters on the Mode in which the Relation of Principal and Agent is created, Effect of Relation of Principal and Agent, and Determination of Agent's Authority. This is followed by chapters on Contract and Quasi-Contract. The index contains the title of the case, with the date of the decision and the reference to the page in the volume where the case is cited. This is a most convenient and useful arrangement, as it allows the question of time when the decision was rendered to be easily ascertained.

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# The Albany Law Journal.

ALBANY, DECEMBER 7, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

THE nomination of the Hon. Rufus W. Peckham for Associate Justice of the Supreme Court of the United States has been received with the greatest satisfaction and enthusiasm by members of the Bar, who have always recognized in Judge Peckham a keenness of intellect, quickness of perception, honesty of purpose, uprightness of motives and thorough appreciation of the law which few men have ever equalled in the learned profession. Judge Peckham's career as Judge of the Court of Appeals has entitled him and has given him the deepest respect and regard of the members of the court and of the Bar, who have viewed his forcible opinions with the greatest favor, and have considered them among the ablest that have ever been written by any member of the court of last resort of the State. The only regret that has been heard is that our own highest court will lose its senior Associate Justice, one of the most experienced and learned jurists who has ever graced the bench of that court. No words but those of praise can be uttered in regard to the nomination, and its wisdom will be made manifest in the early and prompt confirmation by the Senate.

Judge Peckham was born in Albany fifty-six years ago, and entered upon the study of law at the age of eighteen, having previously graduated from the Albany Boys' Academy. After three years' study he was admitted to the Bar, beginning practice in his native city. In 1869 he was elected district attorney of Albany county, and in 1883 was elected to the Supreme Court bench. Three years later he was elected to the Court of Appeals, wherein he has since remained. During his life Judge Peckham has held many posts of honor aside from those mentioned, always enjoying the greatest faith and confidence of the people. Our gratification at

the appointment is only marred by the great loss which we will sustain by Judge Peckham's resignation from the Court of Appeals — a loss at once to the Court of Appeals and to his native city.

A very interesting article appears in the *American Law Review* for September. The author, Mr. Knott, in writing on Lord Selborne, says :

"As Sir Roundell Palmer, Lord Selborne succeeded to the rôle of Lord Westbury, as the advocate of a fundamental reform in the system of legal education. In 1833 the Incorporated Law Society introduced a system of lectures, and in 1836, a qualifying examination for admission to practice in the solicitors' branch; but, as late as 1870, the Inns of Court still continued to call students to the Bar who need only possess the qualification of being able to eat and drink and write their names; provided they ate and drank in the halls of the Inns, and paid certain fees on making their signatures. In 1855 a commission had been appointed to inquire into the arrangements of the Inns of Court in regard to legal education. In 1856 it reported recommending that the four Inns of Court should be turned into a legal university, whose examinations or degrees should be necessary to enable persons to be called to the Bar; and at which others of position in society, as country gentlemen, who, as unpaid magistrates, perform such important duties as administrators of the law, might avail themselves of means of legal studies, which were, up to that time, nowhere provided for them. This report remained inoperative, chiefly owing to the resistance of the Inns of Court. They disliked contact with the public and with the freer air of the outer world, which would have blown on them after the creation of a body with specified duties and responsibilities imposed by Parliament. But they proceeded in a feeble and languid manner to justify their opposition, as they considered, by voluntary action through the Council of Legal Education — an alliance of the four Inns for supplying certain lectures and holding non-compulsory examinations, which they had entered into in 1852. Peace reigned within their ancient walls for fourteen years longer, when Lord Selborne (then Sir Roundell Palmer), who was out of office at the time, took

up the task which Lord Westbury had dropped, and he and others, in both branches of the profession, formed 'The Legal Education Association,' for the purpose of carrying out the plan of a legal university.

"He was its first president, and in a paper on 'Proposals for a University or School of Law,' and in his presidential address, he laid down the lines upon which the proposed school should be constituted.

"In 1876 he moved a resolution in the House of Commons for an address to the crown, praying for a charter establishing such school or university. The state of business prevented it from getting beyond the stage of his opening speech. The resolution was never heard of afterwards; and we are, at this day, apparently as little likely as ever to see a legal school established, granting certificates of proficiency, or degrees to both branches of the profession, and without which no person in either branch would be allowed to practice. The only result of the movement was to extract from the benchers an expression of opinion, and a scheme founded upon it, which has been in operation since 1871, to the effect that, while it was not desirable that the education of students be articulated to solicitors should be under one joint system of management, yet that there should be a compulsory examination of students for the bar before being called, and that the four Inns of Court should establish such an examination through the agency of the Council of Legal Education. Education under this system is no longer flagrantly insufficient, but it is far from satisfactory; and there is not, for either branch of the profession, anything like such efficient provision as may be found in Scotland, for example; and no law school so good as some of the larger law schools of America. The universities of Oxford and Cambridge are not available for the majority of students; and though a London university would be more accessible for them, as the Edinburgh and Glasgow universities are for the Scottish students, the present London university is not a teaching but merely an examining body."

In *Fox v. Hale and Norcross Silver Mining Company* (41 Pac. Rep. 308), the Supreme Court of California has decided one of the most closely contested mining litigations which has

arisen in recent years. The Hale and Norcross Silver Mining Company owns one of the claims on the Comstock lode in Nevada. It is a valuable property, and ore worth many millions of dollars has been taken from the mine. A stockholder in the company made complaint a few years ago that some of the directors had defrauded the company out of more than \$2,000,000 by means of a conspiracy. He declared that the directors, acting through the president of the company, caused the superintendent to mix low-grade ores with the high-grade ores, for the purpose of concealing their real value, and of giving employment to mills at which the ores were crushed and milled. The directors, it was charged, received some of the profits of the milling company, which charged an exorbitant price for its work. The directors denied the accusation. The trial of the case occupied nearly four months. The plaintiff obtained judgment for over \$1,000,000, but the case was carried to the Supreme Court, which has now modified the judgment. The Supreme Court affirms that three of the directors formed a fraudulent combination for mining and milling the ores, but that the other directors were merely negligent and cannot be properly charged with actual fraud. It declares that the three directors caused a large quantity of worthless ore to be taken from the mine and milled after being mixed with ores of a higher grade, and that the charge for milling was one-third greater than the cost. The Supreme Court allowed a judgment against some of the directors, though for a smaller amount than that granted in the trial court.

To those restless spirits who always seek variety, even in the comparison of governments of the various nations, ancient and modern, the interesting article in the *LAW JOURNAL* on Guernsey government, revealing the peculiarities of law and constitution to be found in the Channel Islands, will be welcome. The article is as follows:

The peculiarities of law and of constitution to be found in the Channel Islands have occasionally been touched upon by the wandering lawyer from the adjacent island of Great Britain, and not always, unless he were an antiquary, with unmixed delight. It is to be feared, however, that the judgment of lawyers

in England does not distinguish with the clearness which is desirable between the state of affairs in the different islands which compose that fragment of the old Norman duchy which remains attached to the British Crown. For the truth is that Jersey, while retaining much of the mediæval form of government and judicature, has, with timely forethought, introduced such modifications as were required to harmonize with the conditions of modern life. Hence, in Jersey, what remains of the mediæval has the advantage of being picturesque, and has not the drawback of being antiquated and obstructive. Jersey has representative government, separation of the legislature from the judiciary, and trial by jury; while in Guernsey all the anachronisms flourish.

At the same time, the case is worse in Guernsey than if it were one of mere survival of mediæval institutions. The antique freedom of constitution, which was to be found all over Western Europe before the centralizing monarchies crushed out the local liberties of the provinces, exists in Guernsey no more. Local liberty has disappeared, although the king was not the destroyer. By a fantastic inversion of rôles, the Royal Court of Justice was the usurper.

What are the distinguishing features of the present system, which fifty years ago merited the condemnation of a royal commission? The answer will surprise most people. The present system rests on a flat contradiction of every cherished maxim of English (and, indeed, of most civilized) government, and on a denial of every condition supposed by Englishmen to be the defenses of English liberty and good administration. Let us see what are the chief features:

1. There is no representative government in Guernsey. The government, say the royal commissioners, is practically self-elected and hereditary.

2. There is no trial by jury. Accused persons are triable, and the property of all persons (including that of a large body of English residents) is under the judicial control of the same self-elected body, which constitutes the Legislature, judiciary and executive.

3. There is taxation without representation; the same body taxing as well as judging and

legislating. A nominal right of election on a restricted franchise is a mere form.

4. There is no relief from arbitrary imprisonment or exile. No code, statute or binding judicial precedent (even of the very judges themselves) tempers the mere *arbitrium* of the body which is executive, judiciary and Legislature combined. There is no appeal against its sentences in criminal matters.

5. There is no rule against *ex post facto* of retroactive legislation. The punishing body claims the right to inflict punishment, notwithstanding that no previously enacted law has been violated. The bizarre defense of this paternal rule is that evil deeds are nipped in the bud before settled courses of ill doing and example can grow up in the community.

6. As follows from what has been said, there is none of that *séparation des pouvoirs* wherein Montesquieu discovered the secret of English liberty. Judge, legislator and administrator are rolled into one.

7. Magna Charta, which provides that judges shall be learned in the law, has no force. Twelve out of the thirteen judges are laymen.

8. Last, and not least from the point of view of the administration of justice, the bar is not, as in England, open to all who qualify by following a prescribed course of study. The Bar is limited to nominally six, really four, members, nominated by the head of the governing, legislating, judging corporation.

Other points whereat the English resident chafes are perhaps not fairly describable as grievances, though they may detract from the amenities of residence. The language of the supreme body, in all its various transmutations of name, is French, even though the parties interested be English. Universal compulsory military service is imposed on all residents, even on Englishmen who have no voice in the government.

In one of Sir Walter Besant's tales of the future it is recorded how in England supreme power is grasped by the College of Physicians, who have frightened the people into subjection by the terror of microbes. Seated in the Cathedral of Canterbury, the college has absorbed the whole powers of government. In somewhat similar fashion the Royal Court of Guernsey has ousted all its rivals, and has concentrated

into its hands all the powers of administration. As Sir Henry Maine would put it, Themis has set up for herself in Guernsey. But by a happy stroke of irony the Royal Court of Justice, which makes, interprets and supersedes the law, is not composed of lawyers; it is composed of twelve laymen, styled jurats, presided over by one lawyer, called the bailiff, the latter nominally appointed by the crown, really chosen by the jurats. Bailiff and jurats alike, as the royal commission attests, are practically a self-elected, hereditary body.

It would be tedious to trace in detail the history of the successful usurpations of this singular body. Suffice it to say that the bailiff and jurats in the beginning of the fourteenth century ousted the jurisdiction of the king's itinerant justices. At the end of the same century they encroached on the legislative authority of the mediæval three estates of nobles, clergy and commons, herein exactly imitating the French judicial *parlements*. At three great church festivals in the year, still called the Chief Pleas, the Guernsey jurats and bailiff pass ordinances, precisely as Bacon describes their prototypes of France, who for the purpose arrayed themselves *en robe rouge*. A century ago in France the code put an end to this usurpation: "*Il est défendu aux juges de prononcer par voie de disposition générale ou réglementaire sur les causes qui leur sont soumises.*"

This is the anomalous body which is all in all in Guernsey. The military forces of the crown are at the disposal of the lieutenant-governor appointed by the crown. All other matters are avowedly or substantially in the hands of the Royal Court. Sitting in Chief Pleas, the jurats and bailiff legislate; sitting as judges, they interpret their own enactments; sitting as jurors, they decide on the facts in each cause; sitting in appeal, they hear appeals from themselves. Dividing themselves, they validate wills as single members, hold inquests as coroners, hear police cases as magistrates. And all this time they are self-elective and hereditary.

Many other curious details of the administration—in equal contrast to the institutions of England as of France—might be given. Enough, however, has been said to show that lovers of the curious and of "survivals" should find enough to interest them in this one of the Norman isles. And they should go soon to see,

for it is hardly possible that, however curious, these peculiarities, so often condemned, can last much longer.

A very pretty and proper distinction is made by the Court of Appeal in England in the case of *Russell v. Russell*, in which it is held that certain acts of the wife are sufficient to justify the court in refusing to decree a restitution of conjugal rights, but that they do not amount to legal cruelty sufficient to support the husband's counter-claim for judicial separation. The court holds that in order to constitute legal cruelty as between husband and wife there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. The wife, in a suit brought against her husband for judicial separation which failed, charged him with the commission of an unnatural offense, and reiterated that charge subsequently, notwithstanding the verdict of acquittal which he had obtained. The wife then brought a suit for the restitution of conjugal rights, which the husband opposed on the grounds of cruelty on the part of the wife in making the above charge, well knowing the same to be false; and he also counter-claimed for judicial separation on the same ground. The court very properly held that the above charge was sufficient to justify it in refusing to decree restitution of conjugal rights, and not enough to constitute legal cruelty to support the husband's counter-claim for judicial separation. An exhaustive opinion is written by Lopes, L. J., in which the question of cruelty and other kindred subjects are discussed fully, and which is entirely too long to quote in the *LAW JOURNAL*. The case shows a pretty and proper distinction, as we remarked before, and one which, as we must place confidence in the court, is very fittingly determined.

#### LEGAL EDUCATION.

BY THE LORD CHIEF JUSTICE OF ENGLAND.  
(Lord Russell of Killowen.)

I APPEAR before you this evening, in response to the invitation of the Council of Legal Education, to address you upon the subject of legal education. I felt honored by that invitation, but I confess it was not without misgiving that I accepted it. I felt—and I feel—how much more worthily this

place would have been occupied by that distinguished judge, Lord Justice Lindley, who, as chairman of the council for some five years, has, with the loyal co-operation of his colleagues, acting under difficult conditions, done much to improve our system of legal education. For myself, I have no such services to point to. It is one of the many drawbacks of a busy, professional life that, however great one's interest in such a subject may be, and however strong one's views, the time necessary to manifest usefully the one, or to give practical effect to the other, is not available.

I propose to myself to-night but one object, and that is to endeavor to give, what I conceive to be, a much-needed stimulus to the cause of legal education. With that object in view, I shall ask you to follow me whilst, with needful brevity, I consider—1, the past history of legal education in England; 2, its present state; 3, its state in other countries; and, finally, 4, the shortcomings in our present system, and how those shortcomings may best be remedied and a system of legal education established on a broad and enlightened basis.

One word I must premise. I speak here in no representative character. I have no mandate from the benchers of my own Inn of Court—Lincoln's Inn—nor from any other body of men. I speak with no other weight or authority than may properly belong to the merits of what I say. But I would fain hope that in this hall, and in a wider circle outside it, I shall find responsive echoes, and that, as the result, the effort may once more be made, and this time successfully made, to establish what Westbury and Selborne hoped and worked for, namely, a great school of law fit to interpret and to teach, to this and to future generations, the noblest system of law which, take it for all in all, the world has known.

In speaking of our law I would avoid, on the one hand, the indiscriminating praise of Blackstone, and, on the other, the uncompromising censure of Bentham. Our law is no doubt unsystematic in its character; it is labyrinthine; it is disfigured by crudities, which it is gradually rejecting; it is insular, and therein lie at once its weakness and its strength. But its faults are faults of form and method rather than of substance. It bears the marks of its native origin. It is not a system fashioned by the great minds of one day or generation. Its growth, like that of our Constitution, has been slow. It is instinct with the genius and peculiarities of the mixed race from which it has sprung. It is elastic in its character, and it follows, slowly indeed, but surely, the needs of society, always changing and always progressive—bringing itself more and more closely in accord with the

social, political, and moral sentiments of the community.

To-day we stand, as it were, on the banks of a mighty volume, which, swollen by many tributary streams, taking their rise from many different sources, spreads fertility in its stately and beneficent course. Our law has for its foundations equity and utility—the only foundations on which, as Edmund Burke well says, law can fitly rest.

In the historical portion of my address I avail myself of the evidence given before the Gresham Commission of 1892, and particularly of that of my friend, Mr. Montague Crackanthorpe, who has been so earnest and steadfast an advocate of improvement in our legal educational system, but whose voice has so often been as the voice of one crying in the wilderness. I do not approach the subject exclusively from the standpoint of the professional lawyer. Some training in law ought to be part of a liberal education. "Every man is supposed to know the law," expresses a legal presumption, and is one of those legal fictions which Sir Henry Maine says plays so important a part in our legal history. The wisdom of the councilors of the Stuart times prompted the passing of a law compelling the eldest sons of nobles and of great land owners to go through a course of legal training to fit them for the due discharge of the duties appertaining to their station. To-day all classes and all grades of society have the same need. The wisdom of Parliament has widened the area, not only of the rights but also of the duties of citizenship. It is hardly exaggeration to say that every citizen, from the humblest to the highest, has his share in the government of his country.

It is, therefore, not alone professional lawyers, nor legislators, nor justices of the peace, nor sons of nobles, who take part in the actual government of the country, and therefore consequently require to know something of its laws. The need extends to all classes. It includes the unambitious, but nevertheless important, rôle of municipal councilors, county councilors, school board members, parish councilors, and the rest. It extends also to our diplomatic and consular services.

Bentham described the state of our law in his day as chaotic, and although his teaching (with that of others) has done something towards its improvement, much is still needed to simplify and systematize it. The value of his teaching, as is so often the case, was but tardily recognized, and it is somewhat curious that many of his works were first published in a foreign tongue and in a foreign country.

I for one am strongly convinced that there is no factor which will prove so potent for the simplifica-



tion and the systematization of our law, as its scientific teaching in a great school of law, which shall be open to all who desire to avail themselves of it, but whose curriculum shall be framed mainly with a view to those who propose to follow the law as a profession in one or other of its branches.

#### PAST HISTORY OF LEGAL EDUCATION.

I recur to the points on which I desire to dwell, and first a few words about the past history of legal education. Need I say that that history means in effect the history of the Inns of Court? I propose to speak on this point with marked brevity of the period up to 1846, when the report of a committee of the House of Commons did much to rouse the Inns of Court and the profession from the lethargy in which they had long lain. It is impossible to speak of the Inns of Court without emotion. They are unique in the history of the world. They are private, unincorporate associations, and, except for such difference as the confirmatory charter of James I. may have made in the case of the Temple Inns, they hold their property on no express trust, and probably on no enforceable implied trust. Yet, during their venerable history, they have now with greater, now with less zeal, fostered legal education; and further, they have, by their disciplinary authority, uniformly upheld a high standard of professional conduct. If they had done nothing but this last, the world would be largely their debtors.

What a suggestive history is theirs! What an illustrious roll of men they have sent forth to add to the wisdom and to the literary and scientific wealth of the world—statesmen, poets, philosophers, jurists, advocates and judges! Their history sends us back to the thirteenth century, when our Constitution was still crude and unformed. They were, when the new worlds were not within our kin. They have seen the advent of those new worlds and the social and political transformation of the old. They have witnessed the long struggle for, and the final attainment of, constitutional freedom which the labors of their children did much to secure. But if it be charged against the Inns of Court that they have in great measure been stationary, while society in its progression has been giving birth to fresh needs—that they have been slow to follow in paths along which they ought to have led—that in the matter of legal education they have not acted up to the full measure of their opportunity and their responsibility, I think that by no candid judge can they be assuaged from these charges. I speak not of the calling and disbaring powers of the Inns of Court; that would be foreign to the subject in hand. It is enough to say that these weighty powers have been exercised with a single view to the interests of the public and the profession.

A brief glance at the character of the legal instruction given in the Inns will suffice. Originally, "inns," in the literal sense of lodging and boarding their students, they imparted legal instruction in lectures and in "moots" and like exercises; the greater part of study, however, being done, as must always be the case, by the student in his own chamber. Fortescue, in the forty-ninth chapter of "*De Laudibus*" (which chapter has, however, been attacked as apocryphal), is represented as writing thus: "There is both in the Inns of Court and the Inns of Chancery a sort of an academy or gymnasium fit for persons of station, where they learn singing and all kinds of music, dancing, and such other accomplishments and diversions (which are called revels) as are suitable to their quality, and such as are usually practised at court. At other times, out of term, the greater part apply themselves to the study of the law. Upon festival days, and after the offices of the church are over, they employ themselves in the study of sacred and profane history. Here everything which is good and virtuous is to be learnt. All vice is discouraged, and banished, so that knights, barons, and the greatest nobility of the kingdom often place their children in those Inns of Court, not so much to make the laws their study, much less to live by the profession (having large patrimonies of their own), but to form their manners and to preserve them from the contagion of vice."

I will not stop to inquire how far this pleasing picture can be historically justified. One thing is clear, that again and again earnest men in the profession of the law lamented the deficiencies of the Inns of Court as legal seminaries. Bacon, Lord Verulam, is loud in his lamentation at the absence of what he calls a "legal university" in London, "which shall impart legal knowledge and befit men for public life." Meanwhile, in the universities, the study of law, except the canon law, was neglected. Chroniclers agree that the period from the sixteenth to the eighteenth century was marked by apathy in the Inns of Court; that legal instruction and legal learning were on the whole at a low ebb; and, co-incident with that apathy, and in part, probably, because of it, arose that system of special pleading, the painful record of whose subtleties fill many volumes of laborious law reports. I do not wish to be misunderstood. In its original conception, special pleading was sound. It radically meant nothing more than this—that the essential conditions, on which a claim was based, or the answer to that claim rested, should be clearly stated without redundancy. But that object was soon overlaid by a mass of technicality in which, as has been well said, the science of statement was made

to appear more important than the substance of the right. In our civil suits this system has gone by the board, but its spirit still survives in our criminal procedure.

In our civil procedure, the enemy against which we have now to guard is not over-technicality, but redundancy and prolix statement, often of immaterial matter.

#### PRESENT STATE OF LEGAL EDUCATION.

I pass to the consideration of the present state of legal education. I start from the report of the Commons Committee, 1846, already referred to. One of the principal witnesses examined by it was Mr. Richard Bethell, afterwards Lord Westbury, and it is significant of the conservative spirit of the age, and of the profession (I am speaking in no political sense) that although that report is now nearly half a century old, we have to-day to deplore a state of things as existing now which in large measure existed then.

The action of the other branch of the profession of the law had done something to quicken the public conscience. In 1832 the charter of the Incorporated Law Society had been obtained and the body of solicitors had aimed at insuring adequate legal education for those who desired to be enrolled as solicitors. Since 1836, a satisfactory public examination has been a condition precedent to admission as a solicitor, but it was not until 1872 that a similar rule came into existence for aspirants to the bar. In 1833 some of the Inns appointed Readers or Lecturers in Law, but the students of Lincoln's Inn could not attend the lectures at the Temple, nor Temple students the lectures at Lincoln's Inn. There was no concert between the Inns, and, therefore, no system of education for the profession as a whole.

The report of the committee of 1846 is a scathing condemnation of the then state of things. The committee arrived at several important conclusions. It resolved that no legal education worthy of the name, of a public nature, was then to be had. It called attention to the striking contrast in this regard between England and the more civilized States of Europe and America. It pointed out that, amongst other consequences of the want of scientific legal education, this country was deprived of a most important class, "the legists or jurists of the continent, men who, unembarrassed by the small practical interests of the profession, are enabled to apply themselves exclusively to law, as to a science, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered." It pointed out that the legal education of the continent is conducted in connection with the univer-

sities, in which jurisprudence often forms the chief faculty, and that, through the legal faculty, supplied with numerous courses and tested by efficient examinations, not only the future lawyer, jurist, civilian, and solicitor, but the future diplomatist and official must necessarily pass. It declared that a system of legal education ought to comprehend and to meet the wants, not only of the professional, but also of the unprofessional student, and that, for the purposes of a comprehensive system, the four Inns of Court should be constituted an aggregate of colleges, or law university. The final resolution of the committee contains a covert threat that if the Inns failed voluntarily to take the initiative in the suggested direction, recourse should be had to a royal commission with a view to compelling them. The report besides contains much valuable matter as to what ought to be the scope and character of the system of legal education to be pursued.

The single net result of this report was the formation in 1852 of a standing council of eight benchers, representing all the Inns, to frame a scheme of lectures open to the members of each of the Inns. This standing counsel was the germ of the council of legal education. Subsequently, five readerships were instituted, viz., in jurisprudence and roman law, real property, common law, equity, and in constitutional law and legal history. This was undoubtedly a step in the right direction. It was in this state of things that I made my way to the Bar, and I recall with gratitude the benefit I derived, especially from the lectures in jurisprudence and Roman law of the late Sir Henry Maine, and in equity of the late Mr. Birkbeck. But still there was no guarantee of competent legal learning as a preliminary to call. The student had his choice either (1) to pass an examination, or (2) to attend for one year two sets of the lectures, or (3) attend for a like period in a barrister's, pleader's, or conveyancer's chambers.

I will not stop to point out how slight the evidence of competent knowledge which any of these tests afforded, and how illusory were the last two. It was the taunt levelled at the Bar that, while in other professions and in handicrafts long service and special preparation were considered necessary as a guarantee of fitness, there was no such safeguard in the case of the Bar. The taunt was the harder to bear because it was based on truth. It was said that a man had only to "eat his way" to the Bar, which was a contemptuous mode of condemning the requirement of keeping term by dining in hall. I do not join in that condemnation. I maintain that the requirement is wise and useful, but it must not stand alone. Just as much of the advantage of university life springs from the association of students in their studies and sports, so the meeting

in Hall, for even the commonplace purpose of dining, has its direct advantages. Friendships are formed, schemes of mutual encouragement in study are set on foot, a spirit of emulation is cultivated, a feeling of good fellowship springs up, the rough edges are smoothed off, and a standard of manners and of conduct attained, which, fashioned by the students in the aggregate, will generally be found to be higher than in the average individual. A disciplinary force is also thus brought into action which lasts during professional life. I do not hesitate to say that to the association which so largely prevails amongst us are in great measure to be attributed in the first place the honorable character which the Bar as a whole has always maintained, and in the second place, the fact that, although our profession is one in which men are brought into close and severe personal competition, there is a marked absence of jealousy and ill-will amongst us, and a generous appreciation of men according to their deserts.

In 1855, a royal commission was appointed "to inquire into the arrangements of the Inns of Court, for promoting the study of the law and jurisprudence, the revenues properly applicable, and the means most likely to secure systematic and sound education for students of law, and to provide satisfactory tests of fitness for admission to the Bar." Amongst the commissioners were Sir William Page Wood, afterwards Lord Hatherley, Mr. Justice Coleridge, Sir Alexander Cockburn (then attorney-general), and Sir Richard Bethell (then solicitor-general).

The character of their inquiry and their report is like that of the committee of 1846, already dealt with. It condemns the existing state of things, and recommends the formation of the four Inns of Court into a legal university, with power of conferring degrees in law, and that the necessary funds for carrying out the scheme of education shall be provided by the Inns of Court. It lays down the necessity for a preliminary examination of candidates before admission as students at the Inns, and of an examination before call to the Bar. The Inns of Court acted promptly upon the suggestion as to the preliminary examination, but the final or test examination was not adopted, as I have already said, till 1872.

The movement inaugurated by the late Mr. Jevons solicitor of Liverpool, in 1868, taken up by Sir Roundell Palmer, and followed by a resolution debated in the Commons in 1872, affirming the necessity for the establishment of a law school, followed in turn by Sir Roundell Palmer's (then Lord Selborne) bill of 1877 with that object, which obtained a second reading in the House of Lords — all these events passed lightly over the heads of the benchers.

They had, however, ultimately some definite and important results. Time does not permit, nor is it necessary, that I should trace chronologically and in detail the gradual evolution of the consolidated regulations until finally they attained their present character. However much we may think that we are still far off a system of legal training worthy of the name, we should indeed be ungrateful if we did not recognize the progress made in face of difficulties and opposition almost incomprehensible.

It will suffice to summarize the results. They were these: 1. An official examination before call is made compulsory. 2. The council of legal education is increased to twenty members. 3. Its powers are enlarged. 4. A board of studies formed by it devotes much pains to the character of the lectures and of the examinations. 5. The public are in future to be admitted to the lectures; and 6. In addition to the ordinary lecturers and assistant lecturers, the council may arrange for special lectures by special lecturers.

The enlargement of the powers of the council and the securing admission of the public to the lectures are important recent gains, and are due to the strenuous efforts of the present members of the council of legal education.

I am glad to know that, at the instance of the council, Mr. William Willis, Q. C., has undertaken to deliver six lectures on the "Law of Negotiable Instruments." I hope other distinguished members of the profession will follow this example. I hope also that the judges will not forget that Story and Kent found it possible to instruct the world by their learning even while discharging the onerous duties of the judicial office.

Before I pass from this subject I desire to state what is the actual instruction now offered, and what is the actual test of fitness before call to the Bar under the existing system. I reserve till a later moment some criticism on both these points.

According to the existing regulations, the curriculum embraces Roman Law and Jurisprudence, International Law, Constitutional Law and Legal History, and English Law (including Equity) in all its branches. There is a staff of readers and assistant readers, the readers being appointed for three years, and the assistant readers on terms left to the discretion of the council. The lectures and classes are carried on throughout the year, except during vacations. There are four examinations for call to the Bar in each year, and each person must pass a satisfactory examination in Roman Law and Constitutional Law and Legal History, and in English Law, including Equity; but the council may accept as an equivalent for the examination in Roman Law certain university degrees and testamurs.

I think that the curriculum here shadowed forth

is sufficiently 'comprehensive, and that if really studied and mastered it would adequately equip the law student for the grave responsibilities of professional life. But is there any guarantee that it is studied and mastered? I shall later recur to this matter; but, first, I turn to the third head of my subject, viz., the state of legal education in other countries.

#### STATE OF LEGAL EDUCATION IN OTHER COUNTRIES.

Time compels me to make the briefest reference to European systems. In the collegiate and university system of Europe, law holds a much more important place than with us, and the professor of law, who is also generally the text-writer and jurist, holds — and rightly — a much higher position. In France there are eleven seats of faculties of law, and before joining the law school each student must obtain the degree of *bachelier-ès-lettres*. To become qualified as an *avocat* he must be a licentiate of law, and this involves an attendance at law lectures for two years or more, and the passing, during this course, of several examinations. The range of subjects is wide, and includes the study of law scientifically and historically treated, as well as law for practical professional uses. In Germany the law student requires, as a preliminary to admission as a student, a certificate of proficiency in classical and modern literature, and in mathematics. In general, attendance at the law lectures of university professors is obligatory. In Berlin the curriculum extends over some three years, and applies to as many as sixteen legal subjects, or subjects cognate to law.

In a word, these foreign systems show that the teaching of law on a comprehensive and scientific system is regarded as a matter that concerns the State. It is, therefore, carried on under public responsible authority, principally in connection with the universities. Cogent proof also is required that the man who proposes to practise the law as a profession shall be adequately equipped for the duty.

I turn to the state of things in the great Western Republic, where our own system of law largely prevails, expanded and modified to meet the existing conditions of society. Sir Frederick Pollock, writing in the *Law Quarterly Review* of 1892, speaking of the improvements then contemplated by the Inns of Court, and now carried out by the Council of Legal Education, says that, "if worked with zeal and intelligence, the Inns of Court may, possibly, within a few years be not much inferior as a center of legal instruction to an average second-rate American law school." He is no mean authority upon the subject. The general system in the United States may be described briefly thus: The law student is required to spend from eighteen months to two years — sometimes more — in a law school before

applying himself to the actual practical work of the profession in solicitors' chambers. That period is passed in the learning of law, historically and scientifically considered.

Professor Elliott, of Harvard university, writing in the *American Law Review*, speaks of the revolution in legal education effected in recent years; how the old system of sending students to chambers, before they knew anything of the history and principles of law, had been completely discarded, and with the best results, and previous systematic teaching in the law schools had taken its place. According to the report of the American Bar Association for 1894 (these annual reports afford much instructive reading), there were then existing in the United States seventy-two law schools, attended by 7,600 law students. In such schools there were engaged altogether some 500 professors whose business is the teaching of law. The schools are for the most part in connection with universities, but it is to be noted that, although this is so, the majority of students do not in fact obtain university degrees. The percentage of students who have such a degree varies from seventy-six per cent in the case of Harvard students, to seventeen per cent in the case of students of the Columbian university.

The range of subjects is comprehensive, and periodical examinations take place in class throughout the course. The system of teaching itself is largely catechetical. There are constant moots or exercises. The professor is always at hand to give advice and assistance. Cases are argued by the students, the professor acting as judge, and care is taken that the student shall really appreciate the matters discussed, by having brought before him and placed in his hands, in class, specimens of actual instruments, leases, contracts, policies of insurance, pleadings and the like, so that he reaches, in a way in which he is likely to keep hold of it, the principle sought to be deduced from the concrete illustration given.

I observe also, as a matter of interest, that the Bar Association, which annually meets in one or other of the States to discuss matters affecting the Bar, the Judiciary, and the legislation of the country, has appointed a section called the "Legal Education Section," which charges itself with the discussion of all matters affecting that important subject. With all this care and zeal, I note that the need of further improvement is still urgently pressed.

Enough has, I think, now been said by me to show that we must bestir ourselves if we are, in this country, to keep our proper place in the march of educational progress.

#### DEFECTS IN OUR SYSTEM OF LEGAL TRAINING.

I now come to the concluding head of my sub-

ject, namely, What are the shortcomings of our system of legal training, and how can these shortcomings be remedied?

But here it will be said, "Why should we trouble ourselves? You admit that our system is better to-day than in former times, yet in the worst times we have had at least a good bar and a reasonably good judiciary." I would say in answer that the same objection could be made, and indeed has been made, when in the past history of reform and progress any change was advocated. It is true we have had a good bar and a good judiciary, but we have had these, not because, but in spite of, our system of legal education. A better system will not make our bar less able or our bench less learned. Considered as a profession merely to deal with the litigation of the country, the bar has always been competent for that task. As the bar is, so is the bench, which is recruited from the bar. But surely we should aim at a higher ideal than this for the bar and bench of England. Have we ever considered how small a part that bar and bench play in the field of jurisprudence and legal literature? Except in the United States, there are few of our text writers known, and even in the United States the number is becoming less and less, as authors of native growth spring up; and few even of the greatest judgments of our most distinguished judges are to-day cited in any legal forum but our own. I know that this, in part, is accounted for by what I have already described as the insular character of our law; but this is not an explanation of the whole case. What are our treatises and text-books? What are the arguments of counsel? And, indeed, what are the judgments of our judges? Are they much more than a nice discrimination of decided cases? I am speaking, I need not say, of the rule to which there are exceptions. I firmly believe that much of this is attributable to the absence, through succeeding generations of lawyers, of a comprehensive and scientific system for the teaching of law. Nor do the effects of our want of systematic teaching end with the bench, bar and text writer; their effects are also, I firmly believe, to be traced in the unmethodical, unsystematic character of our legislation.

But can it ever be safely predicated of our present system that the test examinations, under the improved regulations, supply any guarantee of competent knowledge? I have admitted that mastery of the subjects in the curriculum would be adequate equipment for the bar. But are the subjects mastered? Are they digested and understood by the students, or, is it not the fact that students with but slight and superficial knowledge of the subjects dealt with, are able, with the crammer's assistance, to answer a fair proportion of

the questions put? Questions which, through a long series of years, bear a strong family resemblance one to another. Do we quite realize what ought to be implied in the possessor of the status of barrister? "Barrister learned in the law." Can we truly say that a tithe of the students who attain pass certificates deserve that honorable description? From inquiry I have made, I have reluctantly come to the conclusion that, with all the care taken, the examinations are such as can be satisfactorily passed without any prolonged study, and without any real learning, under the guidance, for a comparatively short period, of the skilled crammer.

I will give two illustrations of cases, the facts and circumstances of which I have taken the trouble carefully to verify. One relates to the state of things prior to December, 1894, when certain alterations were made with a view to greater stringency in the examinations. The student in question was an Oxford man. He took his degree in law, but only in the fourth class. His knowledge of Roman law, however, was so deficient that he could not pass in that subject. He therefore required to pass in Roman law under the auspices of the Inns of Court. He came from the university in the summer of 1894. Later in that year, learning of the contemplated change, he wished to try to pass under the easier system. He went to a coach in the beginning of November, and after one month's coaching, he passed a so-called "satisfactory" examination in the subjects in the curriculum, including Roman law. Need I stop to point out how absurd it is to suppose that this gentleman had acquired any real grasp of the subjects in which he was examined.

The other case relates to a student under the later and more stringent regulations. He obtained his degree at Oxford in Science in the summer of 1894. While at the University he had never attended any lectures upon Law, and his first reading for the Bar began in October, 1894. In December, 1894, he passed his examination in Roman Law. In April of 1895 he passed his examination in Constitutional Law and Legal History, and, having passed such examinations, he began, for the first time, to read with a view to the examination in English Law (including Equity) of which he had no previous knowledge. He obtained the services of an intelligent coach, and, after two months' coaching, he, in June, 1895, passed a "satisfactory" examination in English Law, including Equity. What did that examination cover? It covered (1) Elements of Real and Personal Property and Conveyancing, including Leases, Settlements and Mortgages; (2) Contracts and Torts, Sale of Goods and Agency; (3) Trusts, Principles of Equity, Administration of

Assets on Death, and Partnership; (4) Criminal Law and Criminal Procedure, and Civil Procedure and Evidence. Thus, after a period of altogether eight months' study, this gentleman was supposed to have acquired some substantial knowledge of Roman Law and Jurisprudence, Constitutional Law and Legal History, English Law (including Equity), Civil Procedure (including Evidence) and Criminal Law and Procedure. And in two short months of these eight months he was supposed to have acquired a knowledge of the English Law sufficient to entitle him to practice it as a profession.

These gentlemen were both gentlemen of intelligence, and gifted with remarkable powers of memory. They had not mastered the Law, but what they had done was, under the skillful direction of the coach, to learn the answer to a large proportion of the questions which the previous experience of the coach enabled him to say would probably be put in the various papers. In the latter of the two cases, the student was assured that he had answered properly more than three-fourths of the questions put; but he candidly confessed that he could not answer them now, that they had faded from his memory, and probably the most that this so-called legal training has done for him is to familiarize him with the books in which he may find the information useful to him, when he comes to the actual practice of his profession. It may, of course, be urged that the crammer is a difficulty in any system where examination is made the test. That is so, and hence the suggestion arises whether a better or some additional guarantee of learning may not be secured by some other method.

Compare our legal system with the elaborate care and training in the medical and surgical schools. As has recently been well said by Sir Edwin Arnold, the labors of educational preparation for these professions grow, year by year, harder and harder—and so they ought. To be up to the high-water mark of proficiency, a young doctor must to-day be a chemist, physiologist, botanist, mechanic, and many things besides.

Indeed, the history of medical education in recent years, from the time when the College of Physicians and the College of Surgeons commanded the principal avenues to the profession to the changes wrought by the legislation of 1858 and 1886, affords an instructive example of the improvements that may be effected under a body such as the General Medical Council clothed with public responsibility, and broadly representative in its character. It shows also how university teaching may be utilized, even in a profession in which a large part of the needful training is highly technical, practical and experimental.

Before leaving the subject of the existing legal

curriculum, I desire to mention that students have complained to me that the 'lectures,' whether in the lecture-room or in the class-room, are sometimes essays merely, and frequently above their heads. They say, that, when the lecturer is speaking of legal documents, examples of the actual things are not put before them, and they fail to realize them. They say the classes are not sufficiently catechetical, and that when the lecturer has delivered himself he disappears, and is not available for advice and assistance from day to day in moments of doubt and difficulty. It is certain, if these complaints are well founded, that they point to serious defects in our methods of instruction.

On the whole, therefore, is their not reason to think that our system of education is not satisfactory, that it is not thorough, that it does not supply any real test of adequate knowledge, that we are in too great a hurry to manufacture barristers, and that by this course we are neither recognizing our responsibilities to the public nor the true interests and dignity of the profession of the law?

I do not profess to be competent to lay down the lines of a proper and adequate system, but I am satisfied that we shall never have such a system until legal education is placed under the control of an authority differently constituted from that which now exists, and I shall only make such further demands upon your patients as will enable me to justify this view, and to suggest for your consideration the constitution of such an authority as might fitly be entrusted with this great work.

What are the objections to the Council of Legal Education? To begin, it is the creation of the concerted action of the four Inns of Court, and, therefore, the dissentient action of any one of them might undo it, though I admit this is not a probable contingency. Its powers are limited. It has not a free hand. Although it has now powers of initiative, that initiative may at any moment be checked by any one of the Inns of Court. It is composed solely of benchers of the Inns. This I conceive to be a grave defect. It is composed of men of advanced age—of men already fully burthened with the weight of professional and judicial work. Why should not the zeal and energy of younger men be utilized? Aye, and of men outside the profession of the law, if they are able to bring useful experience with them? Again, why are solicitors and students in that branch of the profession excluded? Down to the middle of the sixteenth century all members of, and students for, either branch of our common profession were alike part and parcel of the Inns of Court. I have never understood how the solicitors were then properly excluded. The lines of study of the two branches must be, to a large extent, similar. Why should they be kept apart? Their separation is a waste of

power and a loss of advantage to both. This was so far back as 1846 pointed out as a grave evil by the Commons' Committee Report of that year. Some, I understand, advocate the separation as a barrier against fusion. I do not advocate fusion, nor do I believe in the probability of its occurrence, on the ground, mainly, that the distinction between the branches is the result, not of an arbitrary superimposed ordinance, but of a division gradually evolved because of its supposed convenience and utility. In America the distinction really, though not nominally, exists to a large extent.

See the enormous gain to the cause of legal education from the junction of the two branches. With increase of numbers comes increase of emulation amongst the students, and consequent incitement to the teachers to put out their best efforts, which the chilling influence of sparse attendance at lecture or in class will not bring forth. Have the Inns' lectures, even under the improved system, been a success? Look at the attendance. In 1892, only 582, whilst in 1893 the number had fallen to 460, and in 1894, to 384. But since the Council of Legal Educational has secured freedom of admission to the public to all the lectures (all credit to them for it) it would seem to be impossible even if it were desirable—which, in my opinion, it is not—to keep up the separation.

A word as to the teaching staff. I say nothing to their disparagement. Far from it. I have no doubt they are able men, but many of them are men with whom teaching is not the business of, but only an incident in their professional lives. For a large class of subjects which must be taught, for example, Jurisprudence, Roman and Constitutional Law and Legal History, International Law and Comparative Law, we want a professional class of teachers; and we must make it worth the while of able men to devote themselves to such teaching as a calling. This class we cannot hope to have, without being in a position to offer adequate reward and security of tenure, and these in turn we cannot give unless and until the system of legal education is under a body of men permanently constituted, so as to command the confidence of the public and the profession, a body invested with adequate powers clothed with public responsibility and amply endowed.

One other word as to the teaching staff. If we cannot at once get here all the right men we want for the work, we must look for them elsewhere, even if we have to go far afield for them. No narrow insular spirit should interfere with the selection of the best men. Athens did not repel the master of Socrates because he hailed from the coast of Ionia, nor Aristotle, because Stagira was his birth-place. The most famous schools of the European continent derived their fame from the genius of the Alcuius of

England and the Clements of Ireland, and in our time the New World has had the wisdom in the colleges and universities to utilize the trained experience gained in the colleges and universities of the Old World. I do not doubt that we have amongst us the right stuff for the work, if we proceed in the right way to bring it forth and to utilize it.

It will then be asked, "What do you propose?" I answer first, in general terms, that I desire to see legal education placed under a body permanent in its character, not purely legal in its composition, which shall be in close touch and sympathy with the Inns of Court, but shall not be governed by them—a body with public responsibility, which shall be free to call to its aid, from any quarter inside or outside the profession, men whose experience and attainments best fit them for the work of legal education.

#### INNS OF COURT SCHOOL OF LAW SUGGESTED.

How is such a body to be brought into existence? Two schemes have been suggested. One is that in connection with a teaching university in London there should be founded a Faculty of Law to be endowed by the Inns of Court. In reference to this scheme, it is, perhaps, at this time enough to say that there is not at present any teaching university in London in connection with which such a faculty could be founded, and the scheme which I propound would not prevent such a connection being established should that course hereafter appear desirable.

My proposition is that a royal charter should be obtained to establish a school of law, to be called, say, "The Inns of Court School of Law." The senate, or governing body should consist of, say, thirty members, ten to be nominated by the Inns of Court, ten by the crown, one each by the lord chancellor, the lord chief justice, and master of the rolls, one each by the four universities of Oxford, Cambridge, London, and Victoria, and three by the Incorporated Law Society. These figures are merely suggestions. Personally, I should desire to have some of the governing body elected by the free voice of the profession as a whole. I should not limit the representatives of the Inns of Court or of the Incorporated Law Society to members of their own bodies respectively. In this way, coupled with the nominating power of the crown and of the universities, security would be had against that narrowness which, in spite of ourselves, has a tendency to creep into purely professional associations. I attach importance to the universities being directly represented on the governing body, because (amongst other reasons) it would render it easier, and with safety, to determine what degrees and what testamurs might properly be accepted in the case of university students and graduates, and it would tend towards es-

tablishing that connection of legal education with university training which, with advantage, largely prevails in other countries, but is almost wholly wanting in our own. I should confer on such a body the power of granting academic distinctions, and I should commit to it in fullest confidence the settling of a scheme of preliminary examination, of systematic instruction, and of final tests of fitness for the profession of the law. A difference would, no doubt, have to be made between Bar students and others. But that is a matter of detail. I think such a scheme, well considered in all its parts, ought to receive the sanction of the Inns of Court, and would receive the warm support of the profession generally. It continues the name of the Inns of Court—as it ought to be continued—in connection with the cause of legal education. The new creation would be, in effect, their child. On the governing body their voice would be powerful, and to the Inns of Court, I need hardly say, we must mainly look for the funds to carry on the work in worthy fashion. The Inns of Court—to their credit, be it said—have never shown a spirit of parsimony. On the existing system the annual expenditure amounts to some £7,000. If the lectures and classes are made attractive, I doubt whether any larger sum, or, at all events, any substantially larger sum, would be required to work the scheme which I advocate.

I have said that to this body I would confidently entrust the work of education. To the Inns of Court I should still leave untouched, in all their fulness, those functions of discipline, those powers of calling or refusing to call, and of disbarring, which they have hitherto exercised with honor to themselves and with advantage to the public and to the profession. To the incorporated Law Society, in like manner, I should leave untouched such analogous authority as they now possess. The pith and substance, then, of what I have to urge is the necessity for establishing a school of law. To the governing body of that school of law will fall the working out of a wise and comprehensive system.

A word of warning is perhaps hardly needed, but I will utter it. However perfect the system, its fruition must mainly depend upon the energy and intelligence of the student. After all, the main function of teaching is to teach men how to think, to give them a grasp of principle, to put them on the right track, to give them a clue to the labyrinth, to inspire them with enthusiasm for the profession, that they may work with a will, inspired by a lofty idea of the dignity of the profession of the law, of its duties and of its responsibilities. Nor will any system dispense with the need of practical study in the chambers of a working lawyer, which, however, may well (in the case of students for the bar), be postponed to a later stage,

and which, probably, may usefully occupy those earlier years of professional life when professional work is insufficient for full occupation.

I have now done. I feel how perfunctory my treatment of this great subject has been, for a great subject it undoubtedly is.

I shall be content, if to earnest minds inside the profession and outside it (for it is not merely a professional question), I have said enough to inspire the conviction that the effort ought now to be made to end a state of things certainly not creditable to the profession of the law, and surely disadvantageous to the community.

Never at any time, in any State, has there existed such a conjunction of circumstances as marks London pre-eminently to-day as the seat of a great school of law. We are here at the very heart of things, where the pulse of dominion beats strongest, with a population larger than that of many kingdoms—a great center of commerce, of art and of literature, with countless libraries, the rich depository of ancient records, and the seat at once of the higher judiciary, of Parliament and of the sovereign. From this point is governed the greatest empire the world has known. From our midst go forth to the uttermost ends of the earth, not merely those who symbolize the majesty of power, but happily with them, those who represent the majesty of Law—Law, without which power is but tyranny.

It has been well and truly said that there is hardly any system of civilized law which does not govern the legal relations of the queen's subjects in some portion of the empire. In parts of Canada, French law, older than the first empire, modified by modern codification, prevails—in other parts, the English system; in Australia, English law modified by home legislation in those self-governing communities; in parts of Africa, Roman law with Dutch modifications; in the West Indian colonies, Spanish law modified by local customs; in India, now the Hindoo, now the Mahomedan law, tempered by local custom and by local and imperial legislation.

If the empire of our arms is wide, so, happily, is the empire of our law. For this wide and varied field, the ultimate legal court of appeal is the judicial committee of the privy council. Before that tribunal the bar of England aspire to practice, and on its benches aspire to sit.

Surely these facts suggest great possibilities and great responsibilities. Is it an idle dream to hope that, even in our day and generation, there may here arise a great school of law worthy of our time—worthy of one of the first and noblest of human sciences, to which, attracted by the fame of its teaching, students from all parts of the world may flock, and from which shall go forth men to practice, to teach, and to administer the law with a true and high ideal of the dignity of their mission?



### SOME NOTABLE SCOTCH LAWYERS— JOHN HOPE.

IN the legal annals of Scotland the families of Hope and Dundas have a remarkable record in the number of judges they have given to the bench of the Court of Session. Of the Dundases five attained the judicial dignity; this, however, is outdone by the Hopes, who can claim six representatives as senators of the College of Justice, and of this number three were brothers. These three were the sons of Sir Thomas Hope, of Craighall, the founder of the legal dynasty, who for many years held the office of lord advocate in the reign of Charles I. With Sir Thomas was initiated the custom which long prevailed for the lord advocate to plead in court with his hat on, this privilege being granted to him, as it appeared unfitting that a man should plead uncovered before his sons. In connection with our present sketch we are concerned only with Sir Thomas' third son, Sir James Hope, of Hopetoun. This Sir James was the grandfather of the first Earl of Hopetoun, from whom was descended Charles Hope, of Granton, for many years lord president of the Court of Session; he married his cousin, a daughter of the second Earl of Hopetoun, and of that union John was the eldest son.

John Hope was born on the 26th May, 1794, and was educated at the High School and University of Edinburgh. Following in the footsteps of his distinguished father, he entered the Faculty of Advocates on the 23d Nov., 1816. With a lord president for his father, closely connected with the noble family of Hopetoun, with opinions on political affairs in harmony with those of the government of the day, and with powers of no mean order, Hope might be classed among those who have greatness thrust upon them. His rise was extraordinarily rapid. Three years after his admission to the faculty he became an advocate-depute under Sir William Rae; and when only of seven years' standing he obtained the office of solicitor-general. From the first he appears to have been somewhat impetuous. Scott, writing in his "Journal," thus refers to him: "Walked home with the solicitor—decidedly the most hopeful young man of his time; high connections, great talent, spirited ambition, a ready elocution, with a good voice and dignified manners, prompt and steady courage, vigilant and constant assiduity, popularity with the young men and the good opinion of the old, will, if I mistake not, carry him as high as any man who has arisen here since the days of old Hal Dundas. He is hot, though, and rather hasty; this should be amended. They who play at single-stick must bear with pleasure a rap over the knuckles." An inability to bear raps over the knuckles accompanied him

through life, and more than once got him into difficulties. So early as 1822, while still an advocate-depute, he came into collision with the House of Commons. Mr. Abercromby (afterwards speaker) had brought under the notice of the House the relations of the lord advocate and certain of his subordinates with two newspapers in Scotland—the *Beacon* and the *Sentinel*—which, in a very short time, achieved an unenviable notoriety by the number and virulence of their attacks on political opponent; and, in the course of his speech, Abercromby animadverted in severe terms on Hope's conduct as advocate-depute in connection with a prosecution relating to the affairs of these newspapers—conduct which, it was alleged, was intended to prejudice the trial of Stuart of Duncan, who, in a duel arising out of libellous productions in the *Sentinel*, had killed Sir Alexander Boswell. Part of the attack on Hope was based on a misapprehension, but Hope was naturally indignant, and, in a letter which he addressed to Abercromby, he gave vent to his indignation in strong terms. This letter, being brought before the House, was voted a breach of privilege, for which its author was ordered to attend at the bar, and give an explanation of his conduct. In obedience to this order Hope attended, and, in a speech marked by a good deal of spirit, he explained that, while he regretted having been guilty of a breach of the House's privileges, he had felt compelled to adopt the course he had, to vindicate his honor as a professional man and as a gentleman. The House was favorably impressed with his speech, and, according to Hansard, he withdrew "amidst loud and continued cheers." Some discussion followed, and eventually it was resolved that no further steps should be taken in the matter, in view of the explanation which had been offered.

Mention has been made, in the sketch of Sir James Moncreiff in this series, of Hope's protest that he, as solicitor-general, was entitled to take precedence of Moncreiff as dean of faculty, and of Moncreiff's answer to the protest. Both on this occasion and in 1829, when Jeffrey was elected dean, Hope behaved with much magnanimity. At that time it was not unusual for the offices of lord-advocate or solicitor-general and dean of faculty to be combined in one person; the rule securing a fair distribution of honors being of a much later date. In those circumstances, and considering that the conservatives were still in the ascendant in the faculty, Hope, had he chosen to push his claim, might easily have got the deanship for himself. Some had put him forward in 1829 to oppose Jeffrey, but he waived his claims in deference to his opponent's seniority and high standing at the bar; not only so, but he moved Jeffrey's election. He lost little by waiting; for, in

the following year, on the accession of the Whigs to power, Jeffrey—thus anticipating the later practice—resigned the deanship on becoming lord advocate, and he was succeeded in office by Hope, who thereafter held it during the whole of his subsequent career at the bar. According to Cockburn, whose estimates—however picturesque and amusing—were, it must be remembered, apt to be colored by political feeling, Hope's style of oratory was of the foaming, declamatory style; "our high-pressure dean," he writes, "screams, and gesticulates, and perspires more in any forenoon than the whole bar of England (I say nothing of Ireland) in a reign." Scott's estimate, already given, differs radically from this; he, of course, saw Hope with more friendly eyes.

In the great Auchterarder case, which aroused so much excitement throughout Scotland, and which led eventually to the secession of 1843, Hope was leading counsel for the patron and intruded minister. The case was argued before the whole court, the argument extending over ten days, and the delivery of the judgments occupying a further seven days. Hope was successful, judgment being given for the pursuers both in Scotland and in the House of Lords. This appears to have been about the only memorable cause in which Hope was engaged while at the bar. He, however, always had a very large practice, to which he devoted himself with extraordinary intensity. Late at night and early in the morning he was at his papers; and no client could ever complain that the dean had not made himself master of his facts; yet in his busiest years he could find time, as only the busiest men it seems can find time, to keep up his reading in general literature. Gifted with a tenacious memory, it is said he never forgot even the smallest details of old cases or the books he had perused.

In 1841 his father resigned his office as lord president, being succeeded by Boyle, the lord justice clerk, the vacancy occurring in the latter office being filled by Hope, who, at the same time, was sworn of the Privy Council. Of his career on the bench there have been varying accounts. His industry he undoubtedly carried with him; that was accompanied, however, by his old impetuosity and hasty speech. An instance of this is related in the biography of Lord President Inglis. In one case in which Inglis was engaged Hope took a very strong view adverse to Inglis' contention sooner than perhaps he ought to have done, that is, without hearing the whole of the argument. Inglis, seeing this and feeling that it was of no use to go on then, strategically asked for a continuation of the case in accordance with the forms then in vogue. Before the case came on again an appeal had been taken to the House of Lords on another point, and on this

being announced to Hope he blazed up in a great fury and declared that such conduct was dishonorable. Inglis was not present at the moment, but on being told what had taken place, he rushed into the court in a great rage, flung down his papers and told Hope that as long as he sat on the bench he (Inglis) would never plead before the court again. Moncreiff (the late lord justice clerk, then at the bar) endeavored to bring about a pacification, but Inglis would have none of it until Hope wrote a letter apologizing for what he had said; and this being done matters were smoothed over. Besides his impetuosity he had other failings: he would take strong dislikes to particular members of the bar, and this is always a serious failing in a judge, although unfortunately, it is by no means uncommon. As to his judgments, the matter of most of them was very mediocre; his powerful memory was here rather a drawback than a help, for it made him cling too tenaciously to precedent. Yet, making every deduction, Hope was still a notable man, and a judge who endeavored to do his duty conscientiously and well.

In the Court of Justiciary he presided at the trial of Madeline Smith in 1857 for poisoning her lover, and his summing up was generally considered a very impartial presentation of the facts. The verdict, it will be remembered, was "Not proven."

He continued to discharge his various duties with his accustomed energy till very shortly before his death, which took place suddenly at his house in Moray-place, Edinburgh, on the 14th June, 1858. He had been engaged in his library between seven and eight o'clock, and by 11.30 he had breathed his last.—*Law Times*.

#### THE LAW OF THE VENEZUELAN CASE.

A CAREFUL study of executive document No. 226 of the Fiftieth Congress, first session, wherein the President transmits to Congress the correspondence relating to the pending boundary dispute between Venezuela and British Guiana, discloses only a single issue; and this, in the clear light of international law, proves to be a very simple one, upon which no two intelligent arbitrators will be likely to disagree. The single issue is whether Spain, by merely discovering, without settling or occupying, the disputed Guiana coast, acquired such a title to the back-lying territory that every subsequent actual settlement of such territory by the Dutch became wrongful, and that only occasional armed protests by Spain, at intervals of years or centuries, were necessary to maintain her title, without any interval of permanent occupation by the Spanish from 1581 until to-day. In short, does discovery without occupation give title

against those who permanently occupy, but had not the good fortune originally to discover?

In order to be assured that this is all there is of the Venezuelan question, it is to be observed that the diplomats who have at various times had charge of the case of Venezuela, do not deny the continuous possession of the disputed territory by the Dutch alone for three centuries, but actually charge it upon them as part of their fault, under the names of usurpation, intrusions and aggressions. Nor do the Venezuelan diplomatists allege, except in the case of a few missionaries to the Indians between 1581 and 1580, that any Spanish residents or persons rendering allegiance to Spain have ever gone into the disputed territory, except as small armed expeditions coming by land or sea merely to drive out or capture the Dutch. The sole tendency towards settlement of the country in dispute has been from the direction of Georgetown and the Essequibo river. The historians, geographers, map-makers and publicists, from Raleigh to Humboldt, if they have carried the Dutch boundary westward to the Orinoco and Moroco, or the Barima, have talked about the Dutch possession or occupation; if they have carried the Spanish line eastward to the Essequibo, have in no case declared it to be a Spanish occupation, but only a domain or sovereignty or supposed abstract right. And when (Ex. Doc. 226, p. 34) Lord Salisbury in 1880 writes to Senor Rojas that to recognize Venezuelan "proprietaryship to the Essequibo would involve the abandonment of a province inhabited in 1880 by 40,000 British subjects, and which has been in the uninterrupted possession of Holland and Great Britain successively for two centuries" — we find Venezuela replying in 1882, through Senor Seigas (p. 32), that "to deliver up territories in which populations have been founded cannot help producing grievances; in that, all the world is in accord. But the convenient is not the right, neither can it be confounded with it. He who has occupied a thing not his own, remains with the obligation to restitute it whenever it is demanded of him, and to indemnify all the damages consequent upon the illicit act."

Inasmuch as the Venezuelan lawyers do not instance the building of a single town, or fort, or trade agency, or the occupancy by any Spanish settlers of the territory in dispute at any point, but confine themselves to recounting the encroachments and intrusions of the Dutch, the inference from the record is that no Spanish settlements occurred, and hence that the question is one between occupancy by one nation and naked claim of right to occupy without actual occupancy by another. The Venezuelan lawyers show that they cannot fortify their case by actual acts of occupancy, for they make a strained citation of Vattel, to the point that a country need not occupy the whole of its own territory, but can suit itself as to how much of it it will use. But this text (Vattel, Book II, ch. vii.) clearly refers to the case of a country having a master or

government and established boundaries, within which some places are left unoccupied. Vattel places in another category a newly discovered continent in which rival countries are obtaining title by occupancy. Of such a country he says (Book II, ch. vii):

"If two or many nations discover and possess at the same time an island, or any other desert land, without a master, they ought to agree between themselves and make an equitable partition; but if they cannot agree, each will have the right of empire and domain of the parts in which they first settled. It may happen that a nation may be contented with possessing only certain places, or appropriating to itself certain rights, in a country that has not a master, and be little desirous of possessing the whole country. In this case another may take what the first has neglected," etc.

The Venezuelan lawyers declare that what is expedient is not necessarily just, and plead that the Spanish could, without occupancy themselves, treat the occupancy by the Dutch as usurpation for an indefinite period. Vattel, on the contrary, expressly bases the doctrine that territorial titles between nations can arise by prescription — *i. e.*, by lapse of time with possession adverse to the right — on the inexpediency of allowing old possessions to be ripped up, and settled populations to be compelled either to give up their settled homes or to come under a new allegiance. He says (p. 289):

"Nature has not herself established property, and in particular with regard to lands. She only approves this introduction for the advantage of the human race. It would be absurd, then, to say that domain and property being once established, the law of nature can secure to a proprietor any right capable of introducing disorder into human society. Such would be the right of entirely neglecting the thing that belongs to him, of leaving it during a long space of time, under all the appearances of being property abandoned, or that does not belong to him, and of coming at length to deprive an honest possessor of it, who has perhaps acquired a title to it by burdensome conditions. \* \* \* Were it permitted to have constantly recourse to ancient times, there are very few sovereigns who would enjoy their rights in security, and there would be no peace to be hoped for on earth."

What Vattel here condemns, namely, having recourse to ancient times to upset the effect of centuries of possession adverse to their claim of sovereignty, is exactly the case of the Venezuelans. During all the reigns from Philip II. to Philip V. of Spain, the Netherlands, which owned Dutch Guiana, were themselves under Spanish domination, as was also the present Venezuelan dependency. If Spain, when in full control of both parties to the contention, did not think it worth while to require the Dutch to retire behind the Essequibo, it would be a marvellous stretch of authority for the United States to disturb three centuries of possession, by the Dutch and their successors, at this late day.

— *The Nation*.

# The Albany Law Journal.

ALBANY, DECEMBER 14, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

ONE of the most sensational trials which has taken place in many years has been that of Langerman, who was accused by Barbara Aub of criminal intimacy, and who was found guilty by a jury last week. The trial, in all its unfortunate details, has been fully published. There are many lessons which, as ministers would say, might be learned from this trial and its results. It shows, in the first place, that men are more inclined to believe the testimony of a woman who claims she has been wronged than to place credence in the evidence of one of their own sex. We doubt not but that many innocent men have suffered for acts for which they were no more responsible than the guilty woman. The fearfulness of such a situation is apparent, and appeals most strongly to men who, though they respect the members of the gentler sex, must admit that women succumb to their passions as well as men. The case is also an illustration of the kind of evidence which is given in many cases before a jury, where, as in this case, after a confession is made, it is shown by the party confessing that the testimony of those who were opposed to her is at least partly untrue. Naturally, all this is reflective on human nature. It only again shows its frailty and increases our mistrust. Perhaps the most important part of the case is the action of Recorder Goff after he received the confession of the complainant, Barbara Aub. For several days he took no action, and after what the daily papers call "a denouncement of the prisoner," the recorder sets him free on his own recognizance, grants a new trial and holds him as a witness against his complainant in the former trial. Criticism has come from various quarters in regard to the action of the recorder. His address to the prisoner, in discharging him, was:

"Upon a careful review of the testimony

given upon your trial, it must be clear to any impartial mind that the jury were absolutely warranted and justified in finding against you the verdict they found. Even upon the testimony of the girl herself, if there could have arisen a reasonable doubt, you dispelled that doubt yourself—you and some of your witnesses, you particularly.

"Your own testimony dispelled any doubt that could possibly arise upon this record as to your guilt. Your refusal to answer questions on the ground that they would tend to incriminate or degrade or disgrace you; your palpable exaggeration; your statement of occurrences, which to the mind of any man manifestly were false.

"Your statement of occurrences there were such as could scarcely in human reason be believed of the most abandoned woman. Had you confined yourself to the truth, even though you may have contended, and you may from your standpoint have believed yourself justly contending that you obtained the girl's consent—had you confined yourself to that, the jury might have acted and thought differently. But you did not confine yourself to that. You went beyond that, and you testified to a series of occurrences which upon their face carried with them their own refutation, because of their exaggeration and absolute improbability.

"And then, again, what contributed most to your conviction was your evil repute. Had you been a man of good character—could you have shown good character—and whose reputation was fair and good and upright and honest, you might never have had the verdict of guilty rendered against you which you have. It is only an illustration of how valuable a good character is in time of need and in the hour of peril. And I am satisfied that your evil repute, probably more than anything, placed you in the position you are.

"Since the rendering of the verdict I have, as the law gives me authority to do, inquired as to circumstances that would tend to mitigate your punishment as well as to circumstances that would tend to aggravate your offense. Those are the words of the statute.

"I have received a great many communications both for and against you. The peculiar character of these communications is that those

speaking in your favor have without an exception been anonymous, and some of them have been disreputable. Those against you have been signed by reputable men and women who have offered to come forward and make affidavit—and some of them have done so—of former transaction of yours when nothing but the modesty of the woman prevented your being arraigned at the criminal bar then. And your life, it will appear, has been one not of loose morals, because this court is not going to be a censor of morals, but of unbridled lust, committed by violence, and you have even kept a diary as to the acts of your successful transactions. The wonder is you have escaped from being arraigned at the criminal bar so long.

"You may bear now upon your person marks of violence inflicted upon you by women in defense of their honor.

"And you have been found with your face covered with blood in a certain well-known house in this city, and your record is a very unsavory one.

"But notwithstanding that, Langerman, no matter what you have been and no matter what you may be, you are entitled to strict justice and impartial justice, and that justice demands that you be not punished under this verdict.

"I have since the verdict was pronounced instituted on my own responsibility—actuated by some motive, or at least by some spirit that I cannot now account for—an investigation into this matter, and the result of my investigation is that I am fairly and reasonably convinced—that is, as far as human testimony is concerned, and keeping in mind its fallibility—I am convinced you are innocent of this crime."

"This girl has confessed to me that she consented to the act."

"For long and many hours of anxiety and perplexity, I must say covering some days and nights, since your conviction, I have struggled with this case, and I trust that during the rest of my judicial life nothing of the kind will ever present itself to me again.

"Strictly speaking, there might be a grave question whether or not I should arrest judgment, whether I should permit a solemn verdict of a jury to be challenged, and were the crime of a different nature, the alleged crime of a different nature, than the one it is, I would have grave doubts and hesitancy as to whether

I would allow a verdict of a jury to be thus challenged.

"But considering the peculiar character of the crime charged against you and all the surrounding circumstances, I am satisfied that even without the light of judicial precedent upon this matter, for I doubt if there has occurred a case in the history of criminal jurisprudence in this or any other country to equal this, and without the light of precedent or judicial opinion to guide me, I have had simply to rely upon what I consider to be the principles of right and justice and to exercise that inherent power that a court has over its own records, over its own transactions.

"I have taken from this girl, after having had many conversations with her, after exhaustive questioning and examination, a full confession. In justice to the unfortunate creature, she yet persists in denying the frightful and repulsive accusations which you have made against her on the witness stand, and which I before referred to as carrying with them their own refutation.

"I have urged her and I think she has recognized the fact, and she says so in her confession here, that she has done a grievous wrong, and that she is willing to undo that wrong now. She has suffered, the unfortunate girl, very much, and what with her sufferings of conscience and her homeless, houseless and friendless condition, her lot is indeed a sad one.

"I have no word to say as to your act in taking advantage of her visit to your chambers that morning so long as she says that she consented. A court of law has no right to pass an opinion or to express an opinion one way or the other as to the generosity of your conduct, but she does state in her confession that she was angered by your cruel and cold-hearted treatment of her when she went back to you the second time and told you that she feared she would become a mother, and you, knowing that she had no home, no friends, that she was, practically speaking, destitute, and that as soon as her unhappy condition would become apparent she would be cast out on the street as a foul and unclean thing.

"And when she told you of her condition, she says you sneered at her and you treated it lightly; you told her that she need not be

troubled, that she had now a way of making a living much better than by book canvassing.

"She absolutely denies your assertion that she again submitted to you on the second visit.

"I will not read this confession. It is very thorough. She goes into everything that occurred, but, to sum it up, she says that the going from house to house and from place to place and from person to person looking for a sympathetic friend, and not finding any, discouraged her, and that finally, when she visited this lady, to whom she first made the complaint, she, having been rebuked, and having failed to see other persons she sought, had the thought in her mind of going to the doctor, this doctor who met with an untimely death, Dr. Burnett. And the doctor examined her and he told her he could not tell her condition. The thought in her mind was maddening. She saw nothing before her but a life of shame and degradation, and in order to protect herself from that life of shame and degradation she told Miss Smedley that you had outraged her.

"And Miss Smedley, acting on the feelings of an indignant virtuous woman, and a good woman, immediately caused complaints to be made by bringing her to the police court, and once there the girl had not the strength of character to recede one step from the position which she had taken. And even after that, and in the police court, the girl states in her confession, she wished to withdraw without giving any reason, she wished to discontinue the prosecution without stating her reason, but her friend would not permit her to do so, inasmuch as her honor was involved.

"And the girl goes on to say then that if she had withdrawn she would have been cast out by these friends and looked upon as a liar or an abandoned woman, either one or the other.

"And she says in her own pathetic language: 'What was easy at first became easy as the case went on, and the story I told at the commencement became to me as if it were true.'

"So the poor, unfortunate one lied, and she sat here on this witness stand for five hours undergoing a most excruciating examination at the hands of your counsel, and I venture to say it is not usual at least to find a female witness withstanding all attempts made to cast a blemish upon her reputation and find a flaw in her life so successfully as that poor girl did.

"I may be permitted to say here that it is the experience of all lawyers that it is a very unwise thing for counsel to relentlessly and mercilessly cross-examine a young woman unless he have the proofs of her guilt so conclusive that she cannot get away from them. And your counsel for five hours plied this girl with questions, making her his own witness, and her answers became conclusive upon him and during those five hours she withstood that attack successfully.

"Under the condition of affairs, while a formal motion has not been made, but exercising the inherent power of this court on account of its most extraordinary situation, justice dictates to me to do one thing, and only one thing, and that is to set aside this verdict and to grant you a new trial.

"I shall not commit you to prison, holding you for a new trial, because it is manifest that on a new trial, with this testimony in my possession, or at least in the possession of the court and of the law officer of the court, you could not be convicted."

We print this statement of the recorder's as we believe that not only is he thoroughly justified in every word he spoke, but was entirely correct in every respect in the action which he took. It was most proper that the recorder should take cognizance of the statements made by parties as to the former actions of the defendant. It was right that he should consider all the statements which were made as to the former acts of the same kind of the defendant. A judge's duty is to aid in the protection of society, and the first crime of any man is recognized by the law as one which should not be punished as severely as a second offense. Society must be protected from the continuance of crime and from habitual criminals, and, in view of all these circumstances, the recorder showed the greatest judgment and good faith in properly deciding as to the effect of Langerman's past career. Although the recorder was convinced that the defendant had not committed the crime with which he was charged, yet the so-called denunciation of Langerman was prompted by a proper sense of the propriety of the recorder's position and of the functions which he was obliged to exercise. It is well to appreciate that sound judgment, even after a

short delay, is of many times more value than an immediate and less well considered action, and that the honest convictions of an honorable man may with propriety be expressed in words which, coming from the bench, at least assures us that the judiciary are prone to preserve the high tone and good morals of the community upon which rests the very foundation of our law and institutions.

Through the courtesy of the Hon. John F. Dillon, of New York city, we were able to print last week the address of the lord chief justice of England on the subject of "Legal Education." The subject is one which has been much discussed within recent years and many States have already taken steps to advance the interest of the profession by adopting their suggestions in regard to the examination of law students and the preparation which they should receive before they are admitted to practice before the courts of the State. It is particularly interesting to read the suggestions of the lord chief justice, and to note the history of legal education in England. We are also gratified to read the comprehensive review which the lord chief justice makes of legal education in the United States and to see that he appreciates some of the disadvantages under which the system in this country is placed. Coming from such a distinguished jurist and from such a learned judge the article is replete with interest and demonstrates the scholarly attainments for which the lord chief justice of England is noted.

Among the notable contributions to the Woman's Number of the *Chicago Evening Journal* of Nov. 1, was the following from the distinguished female lawyer, Mrs. Kate Kane Rossi, who is still actively practicing the profession in which she has been so successful for the last seventeen years:

"History, either in ancient or modern times, has failed to record any condition of servitude, or any system of human degradation, so brutal, so cruel, and so hopeless as that of female slavery. When I say female slavery I mean all woman-kind—all, from the palace to the hovel, from the vaulted edifice of religion to the echoing halls of revelry and vice; from the recluse in her cloister, imbued with piety, to the felon in her cell, addled with crime. All, all have

suffered from the contaminating touch of slavery, and no woman ever died without having felt its blight—nay, not one, from the petted idol of society, white and chiseled in the grasp of death, to the neglected creature and victim of our civilization, lying upon a marble slab in the morgue—her cross a curse.

"I believe that women will never be emancipated until a sufficient number of them have mastered the law, in order to enable themselves, first, to abolish their own servile environments, and, second, to lead womankind out of degradation. And to do this the first and cardinal principle to be borne in mind is that the law will not be coquetted with by either man or woman; and if they will keep this in mind, there will be hope for our deliverance from a slavery that has never had a parallel in any civilization.

The foregoing is a noteworthy utterance of a member of the legal profession of the gentler sex, and is, to say the least, a laudable ambition for the practicing of any profession. Just how the entrance of women into the legal profession and their appreciation of legal principles are to affect the slavery, even of themselves or of others, is something which we are unable to comprehend. It always seemed to us that women, so far as the law relating to property is concerned, enjoyed greater advantages and were less restrained than men. Take, for example, one notable instance: A married woman may leave her property to whomsoever she pleases, while her right of dower attaches to her husband's property in any event on his death. Certainly her right to dispose of her property is less restrained than her husband's right to dispose of his property. From the standpoint of the lawmaker, women have been more generously treated than members of the sterner sex. But if she could lessen our suffering from endless legislation, yearly passed, by studying the principles of government, we would most heartily welcome her as a lawmaker. It might be well, however, for men to have a little more light thrown on the method by which women are to accomplish all these desirable ends before the men determine how they are to raise future generations in place of those who are to follow their pursuits, even though the slavery of women is said to exist, if indeed the restraint placed on every citizen in order not to trespass on others' rights is to be so called.

# **SPECIAL RULES REGULATING PRACTICE IN THE FIRST JUDICIAL DEPARTMENT.**

## **REGULATIONS FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK AND THE DISTRICT COURTS THEREIN.**

### *Rule I.*

**T**HERE shall be a term of the Supreme Court for the hearing of Appeals from the City Court and the District Courts of the city of New York, which shall commence on the fourth Monday of each month (except the month of August), at half-past ten, and shall continue from day to day during the fourth week until all appeals ready for hearing are heard and disposed of. The court shall hold its sessions in the court-house in the city of New York, and shall be held by three justices of the Supreme Court duly designated to hold such term.

### *Rule II.*

The clerk of such term of the Supreme Court shall make up a calendar of all appeals to be heard at each term, and publish the same in The Law Journal at least five days before the commencement of the term. No appeal shall be placed upon such calendar unless the return from the court below is duly filed with the clerk of such term at least eight days before the commencement of the term; nor, in the case of appeals from the City Court, unless an affidavit is filed with such clerk at least eight days before the commencement of the term by which it appears that three copies of such return, duly printed as required by the General Rules of Practice, have been served upon the attorney for the respondent. Upon such report being filed as aforesaid, and in the case of appeals from the City Court, upon an affidavit as aforesaid being also filed, the clerk shall place the appeal upon the calendar in the order in which the return was filed. The order of the court upon the appeal shall be entered in the office of the county clerk, and in the case of an appeal from the District Court shall be annexed to the return from such District Court and filed in the office of the county clerk. In the case of an appeal from the City Court a certified copy of the order of such court on the appeal shall be annexed to the return received from the City Court, and shall be transmitted to the City Court, as required by section 1845 of the Code. Appeals may be brought on for argument upon notice of eight days.

### *Rule III.*

In appeals from the City Court, in case the appellant does not cause the return to be filed with the Clerk of the said Term of the Court and print and serve three copies thereof upon the attorney for the respondent, printed as required by the General Rules of Practice, within ten days after service of

the notice of appeal, the respondent may move, upon five days' notice, on the first day of any Term of such Court, to dismiss the appeal, and the appeal shall be dismissed unless the time appellant to cause such return to be filed and copies thereof printed and served be extended by such Appellate Term for good cause shown.

In appeals from the District Courts, if the appellant does not procure the return to be made to the Court within the time prescribed in section 3053 of the Code of Civil Procedure, the respondent may move, on five days' notice, to dismiss the appeal, and such appeal will be dismissed unless such Appellate Term, for good cause shown, extends the time in which the return may be filed. If the Court below shall not make the return to this Court, as prescribed by the Code, the appellant may move, on the first day of such Appellate Term, upon five days' notice, to compel such return by attachment.

### *Rule IV.*

Motions for reargument will only be heard on notice to the adverse party, at the next succeeding term after the decision, stating briefly the ground upon which the reargument is asked, and such motions must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the Court, with proper reference to the particular portion of the case and the authorities relied upon, together with copies of the opinions, if any, and counsel will not be heard orally.

### *Rule V.*

In the argument of the appeal from an order not more than fifteen minutes shall be occupied by counsel on either side, and in the argument of an appeal from a judgment not more than thirty minutes shall be occupied by counsel on either side, except by express permission of the court.

### *Rule VI.*

If the appellant does not appear upon the call of the calendar, the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed.

### *Rule VII.*

An application to appeal to the Appellate Division of the Supreme Court from a decision of this term of the Court under section 1844 of the Code of Civil Procedure must be made in writing on notice to the adverse party upon the first day of the term following the term in which the case was decided; and such application must set forth in full the special reasons why such an appeal should be allowed, and must be submitted without oral argument.



**RULES FOR THE REGULATION OF THE TRIAL TERMS OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT AND TO REGULATE THE CALENDAR PRACTICE THEREIN.**

*Rule I.*

A general calendar of all issues of fact triable by a jury in the County of New York, which shall include all cases at issue and duly noticed for trial in the Supreme Court, the Superior Court of the City of New York and the Court of Common Pleas for the City and County of New York shall be made up for the first Monday of January, 1896, and of such subsequent times as shall be specially ordered by the Appellate Division of the Supreme Court. No case shall be put upon such calendar unless a note of issue shall have been filed at least twenty days before the first Monday of January, 1896, with the clerk of Part 2 of the Trial Term, which note of issue shall state the date of issue of the action, the term for which the case has been noticed for trial and the Court in which the action was originally commenced, and if the same had been upon a previous calendar in either or said Courts, its number upon such calendar. Such calendar shall remain unchanged and continue the calendar for each successive Trial Term of the Court until a new general calendar is ordered to be made up. New causes will be placed at the foot of the general calendar when regularly noticed for trial and a note of issue filed as prescribed by the Code of Civil Procedure. Parties filing a consent may have any cause upon the general calendar reserved generally. All causes marked off the term at any Trial Term shall stand upon the general calendar as reserved generally at the beginning of the following term. Any case now upon the Circuit Court, Superior Court or Court of Common Pleas of the City of New York where the parties shall have omitted to file a note of issue so as to have the same placed upon the general calendar, may apply to the Judge calling the Friday calendar on any Friday, on two days' notice to the adverse party, to have the same restored to the calendar, and it shall then be placed upon the general calendar at the foot thereof.

*Rule II.*

Any action reserved generally, where the same has been reached in its regular order, or in which a new trial shall have been ordered, may be placed upon the calendar for any Friday on filing a consent with the clerk; or either party may apply to the justice calling the Friday calendar upon any Friday on two days' notice to have such action placed upon the Friday calendar to be called for trial.

*Rule III.*

There shall be a special calendar upon which shall be placed all actions which have been awarded

or are entitled to a preference either under express provisions of law or by the General Rules of Practice, or by any special rule, which calendar shall be called, and the cases thereon tried and disposed of at Part 2 of the Trial Term. Any party entitled to have a case preferred may, upon two days' notice, apply to the court at Part 2 to have the case placed upon such preferred calendar. There shall also be placed upon this calendar for trial all issues sent from the Special Term for trial by jury; and any issue in an equity action as to which the parties are entitled by law to a jury trial where such issue has been framed to be so tried. All such cases shall be placed upon the preferred calendar in the order of the filing with the clerk of this part of the order granting the preference or directing issues to be tried.

*Rule IV.*

There shall be eleven Trial Terms of the Supreme Court, to be known respectively as Trial Term Part 1, Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10 and Part 11. Parts 2 to 11 (inclusive) shall commence on the first Monday of January, February, March, April, May, June, October, November and December, and the third Monday of September, in each year, and shall continue to and including the fourth Friday of the term. Except that where a justice assigned to hold any of such Trial Terms is also assigned to appellate duty upon the fourth Monday of the same month, the Trial Term held by such justice shall continue until the Friday preceding such fourth Monday. The court shall open at half-past ten A. M. on each day, except Saturdays, Sundays and legal holidays. Part 1 of the Trial Term shall be designated as the Criminal Term of the court for the trial of indictments, and shall be held in the Criminal Court House, in the city of New York. Trial Term, Part 2, shall be known as the Trial Term for the trial of preferred causes. In case, however, this Term of the court shall be unable to dispose of all the preferred causes, the justice holding that term may send causes from his calendar to the other Trial Term parts for trial. Parts 3, 4, 5, 6, 7, 8, 9, 10 and 11 shall try and dispose of cases on the general calendar.

*Rule V.*

The special deputy clerk assigned to Part 2 of the Trial Term shall have charge of the general and preferred calendars hereinbefore provided for; and there shall be two assistant clerks to Part 2 of the Trial Term, who shall in turn, as directed by such special deputy clerk, attend the sitting of that part, and who shall assist the clerk thereof in preparing the calendar. The calendar clerk shall each week make up a calendar of causes from the general calendar for trial at the Trial Terms, which calendar

will be published at least two days before the same is called. This calendar will be called by the justice of the court assigned to the Special Term for the transaction of *ex parte* business, on Friday of each week, at two o'clock P. M., unless another day is specially fixed by him to call such calendar. Causes on such calendar may be set down for trial on any day in the week following. Whenever it shall be necessary to call more than two hundred and fifty cases on any Friday, the clerk shall divide the calendar into two parts. The first part shall be called at two o'clock P. M., and the second shall be called at three o'clock P. M. In case it should appear upon the call of the calendar on Friday that the number of cases set down for trial on the following week will not be sufficient to occupy the available time of all the Trial Terms of the court, the Justice of the Supreme Court assigned to the Special Term for the hearing of *ex parte* business shall order a calendar of cases from the general calendar, to be made up and to be called upon Wednesday morning at ten o'clock. Upon the call of such calendar cases may be set down for any day of the week in which the calendar is so called, or for the succeeding week.

When a case thus set down upon any Friday or Wednesday for trial appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appear by affidavit to the satisfaction of the Court calling the day calendar that in consequence of the happening of an event since the cause was so set down for trial, the trial cannot, with justice to one of the parties, proceed. The Court may then by order set the case down for trial on another day in the same week, or place the case on the Friday calendar. In a case upon the day calendar for trial, where it shall appear to the Court by affidavit that counsel who is to try the case is to argue a cause upon the day calendar of the Supreme Court of the United States, or upon the day calendar of the Court of Appeals of the State of New York, or upon the day calendar of any Appellate Division of the Supreme Court, or is actually engaged in the trial of a case in a Court of Record in the city of New York or in the city of Brooklyn, the case shall be passed for the day, or until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one. In no other event shall a case upon the day calendar be passed for the day.

#### Rule VI.

In an action for goods sold and delivered or in an action brought to recover upon a promissory note, check, bill of exchange, bond, policy of life insurance, lease, undertaking or other instrument for the payment of money only where it shall ap-

pear by affidavit that the trial of the action will not occupy over two hours, either party may apply to Part 2 of the Trial Term for an order placing the case upon the preferred calendar. Upon such application the Court may by order, if satisfied that the trial of the action will not occupy more than two hours, and if no good reason is shown why the same should not be promptly tried, place the case upon the preferred calendar and dispose of the same in its regular order thereon. If the trial shall occupy more than two hours, it shall go to the foot of the general calendar, unless for good cause the Court shall otherwise order.

#### Rule VII.

The clerk shall make up a day calendar for each day of the term of the cases set down for trial upon such day. This calendar shall be divided into two equal parts. The first part shall be called in Trial Term, Part 3, and the second part shall be called in Trial Term, Part 7, and shall remain thereon from day to day until the cases upon such day calendars are tried or otherwise disposed of. Cases upon the day calendar called in Part 3 shall be tried in Parts 3, 4, 5 and 6; and cases upon the day calendar in Part 7 shall be tried in Parts 7, 8, 9, 10 and 11. Such cases shall be so tried in the parts in which they are called (or to which they shall be sent for trial by the justices presiding in Parts 3 and 7) in the order in which they appear upon the respective day calendars. No application to postpone the trial shall in any case be entertained after a case shall be sent to a part for trial.

When, however, the cases upon the day calendar called in either Part 3 or Part 7 shall be disposed of, cases upon the day calendar of the part remaining undisposed of may be sent to any part of the Court not actually engaged in the trial of a case.

#### Rule VIII.

No case shall be tried in any of the Trial Terms except such cases as shall be upon the day calendars of Parts 2, 3 and 7, and the cases upon such day calendars shall be tried only in those parts or in the parts to which they may be sent for trial by the Justices presiding in such Parts 2, 3 and 7, as hereinbefore provided.

#### RULES FOR THE REGULATION OF THE SPECIAL TERM OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT AND ESTABLISHING THE CALENDAR PRACTICE THEREIN.

#### Rule I.

There shall be a Special Term of the Supreme Court for the hearing of litigated motions to commence on the first Monday of each month and to continue until the last Friday preceding the first Monday of the succeeding month, which term shall

be held every day, except Saturdays, Sunday and legal holidays. The court shall open at eleven o'clock in the morning, and shall continue until all business before the Court has been disposed of. This Special Term shall be known as Special Term, Part. 1.

*Rule II.*

Motions may be noticed for any day during the term. The clerk will make up a calendar for each day. Notes of the issue must be filed with the clerk two days before the day on which a motion is noticed to be heard, except where an order to show cause is granted, when the clerk will place the motion upon the calendar at any time before the day for hearing, upon the exhibition to him of the order to show cause and the filing of a note of issue. This calendar will be called at the opening of the Court and no motion will be heard that is not upon the calendar.

*Rule III.*

In all actions or proceedings in which the accounts of an assignee for the benefit of creditors or of a receiver appointed in an action for the dissolution of a corporation are presented for settlement or to be passed upon by the Court, a notice, or a copy of an advertisement, requiring the creditors to present their claims to a referee, must be mailed to each creditor whose name appears on the book of the assignor or corporation, with the postage thereon prepaid, at least twenty days before the day specified in such notice or advertisement. Proofs of such mailing shall be required on the application for a final decree passing the accounts of the assignee or receiver, unless proof is furnished that personal service of such notice or copy of advertisement has been made upon the creditor.

*Rule IV.*

There shall be a Special Term of the Supreme Court for the transaction of *ex parte* business, to be held on the first Monday of each month and to continue to and including the Saturday prior to the first Monday of the following month. The Court shall open at half-past ten o'clock in the morning and shall continue in session until four o'clock in the afternoon, except Saturdays, upon which day the Court may be adjourned at twelve o'clock noon, and shall be open every day of the year except Sundays and legal holidays. This Special Term shall be known as Special Term, Part 2.

*Rule V.*

Application for all court orders, *ex parte* or by consent, or where notice is not required or has been waived, must be made to the Special Term of the court for the transaction of *ex parte* business. Any *ex parte* Court order granted by any Justice of the Court other than the one assigned to hold the term of the court for the transaction of *ex parte* business

shall not be entered by the clerk. All applications for judgment in actions where the defendant has failed to appear, or has waived notice of motion for judgment or has consented thereto, except in actions for divorce, shall be made to the Special Term of the Court for the transaction of *ex parte* business, and shall not be made to any other Court of Justice. All orders for the examination of parties or witnesses in supplementary proceedings, or to perpetuate testimony, or for the examination of parties before trial, or for the examination of witnesses under letters rogatory, or foreign commissions, or in aid of an attachment, or for any other purpose, or in any proceeding, shall be made returnable before the justice assigned to hold the Special Term for the transaction of *ex parte* business, unless made returnable before a referee or commissioner under express statutory authority; and all writs of *habeas corpus* or other writs that are required by law to be returnable at a Special Term of the Supreme Court, or before a Justice thereof, must be made returnable at the said Special Term, or before a Justice assigned to hold the same. Any writ or order before mentioned returnable elsewhere shall, upon its return, be transferred to the Special Term for the transaction of *ex parte* business for hearing and decision. If not so transferred, the writ or order shall be disregarded. In actions for absolute divorce or to annul a marriage, where no answer is interposed, references to take proof will not be granted. In such a case the application for judgment must be made at the Special Term, Part 2 and the case placed upon the preferred calendar as hereinafter provided.

Proceedings under section 511 of the Consolidation act, and all other proceedings authorized by title 5 of said act to be had before a Justice holding the Chamber of the Court, must be heard in the Special Term for the transaction of *ex parte* business.

If a jury is demanded, the Justice holding such term may continue such proceedings before the Justice holding one of the Trial Terms, where a jury shall be forthwith empaneled and the question determined and the proceeding finally disposed of as required by said act. In case neither of the Trial Terms are in session, the Justice assigned to the said Special Term for the transaction of *ex parte* business may empanel a jury and dispose of the proceeding as required by the said act.

*Rule VI.*

The following regulations will apply to all the insolvent assignments for the benefit of creditors and applications to the court thereunder:

Subdivision 1. Duties of the Clerk.—The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in the proceedings according to date, and the docket shall contain a brief memorandum of each day's proceedings according to the respective titles.

The register and docket shall be, at all times during court hours, open for public inspection.

Subdivision 2. Each petition or order or decree filed shall be indorsed within the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

Subdivision 3. No paper shall be permitted to be taken off of the files of the Court for any purpose, except on an order of the Court.

Subdivision 4. Every paper filed shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

Subdivision 5. Copies of any and all papers in these proceedings shall be furnished to any person applying for same upon the payment of the legal fees.

Subdivision 6. Process.—All process, citations, summons and subpoenas shall issue out of the Court under the seal thereof and be tested by the clerk.

Subdivision 7. Appearances.—Any party may appear in these proceedings either in person or by attorney—if by attorney the name of such attorney, with his place of business and residence, shall be endorsed on each and every paper filed by him, and his name shall be entered in the docket.

Subdivision 8. Schedules.—The schedule of liabilities and assets required to be filed by the assignor or assignees shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required the affidavits of disinterested experts as to such value must be furnished.

Subdivision 9. Signing off.—Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and when filed by an attorney, shall also be endorsed with his name and business address.

Subdivision 10. Filing by Assignee.—Should the schedules be filed by the assignee there must be a full affidavit made by such assignee and some disinterested expert, showing the nature and value of the property assigned.

Subdivision 11. Name and Residence.—The name, residence, occupation and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit or annexed to the schedules.

Subdivision 12. Recapitulation.—There shall be

a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to \$ ; assets nominally worth \$ ; assets actually worth \$

Subdivision 13. Contingent.—Contingent liabilities shall appear on a separate sheet of paper.

Subdivision 14. Amendments of.—Application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall appear in full, and such amendments shall be verified in the same manner as the original schedules were verified.

Subdivision 15. Bond of Assignee.—The bond shall be joint and several in form, and must be accompanied by the affidavit prescribed by section 812 of the Code of Civil Procedure, and also by the affidavit of each surety, setting forth his business and where it is carried on, the amount of his debts and liabilities, and the description and value of property, real or personal, owned by him, so that it may appear that he is worth the amount in which he is required to justify over and above his debts and liabilities.

Subdivision 16. Justification of Sureties.—The court may in its discretion require any surety to appear and justify.

Subdivision 17. At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties, the amount of whose justification united is double the penalty of the bond.

Subdivision 18. Provisional.—The affidavit upon which application is made for leave to file a provisional bond, must show fully and fairly the nature and extent of the property assigned, and good and sufficient reason must be shown why the schedules cannot be filed, and it must appear satisfactorily to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

Subdivision 19. Assignee.—Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

Subdivision 20. In making sales at auction of personal property the assignee shall give at least

ten days' notice of the time and place of the sale and of the articles to be sold by advertisement in one or more newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days' before such sale. Upon such sales the assignee shall sell by printed catalogue, in parcels and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

Subdivision 21. When any notice is served on the creditors of the insolvent, pursuant to the provisions of the statute, of these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent to return the same to the sender within ten days unless called for. Upon every application made to the Court upon such service, an affidavit shall be presented showing whether any such notices have been returned.

Subdivision 22. Upon an application made for a general citation, the assignee shall file with his petition his account, with the vouchers.

Subdivision 23. The assignee must file an account in all cases, which shall be referred for examination.

Discharge.—No discharge shall be granted an assignee who has not advertised for claims pursuant to section 4 of the statute and the 30th subdivision of this rule.

No discharge can be granted an assignee and his sureties in any case, whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act, commenced by petition for citation and citation thereon to all persons interested in the estate.

Subdivision 24. Substituted Assignee.—Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

Subdivision 25. Account of Assignee.—The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed, and credit himself with any decrease as well as expenses.

Subdivision 26. The statement of expenditures shall be full and complete, and the vouchers for all payments shall be attached to the account.

Subdivision 27. The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee in writing, or be brought out on a cross-examination, and in the latter case they must be specifically taken and entered in the minutes.

Subdivision 28. The testimony taken shall be signed by the several witnesses, and attached to and filed with a report of the referee.

Subdivision 29, Report of Referee.—The report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as the proper executing and acknowledging of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and when any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

Subdivision 30. Notice to present claims.—A copy of the notice or advertisement, requiring creditors to present their claims, must be mailed to each creditor whose name appears upon the books of the assignor, with the postage thereon prepaid, at least thirty days before the days specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors.

Subdivision 31. The decision of the referee after the trial of a disputed claim, under section 26 of the General Assignment act, shall be filed with the clerk of the court and a copy served on the defeated party. The court shall, on application of either party, confirm the said report, and the decision of the referee shall be reviewed only by appeal from the order confirming the report to the Appellate Division.

#### *Rule VII.*

There shall be six Special Terms of the Supreme Court for the trial of issues of law and issues of fact triable by the court, and for the hearing and decision of all other matters and special proceedings not otherwise provided for, to be known respectively as Parts 3, 4, 5, 6, 7 and 8. Each term shall commence on the first Monday of each month, and shall continue until the fourth Friday succeeding the first Monday.

#### *Rule VIII.*

A new general calendar of all issues of fact triable by the court without a jury in the county of New York, which shall include all such actions at issue and undisposed of in the Supreme Court, in the Superior court of the city of New York and in the Court of Common Pleas for the city and county of New York which shall have been duly noticed for trial, shall be made for the first Monday of

January, 1896. No case shall be placed upon such calendar unless a note of issue is filed with the clerk of Part 3 of the Special Term at least twenty days before the said first Monday of January, 1896, which note of issue shall state the title of the cause, the names of the attorneys, the date of issue, the term for which the case has been noticed for trial, the court in which the action was originally commenced, and, if such action be upon the calendar of either of said courts, its number upon such calendar. Such calendar as made up shall continue the general calendar for every successive Special Term until a new general calendar is ordered to be made up by the Appellate Division of the Supreme Court. New cases as they are noticed for trial shall be placed at the foot of this general calendar, upon filing a note of issue as required by the Code of Civil Procedure. A motion to correct this general calendar, or to add to it any cases which have been left off by mistake, may be made to the Court of Part 3 of the Special Term on the first Monday of each term on two days' notice to the adverse party. There shall also be made up a special calendar upon which shall be placed all actions brought against the New York Elevated Railroad Company, the Metropolitan Railroad Company and the Manhattan Railway Company, to enjoin the use of public streets in the city of New York, now pending in the Supreme Court, the Court of Common Pleas for the city and county of New York or the Superior Court of the City of New York, or which shall be hereafter brought for that purpose, which special calendar shall be called and disposed of in Part 7 of the Special Term. There shall also be made up a special calendar upon which shall be placed all issues of law now at issue in either the Supreme Court or the said Superior Court, or the said Court of Common Pleas, and new issues of law hereafter noticed for trial shall be put at the foot of the special calendar. The special calendar of issues of law shall be called and disposed of in Part 3 of the Special Term. There shall also be made up a special calendar which shall be known as the preferred calendar, upon which shall be placed all undefended actions for divorce; or for annulment of marriage; all actions entitled under the Code or the General or Special Rules of Practice to a preference; all applications for judgment in actions where issues have been framed and sent to a jury for trial; all applications for final judgment where an interlocutory judgment has been entered and an account has been taken or other proceedings had before a referee; all motions for a new trial on the ground of surprise or newly discovered evidence or upon a case and exceptions; all motions to confirm a referee's report and for final judgment in any ac-

tion in which an issue of fact has been tried by a referee where application to the Court for final judgment is necessary; all applications for final judgment in proceedings to condemn real estate for public use; and all applications for final order in *certiorari* proceedings where an alternative writ of *mandamus* has been issued. The special preferred calendar herein provided for shall be called by the Justice assigned to Part 3 of the Special Term, and shall be disposed of by him; provided, however, that in case he find it impossible to dispose of such calendar, he may, from time to time, as may be necessary, assign the cases from such calendar to the other parts of the Special Term for hearing and decision. In actions for divorce and actions for the annulment of marriage the evidence must be taken in open Court and must be written out and filed with the judgment roll.

#### Rule IX.

The clerk will make a day calendar, for each day (from the general calendar of the Court) of thirty cases, unless a different number is specially directed by the Justice assigned to Part 4 of the Special Term, upon which shall be placed all the cases set down for that day or upon previous days, which have not been disposed of; which calendar shall be called in Part 4 of the Special Term, and cases therefrom assigned to the several parts of the Special Term for trial. No case shall be assigned to Part 3 or Part 7 of the Special Term until the special calendars directed to be called and tried in those parts shall have been disposed of. The parties to any case upon the general calendar may file a consent, signed by the respective attorneys, with the Clerk of Part 3 setting the case down for a day to be named in the consent. Thereupon the case will not be placed upon the day calendar until the day name in such consent, and not then unless it has been reached in its order on the general calendar. No case upon the day calendar will be adjourned by consent of the parties or otherwise, except upon the presentation of an affidavit to the Justice calling the calendar, showing either a legal reason for such adjournment or that the counsel who is to try the case is engaged to argue an appeal on the day calendar of the Supreme Court of the United States, or upon the day calendar of the Court of Appeals of the State of New York, or upon the day calendar of any Appellate Division of the Supreme Court, or is actually engaged in the trial of a case in a Court of Record in the City of New York or in the City of Brooklyn in which case, the action shall be passed from day to day until the argument or trial is finished, unless the trial in which counsel is engaged is a protracted one. Any case upon the day calendar, not ready

for trial and not passed or adjourned, as hereinbefore provided, shall go to the foot of the general calendar. Before the case is placed upon the day calendar it may be marked "reserved generally," upon filing a consent with the clerk signed by the attorneys for the respective parties, and such action shall not be placed upon the day calendar for trial except upon order of the Court made upon two days' notice to the opposing party, which motion shall be made in Part 3 of the Special Term. All cases marked over the Term for good cause shown upon affidavit shall at the commencement of the following Term be considered reserved generally. No case upon the day calendar shall be marked "reserved generally."

*Rule X.*

In all actions brought for the foreclosure of a mortgage or for the foreclosure of mechanics' liens, either party may apply to the Special Term, Part 3, upon notice of two days to the adverse party to have the case placed upon the preferred calendar to be called in Part 3, of the Special Term, and if it shall appear to the Court upon such application that the trial will not be a protracted one, or that for any special reason the case should be promptly disposed of, it shall be placed upon the preferred calendar for trial.

*Rule XI.*

In all actions in which a preference is given by express provision of law, or by the General Rules of Practice or by special rules, the party entitled to such preference may, upon two days' notice, apply to Special Term, Part 3, for an order placing the cause upon the preferred calendar. In case such preference is granted, the case shall be placed upon the preferred calendar as of the date when the motion was made, and shall be called in its order.

*Rule XII.*

No Special Term shall be continued beyond the Friday preceding the commencement of a new term, except for the purpose of completing a trial already commenced during the term, in which case, immediately upon the completion of the trial, the court shall adjourn for the term.

**REGULATING THE PROCEDURE UPON APPLICATIONS  
FOR NATURALIZATION IN THE FIRST JUDICIAL  
DISTRICT.**

*Rule XIII.*

All applications of aliens to be admitted to become citizens of the United States must be heard and final action had thereon at the Special Term of the Supreme Court for the transaction of *ex-parte* business. Such hearings shall be had only upon Mondays, Wednesdays and Thursdays of each week during the year, which are hereby designated as the stated days for such applications. The application which is required by chapter 927 of the laws of

1895 to be filed with the clerk of the court shall be so filed with the assistant clerk of such Special Term assigned to that branch of the business. Such application shall specify the stated day (more than fourteen days thereafter) when such application will be brought on for hearing and final action.

The assistant clerk assigned to naturalization business shall make up a calendar of such applications for each of such stated days, upon which he will place all such applications in the order of filing, for the days specified in the application. The calendar will be called at two o'clock in the afternoon upon each stated day. The hearing upon such applications shall be had upon the call of the calendar and the testimony of the applicant and his witnesses shall be thereupon taken in open court. Such testimony shall be taken down by the stenographer assigned to that branch of the court, and shall be written out and filed with the application.

If the applicant fail to appear upon the call of the calendar, the application will be dismissed without prejudice to a fresh application.

**RULES TO REGULATE THE ATTENDANCE AND PRE-  
SCRIBE THE DUTIES OF THE CLERKS, ASSISTANT  
CLERKS, CRIERS, INTERPRETERS, STENOGRAPHERS,  
LIBRARIANS AND ATTENDANTS OF THE SUPREME  
COURT.**

*Rule I.*

The special deputy to the clerk of the city and county of New York assigned to each Special and Trial Term of the Supreme Court shall attend on each day that the Court is in session and remain in attendance while the Court is in session. The special deputy clerk assigned to Part 2 of the Trial Terms shall have charge of the general and special calendars of the Trial Terms. The assistants to such special deputy clerk shall, in turn, as required by him, attend in Part 2 of the Court. All orders relating to the calendar, and all notes of issue of cases to be placed upon the calendar, shall be filed with the clerk of Part 2 of the Trial Term. He shall attend each Friday or Wednesday call of the calendar, shall make up the general and special calendars for such Trial Terms, and shall make up a day calendar for each day of the term when the Court is in session. The clerks assigned to the other Trial Terms of the Supreme Court shall render him assistance when he requires it, when they are not actually engaged in their branch of the Court.

The special deputy to the county clerk assigned to Part 3 of the Special Term of the Supreme Court shall have charge of the general and special calendars of the Special Term, and all notes of issue of cases to be placed upon the Special Term calendar and orders relating to the calendar shall be filed with him.

There shall be two assistant clerks to Part 3 of Special Term, who shall in turn, as directed by such special deputy clerk, attend the sitting of that part, and who shall assist the clerk thereof in preparing the calendar. Special deputy clerks assigned to the other Special Terms shall render the other special deputy clerk of Part 3 such assistance as he shall require when the Courts to which they are respectively assigned are not in session.

The special deputy clerk assigned to each Trial and Special Term of the Court shall, subject to the supervision of the justice assigned thereto, be responsible for the proper condition of the court room, for the supply of stationery and for the attendance of the officers or attendants assigned to such Special and Trial Terms, and for the performance by such officers or attendants of their respective duties. He shall keep a book in which shall be entered the time at which the officers or attendants assigned to that part of the Court shall appear and remain in Court, and shall transmit at the end of each month, to the Appellate Division of the Supreme Court, a copy of such record.

The special deputy clerk assigned to the Special Term for the hearing of motions shall make up a day calendar of motions to be heard each day (not later than three o'clock for the succeeding day) and shall cause the same to be published in The Law Journal. He shall attend at the call of the calendar and render such assistance as the justice assigned to that term of the Court shall require. The two assistant clerks assigned to that part of the Court shall attend each day from ten o'clock in the morning until four o'clock in the afternoon, or as much later as may be necessary and shall perform such duties as the deputy clerk assigned to that part of the Court shall require. The deputy clerk assigned to the Special Term for the transaction of ex parte business shall attend from ten o'clock in the morning until four o'clock in the afternoon or as much later as the justice assigned to that branch of the Court shall require and shall render to the justice such assistance as he shall require. The two assistant clerks assigned to that part of the Court shall keep the records of the Court and shall perform such additional duties as are required by the clerk. There shall be three additional assistants to such clerk (to be assigned to this part of the Special Term) who shall have charge of the records of naturalization heretofore kept in the offices of the clerk of the city and county of New York, the clerk of the Superior Court of the city of New York, and the clerk of the Court of Common Pleas for the city and county of New York, who shall attend to applicants for naturalization and keep the books and records relating thereto, and who shall perform

such additional duties as said special deputy shall require. There shall be two other additional assistants to such special deputy clerk (to be assigned to this branch of the Court) who shall have charge of the records relating to assignments for the benefit of creditors and who shall perform all the clerical duties relating thereto. They shall also perform generally such duties as may be required by them by the justices assigned to this branch of the Court or by the clerk thereof. The assistants to this branch of the Special Term shall attend the office provided for them in the County Court House, in the city of New York, at ten o'clock in the morning and shall remain until four o'clock in the afternoon, and so much later as shall be necessary. The clerk assigned to the term for the hearing of appeals from the City Court and District Courts in the city of New York shall attend the sitting of the Appellate Term while in session, shall keep the records of such Court and perform such duties in addition as shall be required of him by the justices assigned to hold such term. When the Court is not in session he shall attend each day from ten in the morning until four o'clock in the afternoon, and when not occupied with the business of such Appellate Branch he shall assist the special deputy clerks of Part 2 of the Trial Term, and of Part 3 of the Special Term, and perform such other duties as may be required of him by any justice of the Supreme Court.

#### *Rule II.*

There shall be a stenographer attached to each Special and Trial Term of the Supreme Court, whose duty it shall be to attend at the session of the Court to which he is assigned. In case his services are not needed in the Court to which he is assigned, it shall be his duty to attend any other term of the Court at which his services shall be required, either by the Justice presiding at such other term or by the special deputy clerk attached thereto. The Stenographers assigned to the Special or Trial Terms of the Supreme Court must attend in the Court House each day at ten o'clock in the morning, and remain as long as he is required to remain by the Justice presiding at the part to which he is assigned. They shall also render such assistance to any Justice of the Court as he shall require. In case of the absence of any stenographer from the part to which he is assigned, owing to illness, or when owing to an accumulation of work, any such stenographer shall be permitted by the Justice presiding in such part to absent himself for a definite period from the daily sittings of the Court, for the purpose of enabling him to write out the testimony taken by him, such stenographer may, subject to the approval of such Justice, select another stenographer to take his place during such temporary absence.



Such temporary stenographer shall, before acting, take the oath of office. He shall be paid by the official stenographer whose place he takes, and his services shall not be a charge upon the city or county of New York.

*Rule III.*

It shall be the duty of the librarian to take charge of the library of the Appellate Division of the Supreme Court; to attend in the room of such library each day during the sessions of the Court, when the court is in session; and when not in session from ten o'clock in the morning until four o'clock in the afternoon, or as much longer as he shall be required by either of the Justices of the Appellate Division, and to perform generally such duties in relation to such library as either of the said Justices shall require. He shall be responsible for all the books in the library, and shall see to it that all books removed from the library to the Court room, or elsewhere, are returned to the library, and shall be responsible generally for the safe keeping and proper condition of the books and furniture in the library room. The assistant to the librarian shall have charge of the library for the use of the Justices of the Supreme Court. He shall attend at the County Court House from ten o'clock in the morning until four o'clock in the afternoon, and as much longer as any Justice of the Supreme Court shall require, and he shall be responsible for the safety and condition of the books in the library and of the furniture in the library room, and for the return of all books taken to the Court rooms or elsewhere. No books appertaining to that library shall, under any circumstances, be removed from the County Court House, and the assistant librarian shall enforce all orders in regard to the safe keeping and preservation of such books as shall be made from time to time by a Justice of the Supreme Court.

*Rule IV.*

The interpreters shall attend on each day, except on Sundays and legal holidays, from ten o'clock in the morning until four o'clock in the afternoon, and as much later as any branch of the Court is in session, and shall hold themselves subject at all times to a call from any Justice of the Court, whether in Court or out of Court, to render such services as interpreter as shall be required. On their arrival on each morning they must report their arrival to the crier, or assistant crier, and upon their departure in the afternoon they shall report in like manner.

*Rule V.*

The crier of the Appellate Division of the Supreme Court shall assign the attendants to the Appellate Division and to the various Special and Trial Terms of the Supreme Court. He shall have general charge of all the attendants and it shall be

his duty to see that they properly perform their duties. He shall report to the Appellate Division of the Supreme Court any one of such attendants who fails to attend and perform the duties required of him or who in any way misconducts himself. He shall attend at each session of the Appellate Division of the Supreme Court and shall open and adjourn said court except when his attendance is dispensed with by the Presiding Justice. He shall make a report each month to the Appellate Division of any violation of any of the rules of the court of which he is cognizant, and shall perform such other duties as the Presiding Justice or the Appellate Division shall require.

The assistant to the said crier shall attend at the County Court House in the City of New York, on each day from ten o'clock in the morning until four o'clock in the afternoon, and as much longer as his attendance shall be required by any of the Justices of the court, or while any branch of the court is in session. In the absence of the crier he shall perform all the duties of the crier, and shall perform such other duties as any Justice of the Supreme Court, or the crier shall require. The assistant crier shall wear while in court, or in the discharge of his duties, a uniform such as is now established for the crier of the Supreme Court.

*Rule VI.*

The attendants shall each day attend the various branches or terms of the court to which they are assigned by the crier from ten o'clock in the morning until four o'clock in the afternoon, or so much longer as the court is in session or as a Justice of the Supreme Court requires them to attend. They shall report to the clerk of the parts to which they are assigned the hour of their arrival and before they leave. They shall wear the uniform now prescribed for the attendants of the Supreme Court. In addition to their ordinary duties in court they shall perform such other duties as may be required of them by a Justice of the Supreme Court, by the special deputy clerk of the part to which they are assigned, or by the crier or assistant to the crier.

**CORPORATIONS — LIABILITY OF PROMOTERS. —**

Where several persons associate themselves for the purpose of promoting and organizing a corporation for the pecuniary profit of its members, and, after contracts have been made for and in the name of the proposed corporation, they voluntarily abandon their purpose, their relation one to the other, as to third parties, if not that of partners, is that of agent and principal, and each will be liable upon all the contracts of the association he has directly or indirectly authorized or ratified. (*Roberts Manufg Co. v. Schlick* [Minn.], 64 N. W. Rep. 826.)

**Abstracts of Recent Decisions.****ADMIRALTY—SHIPPING—BREACH OF CONTRACT.—**

Where the owner of a ship, who has chartered out the hold, retains control of the navigation of the vessel, and bills of lading for goods consigned therein, which themselves contain the contract of affreightment, are issued by the master, at the instance of the charterer, to consignors, the owner is bound directly to the consignors for the performance of the contract of affreightment as contained in the bills of lading, and the consignors are not affected by provisions of the charter party inconsistent with such contract. (*Robinson v. Holst* [Ga.], 28 S. E. Rep. 76.)

**ASSIGNMENT OF CLAIM—RIGHT TO SECURITY.—**

Where goods are conditionally sold on assignment of the claim for the price, the security follows the debt. (*Ross-Meehan Brake-Shoe Foundry Co. v. Pasca-Goula Ice Co.* [Miss.], 18 South. Rep. 864.)

**BANKS—DEPOSIT.—**Where a bank knows that money deposited with it to the general credit of a depositor is held in trust by such depositor, the bank has no right to apply such deposit to the payment of a note due to it from the depositor. (*Clemmer v. Drovers' Nat. Bank* [Ill.], 41 N. E. Rep. 728.)

**CONTRACT—RECISSION—FALSE REPRESENTATIONS.—**

False representations, knowingly made by a vendor to a vendee previous to the sale, as to the character, condition, and value of the property, are presumed to have influenced the mind of the purchaser, even though he had full opportunity to observe and know the actual truth, and the burden is on the vendor to prove clearly that such false representations did not influence the vendee in making the sale. (*Turner v. Houpt* [N. J.], 38 Atl. Rep. 28.)

**CORPORATION—TRUST COMBINATIONS.—**An agreement to form a trust in the business of manufacturing and selling preserves, by having trustees hold the stock in certain existing corporations, and in others to be formed, and having such corporations wholly controlled by such trustees is void as contrary to public policy, in creating a monopoly, and in providing for a partnership between corporations. (*Bishop v. American Preservers Co.* [Ill.], 41 N. E. Rep. 765.)

**DEDICATION—COMMUNITY PROPERTY.—**A husband without the concurrence of his wife, has power to dedicate a part of the community homestead to a city for a street, if it does not materially interfere with the wife's use of the homestead. (*Orrick v. City of Ft. Worth* [Tex.], 32 S. W. Rep. 448.)

**DEED—RESERVATION.—**A reservation, in a grant for a county road of land which is being used as a pasture, of the right "to attach a fence to the

bridge" to be built thereon over a ravine running through the tract includes the right to a passageway for stock under the bridge. (*Agne v. Seitsinger* [Iowa], 64 N. W. Rep. 886.)

**EQUITY—JURISDICTION.—**Where plaintiff claims under deeds the right to build over defendant's lot at a certain height from the ground, and defendant in possession, having a wall which prevented such construction, denies the right, the remedy is not in equity, but at law. (*Saunders v. Racquet Club* [Penn.], 33 Atl. Rep. 79.)

**FEDERAL COURTS—COURT OF APPEALS—JUDGMENT.—**The applicability of Act March 3, 1891, § 6, making judgments or decrees of the Circuit Court of Appeals final when the jurisdiction is dependent upon the parties being citizens of different States, is to be determined by the showing made by the summons and statement of claim or declaration; and the fact that another ground for supporting the jurisdiction of the Circuit Court was developed in the course of subsequent proceedings is immaterial. (*Borgmeyer v. Idler* [U. S. S. C.], 16 S. C. Rep. 84.)

**FRAUDULENT CONVEYANCES—CHATTEL MORTGAGE.—**Where a chattel mortgage is executed in good faith for a valuable consideration, and not for the purpose of defrauding creditors of the mortgagor, the fact that it was given to secure a larger sum than is actually due does not affect its validity, but such overstatement of the debt secured, unexplained, indicates fraud, and the burden is upon the mortgagee claiming under the mortgage as against creditors to explain the overstatement, and establish the *bona fides* of his mortgage. (*Heim v. Chapel* [Minn.], 64 N. W. Rep. 825.)

**LANDLORD AND TENANT—OIL WELLS.—**An oil lease, the term of which is for "three years, or as much longer thereafter as oil or gas might be found in paying quantities," extends only for three years, unless gas or oil is found in paying quantities before their expiration. (*Shellar v. Shivers* [Penn.], 38 Atl. Rep. 95.)

**MANDAMUS—WHEN DENIED.—**Where, at the time an application for *mandamus* was heard by the judge of the Supreme Court, the time had passed within which the official duty, the performance of which was sought to be compelled, could be performed, the court properly denied a *mandamus* absolute. *Mandamus* will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless. (*Stacy v. Hammond* [Ga.], 28 S. E. Rep. 77.)

**NEGLIGENCE—OBSTRUCTION IN STREET.—**Where earth removed from defendant's cellar was thrown in a pile on the street, and defendant placed a light thereon at night sufficient to warn travelers of the

danger, and the light was removed without fault of defendant, and plaintiff was injured before defendant, in the exercise of ordinary care, could have discovered such removal and replaced the light, defendant was not liable. (*Raymond v. Keseberg* [Wis.], 64 N. W. Rep. 861.)

**PRINCIPAL AND SURETY — BOND — ESTOPPEL.**—Where a bond was executed for the faithful performance of the duties of a public officer during his second term, but said officer failed to take the oath prescribed by statute at the inception of his second term, his sureties will be estopped from asserting that he did not hold by virtue of his second election but held over from his first term, in an action on the bond for a defalcation occurring after the first term had expired. (*People v. Hammond* [Cal.], 42 Pac. Rep. 86.)

**SALE—CONDITIONAL SALES.**—A contract by which property is "leased" on condition that title shall pass to the lessee when certain payments of "rent" are made, constitutes a conditional sale that is void as to third persons if not recorded. (*Clark v. Hill* [N. Car.], 23 S. E. Rep. 91.)

**SET-OFF—JUDGMENT.**—Where a vendee, who has assumed the payment of certain notes of his vendor, before maturity thereof, assigned to a stranger a one-half interest in a demand he held against such vendor, which demand was subsequently, in a suit by him and the stranger, reduced to judgment, the vendor is not entitled to set off against the stranger's interest in the judgment the demand accruing against the vendee on the maturity of the notes. (*Ellis v. Kerr* [Tex.], 32 S. W. Rep. 444.)

**WILL—REQUEST TO CHARITABLE USE.**—A devise to a trustee to dispose of the property among "charitable and benevolent institutions or corporations in the city of Rochester, as he shall choose, and such sums and proportions as he shall deem proper," is void for uncertainty as to the beneficiaries. (*People v. Powers* [N. Y.], 41 N. E. Rep. 482.)

### New Books and New Editions.

**AMERICAN RAILROAD AND CORPORATION REPORTS VOL. II.** Annotated and edited by John Lewis, author of a *Treatise on Eminent Domain in the United States*.

This is the latest volume of the collection of current decisions in the courts of last resort in the United States pertaining to the law of Railroads, Private and Municipal Corporations, Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. This

volume is especially valuable in the collection of decisions in regard to subjects mentioned above and contains over 800 pages of printed matter. The decisions are well arranged, with a foot-note to each showing where it appears in the West series. The number of cases reported in this volume is quite large and the index is prepared with great care and judgment. Published by E. B. Myers & Company, Chicago, Ill.

**THE KING'S PEACE.** By F. A. Inderwick, Q. C., Author of "Side-Lights on the Stuarts," "The Interregnum," etc.; with fifteen illustrations.

This is a most entertaining and clever book divided into six chapters on the Anglo-Saxon period, Curia Regis, from the accession of Edward I to the death of Richard III, the Courts of the Forest, from the Accession of Henry VII to the Restoration of the Monarchy, and from the Restoration to the erection of the Supreme Court of Judicature. The illustrations in this book are particularly entertaining, showing the great seal of the Confessor, Westminster Hall, Court of King's Bench, Seals of the Forest, Sir Edward Coke, and many other illustrations of particular interest to lawyers. The history contained in this book is brief but is full of interesting points which undoubtedly required great labor and skill on the part of the author to compile. The facts are presented in a clear and concise manner, thus rendering the work pleasing either as a first reading or else as a review of periods of English history. The work is bound in cloth. Price \$1.50. Published by MacMillan & Co., 66 Fifth avenue, New York city.

**THE TRIAL OF SIR JOHN FALSTAFF**, wherein the Fat Knight is permitted to answer for himself concerning the charges laid against him, and to attorney his own case. By A. M. F. Randolph.

This is a small book of about 300 pages in which the author has attempted to give the words of Shakespeare's famous character and to bring out the witty and humorous side of his character. The critics also have their place in the work in the quotations which are made from many of the leading authors and critics of Shakespeare. The work is certain to receive welcome from the public, and especially from lawyers who desire in their few leisure moments to devote their time to the reading of extracts and reviews rather than a mass of literature which may or may not be entertaining to them. This access to books has become more and more recognized and enables individuals to select with greater ease what works they shall carefully read and study. This book is attractively bound in cloth. Published by G. P. Putnam's Sons, New York city.

# The Albany Law Journal.

ALBANY, DECEMBER 21, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE publish in this issue of the LAW JOURNAL the first part of the report of the statutory revision commission appointed under chapter 1036 of the Laws of 1895, to suggest amendments to the Code of Civil Procedure. It has just been possible to get part of the report ready for the JOURNAL this week and we have not been able to thoroughly review the matter which we publish so as to comment intelligently on the work of the commissioners, but from a cursory review of the report we feel that it is one which entitles the Messrs. Lincoln, Northrup and Johnson, the commissioners on statutory revision, to the greatest praise for their admirable work in presenting to the public and to the legislature so many interesting historical facts in regard to legal procedure. The work may be said to be the intelligent basis from which may be seen what the advance during many years has been, and is a ground work for the Code revision which we have for so many years advocated. It does not seem possible that the members of the statutory revision, who have so many important duties to attend to, could have found time to prepare such an elaborate treatise as they have given, and we commend their careful study and scientific presentation of the history of legal procedure, together with the review of legal practice in every State in the Union, as well as of many foreign States. It will be with great pleasure that we will be enabled to comment in our next issue upon this admirable report.

A curious case is now progressing in Wisconsin arising from a conflict of the jurisdiction of the United States, State courts of an inmate of the Wisconsin Soldiers' Home, who is charged with assault with an intent to kill.

One Kelly assaulted a fellow soldier, was arrested by a United States marshal and held as

prisoner. Thereupon a writ of *habeas corpus* was sued out on his behalf commanding the United States marshal to produce the prisoner before a commissioner of the State of Wisconsin on the ground that "the said imprisonment and restraint are illegal and contrary to law, for the reason that if any offense has been committed by the petitioner (Kelly) it was in the town of Wauwatosa, and that jurisdiction of it is vested "exclusively in the State courts and examining magistrates of the State of Wisconsin, and not within the courts or judicial officers of the United States."

The United States marshal who held the prisoner, on his return to the writ, simply certified that he held the petitioner Kelly in his custody as marshal of the United States for the eastern district, by virtue of the writ or warrant issued by United States Commissioner Bloodgood, and that he was obliged by virtue of his office to retain the custody of Kelly as in the warrant commanded.

Who has jurisdiction over this crime? The United States or the State of Wisconsin?

The argument in the *habeas corpus* proceedings came on before Commissioner Ryan. The district attorney for the United States, Mr. Wigman, contends that the power of the Federal courts is supreme and that its officers are not required to obey the writs of State courts; therefore, since the return shows that the respondent is a marshal of the United States and has said Kelly in his custody as such marshal, the proceedings before the commissioner must be dismissed. In support of this argument he cites the cases of *Ableman v. Booth*, 21 Howard, 506, and *Tarbel's Case*, 13 Wallace, 397. In the former case, Chief Justice Haney holds that when a writ of *habeas corpus* is served on a marshal or other person, having a prisoner in his custody under authority of the United States, it is his duty, by a proper return, to make known to the State judge or court, the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the State authority, but to obey the process of the United States.

In *Tarbel's case* a writ of *habeas corpus* was issued to a recruiting officer of the United States to inquire into the legality of the restraint by him of a young man who had enlisted in the

army, alleging that he was under the age of eighteen years and therefore could not have legally enlisted according to the statutes of the United States. Tarbel was discharged by the Supreme Court of the State, and Mr. Justice Paine in his opinion (25 Wis. 390), first quotes the opinion of the learned Chief Justice Taney, who said: "But after the return of the writ is made, and the State court or judge judiciously apprised that the party is in custody under the authority of the United States, they can proceed no farther;" concerning which statement, Judge Paine remarks that "the fair interpretation of this language would require a legal authority to be shown. For unless there is a legal authority, there is none at all. There is surely a distinction between the authority under the United States and a mere claim of such authority."

This case of Tarbel's was carried to the Federal Supreme Court. The opinion of the court was delivered by Justice Field, and goes even further than that in *Ableman v. Booth*, *supra*, for it says:

"All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held, be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."

And again in the same opinion we find this language: "If it do not appear that the prisoner is held by authority or color of authority, judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority or claim and color of the authority, of the United States, and to exclude the

suspicion of imposition or oppression on his part."

State Commissioner Ryan, before whom the argument on the *habeas corpus* proceedings was had, claimed that in order to give the Federal authorities jurisdiction over the petitioner, Kelly, in this matter it is essential that he not only should have committed the offense charged, but that it should have been committed upon territory within the exclusive jurisdiction of the United States. There seems to be no Federal statute providing the penalty for an assault with intent to murder, committed with a dangerous weapon. In this case, therefore, the Federal authorities have availed themselves of section 5391, which reads as follows:

"If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States."

This section was originally passed in 1825. But after the Federal courts had construed it as being limited in its application, first to the State laws in existence at the time of its passage, and, secondly, to territory ceded to the United States prior to its passage, it was amended in 1866 so as to make it apply to jurisdiction ceded or thereafter to be ceded to the United States and to State penal laws then in force, even though they should subsequently be repealed. It needs no argument to demonstrate that no criminal prosecution by the United States can be conducted under this section unless the alleged crime was committed upon property ceded to and within the exclusive jurisdiction of the United States.

Was the place where this crime was committed within the exclusive jurisdiction of the United States?

The eighth section of the first article of the Federal Constitution is devoted to an enumeration of certain powers granted to Congress, and

in the sixteenth subdivision of that section the power is granted to that body to "exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." Therefore, in order to vest exclusive jurisdiction in the Federal government, two things are requisite, namely, purchase by the government and the consent of the Legislature of the State. According to the statutes of Wisconsin certain conditions are prescribed by which the State may yield its authority over land to the national government. Having determined under what circumstances the Federal authorities have exclusive jurisdiction, the question narrows down to whether those circumstances existed at the time of the commission of this crime by Kelly. Commissioner Ryan goes into the history of the organization of the Wisconsin Soldier's Home by the women of Milwaukee in 1865 and the transfer of the property to the National Asylum for Disabled Volunteer Soldiers, its successors or assigns, but he claims that in this act a transfer of the property to the United States was not contemplated, nor were the provisions of the State law complied with. In 1867 the Legislature of Wisconsin sought to transfer jurisdiction over the Soldiers Home grounds to the Federal government, but this act was declared unconstitutional by the Supreme Court of that State, the only authority competent to pass upon the question. Therefore, since it is not claimed that the grounds were deeded to the United States or that the title is held by the general government, it rests solely with the State Legislature (the Federal laws being silent on this point) to provide in what manner and upon what conditions the consent of the State to the purchase by the Federal government must be expressed in order to substitute the one jurisdiction for the other. From the fact that the United States does not possess jurisdiction over the place where this crime was committed, Commissioner Ryan very sensibly argues that the mere insertion in a complaint or commitment

that a crime unknown to the Federal authorities has been committed upon territory within the exclusive jurisdiction of the United States can be held to oust the State tribunal or officer issuing the *habeas corpus* of jurisdiction to proceed further in the matter. If the mere insertion that such and such a crime has been committed and that the place where it was committed is "within the exclusive jurisdiction of the United States" be alone sufficient to clothe the Federal officers with absolute control over the matter, then, says Commissioner Ryan, "a United States commissioner can issue his warrant reciting that one alderman has assaulted another in the city hall of the city of Milwaukee, county of Milwaukee and State of Wisconsin, 'being within the exclusive jurisdiction of the United States,' and such warrant would be an absolute protection to the marshal against all interference by the State courts, and the question whether the Milwaukee city hall is or is not within the exclusive jurisdiction of the United States can be decided only by the Federal courts, the State having no voice whatever in the matter. He does not believe that this case is controlled by *Booth v. Ableman* or *Tarbel's case* (*supra*) and considers that the commitment by virtue of which the marshal claims to hold the petitioner, constitutes neither authority nor color of authority nor what purports to be the authority of the United States, but a mere attempt to exercise by force an authority and jurisdiction not conferred by law and a dangerous and unwarrantable invasion by the Federal authorities of the rights and powers of the State. He, therefore, commands the marshal to produce the prisoner. So much for the *habeas corpus* proceedings.

In the meanwhile United States Court Commissioner Bloodgood, who had issued the warrant for Kelly's arrest, refused to recognize the proceedings carried on before State Commissioner Ryan. At the preliminary examination before Commissioner Bloodgood, Rublee A. Cole, attorney for the prisoner Kelly, made the same argument as he offered on the *habeas corpus* proceedings, that the Federal government had no control of the Soldier's home, and that the Federal statutes provided no penalty for the commission of this crime. Before pleading, however, Mr. Cole denied the jurisdiction of Commissioner Bloodgood's court in this mat-

ter. The United States district attorney, Mr. Wigman, had promised State Commissioner Ryan that no further action would be taken in the Federal courts until the *habeas corpus* proceedings had been disposed of. Thereupon Commissioner Bloodgood refused to recognize the jurisdiction of the State court, and as the Federal officers refused to appear in the case, Mr. Bloodgood went on without them. After hearing argument on the case he bound Kelly over to the United States court for January, 1896, to await the action of the grand jury at that term of the court. The result of this is that the sheriff will probably arrest the United States marshal, whereupon the United States district attorney will go before a Federal judge and sue out a writ of *habeas corpus* on behalf of the United States marshal. It is supposed that the Federal judge will uphold the ruling of the United States commissioner and the case will immediately be brought to the United States Supreme Court for final decision.

The maiden report of Judson Harmon, as attorney-general, containing a review of the operations of the Department of Justice for the last fiscal year, was laid before Congress December 7th. It treats at length of the business of the Supreme Court of the United States and recommends that, except in capital cases, appeals in criminal matters should not be taken to the Supreme Court.

To accomplish this result he recommends an amendment of the law so as to exclude the words "other infamous crimes" from the cases subject to appeal to the highest tribunal, and to remit minor cases to the courts of appeal. He points out that the words "infamous crimes" have been given a very broad interpretation. The definition, he says, includes all offenses which may be punished by imprisonment at hard labor, or for more than one year without hard labor, whether they are actually so punished or not. If such punishment might have been inflicted the case may be taken to the Supreme Court, even if the culprit has escaped with a mere fine. That high tribunal of nine judges is frequently required to review conviction of such offenses as passing \$50 of counterfeit money, charging over \$25 for legal assistance to a pensioner, and unlawfully cutting timber.

Another recommendation of the attorney-general called out by recent dilatory proceedings in the case of Dr. Buchanan, the New York wife poisoner, and in a number of other notable murder cases, is as follows:

"A growing abuse of the writ of *habeas corpus* should be corrected which is wasting the time of the Supreme Court and bringing discredit on the administration of justice. Proceedings in State courts are absolutely stayed by section 766, Revised Statutes, pending appeals to the Supreme Court from action of the Circuit Courts on writs of *habeas corpus*, which may be taken as of right. By suing out successive writs and prosecuting appeals to the Supreme Court, persons convicted in State Courts have succeeded in securing repeated delays of execution. There is no limit to this process, so long as prisoners are able to secure counsel. I respectfully suggest, as a cure for this evil, that the allowance of a stay by the Supreme Court, or a judge thereof, be required, at least on all appeals after the first."

The attorney-general adds:

"If the Supreme Court were relieved, as above suggested, its jurisdiction over cases arising under the revenue laws might, and should be, restored. The United States has now no right to a review by that court of any decision construing a tariff or internal revenue law, although millions of dollars may be directly or indirectly involved. A provision for appeals and writs of error from the Circuit Court of Appeals in these cases, similar to that contained in section 707 of the Revised Statutes with respect to appeals from the court of claims would be highly beneficial to the government."

The number of cases on the Supreme Court docket at the end of the October term, 1894, is stated at 649, in 1890 there were 1,190, and since that date the court has been gradually reducing the amount of accumulated business.

There are 9,000 cases on the docket of the Court of Claims, and it is increased by 900 cases per year. Discussing this point Attorney-General Harmon says:

"The very diligent exertions of the present force serve to dispose of less than 800 annually. For the preparation of the claimants' side of suits, there is a roll of more than one thousand attorneys, of whom some hundreds devote their

whole time thereto. Against these is set a corps of seven assistant attorneys for the defense. With such disproportion of force, it seems superfluous to state that the defensive preparation cannot be as thorough as it should be, even in the cases tried. A single important judgment incurred by reason of lack of time for proper preparation may involve many times the cost of an adequate increase of force.

"In my estimate for the next fiscal year I have included an increase of approximately one-third, which it is believed will suffice to enable the department to occupy the time of the Court of Claims. Until that is accomplished, it is not necessary for either Congress or the court to consider plans for increasing the efficiency of the court. The court is by present methods able to hear and decide many more cases than can be prepared."

Mr. Harmon gives a brief summary of the celebrated Peralta-Reavis case, involving the title to over 12,000,000 acres of land in Arizona and New Mexico, under an alleged Spanish grant, which was recently decided in favor of the United States, and says of it:

"The court, by unanimous decision, held that every title paper out of one hundred or more had been manufactured and forged, in whole or in part, and surreptitiously deposited among the archives in the countries named. The case is remarkable as probably the greatest fraud ever attempted against a government in its own courts, and its decision removes a cloud from thousands of titles held by actual settlers.

"Since the decision I have caused Reavis to be arrested and indicted for fraud and perjury, and he is now in prison awaiting trial."

Referring to the Greer County (Texas) boundary case, now in the Supreme Court, Mr. Harmon states:

"The controversy depends on the meaning of the treaty of 1819, between Spain and the United States, fixing the boundary line between the two countries, which treaty in turn was adopted by treaties of the United States with Mexico and with Texas. The treaty describes the line as running up Red river to the one hundredth meridian. Texas claims that when the forks of the river are reached the line should follow the north branch. The United States

claims that it should follow the south branch. In spite of proclamations by President Arthur in June, 1884, and by President Cleveland in December, 1887, Texas has encouraged settlements in this territory, and if the decision shall be in favor of the United States, the question will arise whether Congress should wholly disregard the claims of settlers, as it will have an undoubted right to do, or provide legislation by which they may be protected upon making reasonable payment for the land occupied."

The attorney-general asks Congress to direct him what to do in the Bell telephone litigation. The expense of this case, he says, is very heavy. It will take six months to prepare rebuttal testimony. He favors continuing the case to a final decision, provided the expenses can be met, and says: "If the people have been deprived of their natural rights by the improper issue of a patent, as the government avers, it would not be a proper course on its part to discontinue litigation, which has probably been purposely protracted until the patents have expired, but such litigation should be persisted in to establish finally, for the sake of future action on its part, its right to sue to annul patents."

Mr. Harmon discusses the relations of the Union Pacific railroad and its branches to the government. He says:

"The situation has been maintained as it was when the last Congress adjourned, so far as legal proceedings are concerned, but large amounts of subsidy bonds are about to fall due of those issued to the Central Pacific as well as those issued to the Union Pacific company, and no assurance can be given that the present situation will be long maintained.

"Action should be promptly taken toward working out some solution of the problem presented by the government's relation to these properties.

"As it may become advisable or necessary for the government to institute legal proceedings against one or both of the companies above named, I beg to call attention to the necessity of a law giving some proper court in the District of Columbia jurisdiction of the entire property and of all the parties in interest. What has been hereinbefore said as to the general necessity of giving one court full jurisdiction in such cases applies with special force here. Such



a provision was included in the bill prepared by Attorney-General Olney at the request of the last Congress. It should now be put in the form of a separate act, so as to be made independent of any particular plan of reorganization. Until the passage of such an act, any attempt of the government to protect its rights by litigation will be greatly hampered."

In regard to the Northern Pacific railroad, his recommendations are as follows:

"The Northern Pacific Railroad litigation has called attention in a striking way to the necessity which has long existed of legislation to regulate the appointment of receivers and judicial sales of railroads, parts of whose lines are in different circuits. Public, as well as private, interests require the preservation of the unity of such lines in their management pending the foreclosure, and in their sale. This can now be accomplished only by harmony of action among the courts of the various circuits, but the appointment of receivers and the repetition of orders in each circuit cause a multiplication of trouble and expense which can well be avoided. When, however, the different courts refuse to co-operate, not only are public and private interests in the property imperiled and costs more greatly multiplied, but there is constant risk of scandal from which the administration of justice should be kept free.

"There seems to be a general demand for relief. It can readily be afforded by providing that suits to foreclose mortgages or appoint receivers of such railroads shall be brought in the circuit where the principal operating offices are, or in the circuit in which the chief terminals are situated, or in that containing the greatest length of track, or full jurisdiction might be given to the court in which suit is first brought."

ADMIRALTY JURISDICTION — FLOATING PILE DRIVER.—A pile driver consisting of a floating platform, carrying a derrick, engine, and pile-driving apparatus, and also furnished with a wheel by which it may propel itself about the bay or harbor, from one place of work to another, and which in its present condition is not fitted for purposes of transportation, is not a subject of admiralty jurisdiction; and contracts to furnish it with supplies are not maritime contracts enforceable in the admiralty (Pile Driver E. O. A., U. S. D. C. [Mich.], 69 Fed. Rep. 1005.

## REPORT OF THE COMMISSIONERS OF CODE REVISION.

*To the Legislature of the State of New York:*

The Commissioners of Code Revision beg leave to submit their first report.

By chapter 1036 of the Laws of 1895, the governor was directed to "appoint three members of the bar of this State who shall examine the code of procedure of this State and the codes of procedure and practice acts in force in other States and countries, and the rules of court adopted in connection therewith, and report thereon to the next Legislature in what respects the civil procedure in the courts of this State can be revised, condensed and simplified."

On the 15th of June, 1895, we were appointed, pursuant to the provisions of this law, commissioners to revise the Code of Civil Procedure, and immediately entered upon the discharge of our duties. We have given the subject of civil procedure and code revision some attention, but have not been able to examine in detail all the provisions relating to practice in force in other States and countries, as required by the act. The comparative examination of the codes and practice acts and rules of court affecting procedure in other States and countries requires more time than was given us by the act under which we were appointed, and it is impracticable, if not impossible, within this time, to submit to the Legislature a proposed draft of a Code of Civil Procedure, if one were to be recommended, or to state with much minuteness "in what respects the civil procedure in the courts of this State can be revised, condensed and simplified."

To answer this suggested inquiry, much time and careful study will be needed. The civil procedure in the courts of this State is the product of many years of slow and halting growth, and a revision, such as might be justified by the terms of this law, should be the result of close study of principles and methods, and much deliberation; and a commission should study not only the whole subject of procedure, historically and scientifically, but the comparative merits of different systems which are, or have been, in force in different States and countries. We are unwilling to submit a revision which does not embody substantially the result of such care and study, and hence, at this time, we deem it proper to suggest only general recommendations with an outline of the changes proposed, together with a brief statement showing the development of civil procedure, and the systems of practice in use in other States and countries. The civil procedure in the courts of this State can, doubtless, be revised, condensed and simplified, and the administration of justice thereby greatly improved.

The members of the bar have such a vital interest in the subject of a revision of civil procedure, as interpreters of the law, "friends of the court," and "ministers of justice," that we felt justified in trying to avail ourselves of their experience, and obtain their opinions, on the subject of revision in general, and also upon particular subjects which might need special attention. We accordingly prepared and sent to nearly ten thousand lawyers, and also to the judges, a circular letter, under date of July 25, 1895, in which, after referring to the statute, we said:

"This appointment involves a possible revision of the code of civil procedure of this State, and also a revision of the practice in all the courts, whether the rules governing such practice are included in the Code of Civil Procedure, or in general and independent statutes. But, before engaging in a general revision of the code, we deem it important to obtain an expression of opinion from the bar of the State, upon the general question of revision; whether such a general revision is desirable at this time, and if so, upon what lines it should be made; and if such a revision is not deemed desirable, then what particular changes should be made in the detail or scheme of the code, in order to make it more practical and less complex in its provisions.

"An examination of this subject involves an inquiry whether everything relating even remotely to practice should be included in the Code of Civil Procedure, or whether the code should include only those matters which deal directly with procedure in actions, leaving to other and independent statutes subjects like the organization of courts, the functions and fees of various officers of the court, and matters of substantive law. If the code is to include all matters relating to practice either in actions or special proceedings, then, even with its thirty-four hundred sections, it is incomplete, and several subjects now included in other statutes should be added to the code. If, on the other hand, the Code of Civil Procedure should be limited strictly to questions relating to practice in actions, from their commencement until their final determination, without regard to various subordinate and subsidiary matters that arise in the progress of an action, then some subjects that are now in the code should be eliminated therefrom, in the interests of simplicity, and embraced in other statutes.

"It has been suggested that the practice in justices' courts and in surrogates' courts does not properly belong in the Code of Civil Procedure; also, that the detailed rules of evidence in our present code more properly belong elsewhere; that the various provisions of a local character should be taken from the code and included in the charters of the municipal corporations to which they relate;

that the subject of the organization and jurisdiction of the various courts, and the election and appointment of various officers of the courts, is no part of a proper system of procedure. It has also been suggested that the code of practice should be confined to the rules regulating proceedings in actions generally in courts of record, and that actions of a special character, and special proceedings, should be treated in an independent code.

"If these suggestions should be adopted, it would involve the separation of several subjects and sections from the present code, and their incorporation in other statutes, but it need not necessarily involve a revision or change in the phraseology of various sections; it would require a rearrangement of the law, without changing its language. We are not unmindful of the uncertainty, if not positive mischief, produced by frequent changes in the phraseology of a statute, especially where it has received judicial construction; and the language of a statute which has become familiar to the practitioner should be retained, unless a change will tend to make the law more clear.

"In connection with our work as Commissioners of Statutory Revision we have found numerous instances of omissions either in general statutes, or in the Code of Civil Procedure, and several subjects of general or minor importance are included in other statutes, which, possibly, ought to be incorporated in the code; and in formulating plans for the general revision of the statutes, in connection with possible code revision, it seems to us that the subject should be considered as a whole, and that code revision should be considered in connection with its bearing upon general statutory revision, and *vice versa*. Our statute law is now too fragmentary, and we think that an attempt should be made to produce a harmonious system upon lines which may be considered feasible and practicable, but we are unwilling to engage in a general revision of the code, without first attempting to ascertain the opinion of the bar upon the subject. The determination of this question of a revision of the code will have an important bearing upon our work of general statutory revision."

The responses to this circular show a very decided preponderance of opinion in favor of a general revision of the code.

#### THE DEVELOPMENT OF CIVIL PROCEDURE.

The methods of judicial procedure used in settling private controversies, and which seem so familiar to us, are not the spontaneous invention of any person, nation or period. They have in large part come down to us from former generations, representing and illustrating the customs and manners of people widely separated in history, in experience and in civilization; and it seems to us that in discussing

the possibilities of a revision of the civil procedure of this State, itself an empire, a brief historical statement of the growth and development of procedure in the tribunals of various nations may not be without interest, and may aid in comprehending the great principles which underlie every well-constructed system of procedure.

"The history of law is a history of civilization." Legislation is a mirror of the manners of the people, and by means of it, and of judicial practice and customs, the social, commercial and political development of communities may be traced with reasonable precision. Mr. Tidd, in his great work on English practice, says: "The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage (which may not improperly be termed the common law of practice), regulated from time to time by rules, orders, statutes and judicial decisions. Practice is the law of the court, and as such is a part of the law of the land. As questions arise respecting the regularity of the proceedings, the courts are called upon to settle by judicial decisions the course of their own practice, or to fix the construction of the rules or statutes which have been made respecting it."

Modern law is so largely of a prescriptive character, that it is difficult to understand it without examining the sources of law; but these sources are singularly obscure, and history affords only meagre materials, prior to the period of written law, for the determination of the character of judicial procedure. The legal customs which existed anterior to the period of written law, or written history, can only be conjectured by the earliest laws, which may be considered as reflecting and embodying the existing customs. The Hindoo Manu, Confucius, Lycurgus, Solon, and probably the Roman Decemvirs and King Alfred, were not especially legislators, and their work in law reform can hardly be dignified by the term of statutory enactment; but they performed the important service of collecting, compiling, adapting and promulgating customs recognized by the people; and they performed another important service of substituting written laws for loose, oral tradition, and the communication of a permanent public sanction to regulations previously accepted only as heavenly mandates or inveterate habits. "The change marks a phase when old simplicity and innovating necessities are beginning to combine their action, and to crystallize into fixed shapes, leaving to a much later period the conversion of the remaining and ever-fluctuating mass into similar definiteness." Judging from our own experience, we may fairly conclude that a law at any given period in history reflects in some measure, if not entirely, the customs

of the people upon the subject embraced in the legislation. The earliest known laws seem clearly to embody existing customs, and cannot be considered as statements of new principles or policies then for the first time promulgated. History is especially meagre concerning the everyday affairs of life, and the various social and business problems which make for the happiness or prosperity of the people.

"History illustrate the fortunes of the great," but the annals of the common people are often unwritten. Battles and sieges, conquests and changes of dynasty attract and engross the attention of the historian, while the manners and customs and the daily life of the people seem to be overlooked. In our study of the development of procedure, the information afforded us by the ordinary historical works has been very unsatisfactory, and we have often been obliged to resort to original sources for material upon which to form our judgment of the reason and course of judicial procedure. We have been so long familiar with written law, that it is difficult for us to comprehend a state of society in which law and judicial decision were the expression of the wisdom, or perhaps the caprice, of the ruler or magistrate, who sometimes decided controversies without regard to settled principles of law, and untrammelled by precedents.

In studying early procedure, we can only conjecture what it probably was by what we find written in the earliest laws or codes. From this it is quite apparent that in the early stages of society the State, as we now understand it, was only an umpire, or magistrates were a council of umpires, who only interested themselves to see fair play and to settle a controversy, sometimes of a physical character, after it had actually begun. In this stage men took the law into their own hands, and sought redress for their grievances in their own way, and the most the State could do, from its imperfect conception of its powers, was to regulate and control this attempted private settlement of grievances. The State did not exert its judicial power to aid in commencing a suit, but undertook to regulate and control one already begun. It did not assume at first active jurisdiction, but "in later periods of development the tribunals took the lands or case of the defendant into their own hands, using their power freely to coerce him into submission, and when finally the courts assumed control of judicial proceedings, and required all litigants to submit their controversies to the arbitrament of the court, there was a change from contention in arms to a contention in a judicial tribunal."

It seems quite clear that the earliest method of disposing of controversies was by arbitration. This form of judicial procedure was afterwards made compulsory, and even in the early colonial days in

our own State, arbitration as a method of settling disputes was imposed upon the colony by law; and from an examination of the forms of procedure in various nations of antiquity, it would seem that the judges were simply arbitrators; and the earliest written law indicates that civil jurisdiction sprang out of arbitration. As Mr. Hunter says in his work on Roman law, "the coercive authority of the State grew out of the voluntary submission of its subjects, and is the keynote to the history of civil procedure in Rome." Early judicial decisions probably did no more than declare the right between contending parties, and the tribunals did not seem to possess any machinery for enforcing obedience to their judgments or decrees.

In studying the development of judicial procedure among the ancient nations, we observe considerable similarity in matters of detail, but quite marked differences in the structure of tribunals, and in the methods of administering justice. It was a striking characteristic of the northern nations of Europe that the administration of justice was of a popular character, and was devolved upon the order of freemen. The people either composed or were largely represented in the judicial tribunals; while under the Romans, and among the Asiatic nations whose governments were of a patriarchal or despotic character, popular representation in the administration of justice was practically unknown. The king himself was supposed to be the fountain and source of all wisdom and justice, and he either disposed of legal controversies in person, or delegated his authority to individual judges or magistrates, and defined their powers and jurisdiction. From these so-called barbarian or Gothic nations came the popular administration of justice, which, long ago, developed into the trial by jury; but this tribunal of the people was, at first, quite different from its modern successor.

The early Greeks undertook to popularize the administration of justice by the creation of an unwieldy tribunal called a "dicastery," and in later times the Saxon county court brought in the neighbors or freemen of the county and disposed of controversies in a rude and somewhat turbulent manner. From all these methods, whether the tribunal was composed of an individual or a limited number of persons, or of the general popular assemblies of Saxons or Greeks, or the Roman *pretor* or *judex*, we have derived, by slow and gradual growth and combination, the system of procedure which seems to us, in the main, so simple and efficacious.

While we are unable to state with accuracy, in all cases, the special methods of procedure, we have been able to glean sufficient information to enable us to give a fairly clear view of the structure of tribunals and the methods of procedure

among the most important of the early nations; and it will appear from this sketch that many of the customs with which we are familiar are very old, and have been observed thousands of years.

Rollin says that the Egyptians were the first people to rightly understand the rules of government. Early Egyptian history shows the creation of a judicial tribunal composed of thirty judges selected out of the principal cities, to form a body or assembly for judging the whole kingdom. The scrupulous care manifested by the ancient Egyptians in the administration of justice is shown by a peculiar provision which required all proceedings to be in writing, because it was thought that the judgments of men might be affected by the eloquence of advocates, which would be less influential if everything were reduced to writing.

Among the Hebrews judicial procedure was characterized by great simplicity and promptitude. In early times the patriarch of each family was its judge. Afterwards the elders of a family, tribe or city were its judges by natural right. In the wilderness Moses at first was sole judge and heard all causes, both great and small, but the immense labor thus imposed upon him prompted Jethro, his father-in-law, to suggest the appointment of judges to dispose of small matters, leaving larger controversies to be decided by Moses himself. These judges were to be "able men, such as fear God; men of truth, hating covetousness," and their jurisdiction was divided and distributed so that they became the "rulers of thousands, of hundreds, of fifties and of tens;" these numbers representing families, so that one judge would be the ruler over ten families, another over fifty, and so on. After the Hebrews were established in Canaan, local magistrates were appointed for every city and village. Samuel held a central court at Ramah, and also went from year to year in circuit to different cities and "judged Israel in all those places." Like the early Romans, the Hebrews had no class corresponding to our lawyers, but the parties appeared before the judge in person with their witnesses, and presented and pleaded their own cause.

The institutes of the Hindu law, or the ordinances of Manu, which were translated by Sir William Jones, comprise a code or system of laws relating to the rights and civil duties of the people, and regulating their public and private conduct, Chapter eight, "On judicature; and on law, private and criminal," contains 420 sections, and includes not only positive law, but rules of procedure. The king was the supreme judge, and he had power to designate subordinate judges and assessors, to compose a tribunal, who heard and decided controversies. This code contains simple rules regulating the practice in the trial of ordinary actions: the

number and competency of witnesses; the sufficiency of evidence; the methods of procedure in court, and the judgment and its enforcement. There seems to have been no laws or attorneys, for the code requires the judge to examine the witnesses and the parties. This code seems to contain a written statement of the customary law of the Hindus, and was probably compiled during the ninth century B. C.

The statement of Hindu law in the form of institutes had the usual effect. The attention of the courts was directed to construing and applying the institutes in the administration of justice, and it seems that the decisions of the courts, and probably the opinions of learned men, called upon by the rulers to construe the law, created a new body of law, similar to the constitutions and digests following the Institutes of Justinian, in the later Roman jurisprudence. During the administration of Warren Hastings as Governor-General of India, a translation of these digests, decisions and opinions was prepared, and was called the "Gentoo Code." This was prior to the translation of the institutes by Sir William Jones. Afterwards a further digest was prepared under the authority of the English government, compiled from various digests and from commentaries on the institutes of law. From all these sources there grew up a quite complete system of the administration of justice, and the Hindu law books disclose a procedure which greatly resembles that of the present day. The complainant presented his grievance to the tribunal, who heard what he had to say, and if it appeared reasonable, a summons was either delivered to the complainant, or an officer was deputed for the purpose of citing the adverse party. The person summoned was brought into court, and stood beside the complainant before the magistrate. Each party then stated his case, the complainant beginning, and their stories were written down in their presence. As the practice developed, attorneys were allowed. The law of evidence is quite fully illustrated, and also the method of examining witnesses.

Mr. Finlason, in his introduction to "Reeves' History of English Law," points out that in India from very early times there had existed a system of natural arbitration by the neighbors, which probably formed in that country the first attempt at anything like an administration of justice, and which substantially resembles the old Saxon county court, being assemblies of the principal inhabitants, who took cognizance of the disputes which arose among them, and made the best settlements they could. This was a system suited to an early state of society, and which necessarily precedes a more regular administration of justice. But, as the author further observes, when judges were appointed, however

inferior, yet acting in the regular discharge of an official duty, under the authority of government, and under some sense of responsibility, the great superiority of this approach of a regular judicature to a settled system of administration of justice, was so apparent to the people that their ancient native tribunals were soon discarded, and the new order of judges, notwithstanding all their imperfections, were appealed to in preference. There were at first no advocates or solicitors. In ordinary questions, the people generally appealed to the chief of the place, who took upon himself the office of justice of the peace, and accommodated the matter between the parties. When he thought more fit, he sent them before their local magistrates or arbitrators, whom he appointed, and if the litigants refused to abide the result of the arbitration, the magistrates disposed of the matter without appeal.

Among the Greeks the lack of judicial system was very remarkable. While they gave great attention to politics, and political and governmental questions, they seem to have had no well-defined system of law or judicial procedure. All the people composed the court, and every trial was first heard before a popular assembly. Precedents had little weight, and every decision disposed of the law and the facts in the particular case, and each case was tried strictly upon its own merits, without much regard to former decisions in similar cases.

Sir William Jones, in the "Prefatory Discourse" to his translation of the speeches of Isæus, gives an account of the progress of a law suit among the ancient Greeks. According to this account, when a citizen thought himself wronged, and resolved to seek redress in a court of justice, his first step was to prefer his *plaint*, and to *denounce* the name of his adversary to the sitting magistrate, who examined the complainant, and if he thought the action maintainable, permitted him to summon the defendant to appear at a certain day. Where a more expeditious remedy was required the plaintiff was allowed to attach the person complained against and carry him directly before the court; but in most cases of civil injuries, the first process was by *citation* or *summons*, and officers called *summoners* were constantly at hand.

When both parties were confronted before the magistrate, he proceeded to a strict examination of them, which was called the *interrogation*, and the parties litigant were permitted to interrogate one another, and their answers were set down in writing and might be given in evidence against them at the trial; and if the archon thought it necessary he might adjourn the examination. The archon prescribed the proper form of the action and "*admitted*" the cause into court, after which pre-

liminaries the party complaining put in his declaration or bill setting forth his cause of action, which, with the answer, were delivered orally before the tribunal, and then reduced to writing. Each party was obliged to deposit a certain sum as a pledge of prosecuting his claim or defense. The limitation of action was, in general, five years.

After the issue was framed, the archon cast lots for the judges or persons who were to decide the questions of fact. This tribunal, called a "dicastery," answering substantially to our modern jury, except as to numbers, was usually composed of 500 men, but sometimes, in very important cases, there were as many as 2,000, and a majority of votes decided the suit. The court was held in the open air, surrounded with a rope, and attended by officers who kept off the crowd. The archon presided and introduced the cause.

In addressing the court, the plaintiff, or his advocate, began, and the defendant, or his advocate, closed the argument, and there was only one speech for each party or issue. The advocates seem to have had the privilege of "summing up," or making comments upon the evidence during the progress of the trial. At the close of the evidence and the arguments, a vote was taken by casting pellets or beans into an urn, a separate urn being provided for each party or distinct issue, and the presiding archon counted the pellets and announced the result.

Mr. Grote, in his "History of Greece," commenting on the dicasteries, says that, "taking their general working, we shall find that they are nothing but jury trial applied on a scale broad, systematic, unaided and uncontrolled, beyond all other historical experience, and that they, therefore, exhibit in exaggerated proportions both the excellences and defects characteristic of the jury system, as compared with decision by trained and professional judges."

To the genius of Pericles the Greeks owed the great reform in the judicial system which resulted in reducing the power of the magistrates and the organization of the dicastery. Mr. Grote observes that "what Pericles really did, was to sever for the first time from the administrative competence of the magistrates that judicial authority which had originally gone along with it. The great men who had been accustomed to hold these offices were lowered both in influence and authority; while on the other hand, a new life, habit, and sense of power sprang up among the poorer citizens. A plaintiff having cause of civil action, or an accuser invoking punishment against citizens guilty of injury, either to himself or to the State, had still to address himself to one or other of the archons, but it was only with a view of ultimately arriving before the dicastery, by whom the cause was to be tried."

Professor Holmes, of the University of Virginia, an acute student and critic of Greek life and manners, writing in an early number of the "Forum" (1875), remarks that "it constituted no part of the mission of Greece to provide a science of jurisprudence. It was its mission to make multitudinous experiments in government for the education of humanity in political organization, and for the discipline of men in the arts of freedom. This is of itself a grand contribution to social progress, and a sufficient service to be rendered by any single race." The energy and enthusiasm with which the Greeks discharged this duty were not the most favorable qualifications for the discovery and establishment of the unswerving principles and precise regulations which law requires. Their types of government and their methods of litigation were equally adverse to the production of such a result. The city was the State. The whole community of fully enfranchised citizens were statesmen. The people in public assemblies constituted an absolutely sovereign body. The whole conduct of litigation, the whole order of public justice among the most litigious of ancient nations displays a perverse indifference to precedent, enactment, and often to right, in their multitudinous and cumbersome dicasteries. Legal customs, legal provisions, and statutory determinations were abundant, but received little respect, and less observance, from the heated declamation of litigation, from the tricky ingenuity of advocates, or from the factious temper of a mob judiciary. Forensic contention at Athens assimilated itself in most respects to a political debate. The appeal was made, not mainly to the law, not very earnestly to the facts, but to the passions, the whims, and the momentary necessities of the judicial crowd. The whole body of citizens formed the court, and it continued to do so in theory, though inconveniences in practice, and a multiplication of business, compelled their later distribution into several dicasteries. The judgments of this body were rendered upon the law and the facts in each case, or, as Sir William Jones observes, "every case was generally decided by a kind of political law, to which no precedents were applied, and from which no rules were deduced."

"The inestimable social service of providing a science of jurisprudence was reserved to be the great labor and the crowning glory of the Romans." How effectually, how splendidly, how supremely, and with what incessant effort and repeated transformation they accomplished this lofty duty, is apparent from a careful study of the consummate system which we observe in all its grandeur ranging over a thousand years from the Twelve Tables to Justinian.

Sir Henry S. Maine opens his "Ancient Law"

with the remark that "the most celebrated system of jurisprudence known to the world begins, as it ends, with a code." In theory the Roman system descended from the Twelve Tables, and the principles embodied in them were considered the source of all later Roman law. These tables were the most famous specimen of ancient codes, and their promulgation, about 450 B. C. marks an important epoch in the progress of Roman civilization. The principles of substantive law, as well as the rules of practice stated in them, are probably merely the enunciation in words of the existing customs of the Roman people. Those customs, thus crystalized in written law, have, in many instances, been preserved, and we find them, after nearly twenty-four centuries, stated in modern law in almost, if not quite, the identical language used by the early Roman compilers. The Romans steadfastly maintained the integrity of their judicial system, and firmly resisted all attempts to amalgamate with other systems. Their law readily adjusted itself to the internal changes that were constantly at work in Rome. "It was by a judicious mixture of the permanent or conservative, and the progressive reformatory spirit, that she was enabled to establish and frame laws that in time gave her the empire of the world."

The absolute sovereignty of the State is so clearly recognized and so freely conceded in modern times, that it is difficult for us to comprehend the condition of society in the early Roman period, when even the authority of the State to bring an alleged wrongdoer before its tribunal was denied. Even at the time of the Twelve Tables the State did not as yet claim to decide civil disputes, and only assumed to furnish arbitrators, to whom controversies might be submitted for decision.

The first three of the Twelve Tables cover the early law of procedure, embracing proceedings preliminary to trial, including the commencement of the action, the trial itself and the execution. These ancient actions were of a rude sort, and were not commenced by the service of a written summons, as in later times; but the complainant summoned the defendant before the magistrate, and if he refused to go, the complainant might take him by force, or "by the neck"; afterwards the complainant summoned the defendant, by touching his ear, before the magistrate who had jurisdiction. The magistrate was a sort of umpire, whose duty it was to see fair play, and the use of force was sanctioned to bring an alleged wrongdoer before the tribunal. Mr. Hunter, in his work on Roman Law, says that "the development of the subject of procedure in Rome marks three distinct stages.

"First, the law of the Twelve Tables. At this

time the summons is a private act of the complainant, and disobedience to the summons is not an offense against the law. The whole length that the Twelve Tables go, is to legalize the exercise of force by a complainant to drag an unwilling defendant before the court.

"Second, the Edict of the Prætors. The summons is still the private act of the complainant, but disobedience is made a wrong, and the principle is now established that it is the duty of a citizen to be ready to answer in the courts of justice any complaint brought against him.

"Third, the Imperial Constitutions. The summons is issued on the application of a complainant by officers of a court of justice. This change was also made the means of giving notice to the person sued, of the wrong alleged to be done by him."

The procedure under these three divisions is in many respects very like the procedure of to-day. Many of the forms and methods adopted and instituted by Justinian are still preserved in our practice.

The early mode of summons "continued down to the golden age of literature, and the classical age of jurisprudence." If he were able, the defendant could resist arrest without exposing himself to any danger of punishment, and the complainant could not use force to take him before the magistrate, unless his refusal to go was in the presence of witnesses. The prætor changed this rule by making it an offense for a person duly summoned to refuse to obey, and a plea to the jurisdiction of the court could be listened to only before the court itself.

It seems that even in this primitive period the defendant sometimes kept out of the way to avoid a summons, and the Twelve Tables provided no remedy for such a case. This was, doubtless, due to the peculiar attitude of the law, which recognized no litigants until they were actually in court, and invoked the interference of the magistrate. Another reason why a complainant had no remedy against the defendant who kept himself concealed, probably was that the early Roman law did not assume to seize the defendant's property, but only to punish him personally. The prætor introduced execution against property, and inserted in his edict a notice to the effect that if a defendant concealed himself to evade the summons, he would order his goods to be seized and sold. The next step was a public summons, which, in the reign of Justinian, became an act of public authority, and gave the defendant formal notice of the claim made against him.

By the Twelve Tables a judgment debtor was given thirty days to pay the judgment, and after that time he could be arrested and taken before the magistrate; and, upon failure to pay the debt,

could be kept in bond sixty days. After a certain period a judgment debtor might be sold beyond the Tiber, or punished with death, and his creditors were permitted to cut out their several portions of his body. From this method of collecting judgments by execution against the person, there was a natural transition to execution by the sale of the "universal succession" of a debtor, and last of all by the sale of particular pieces of property. When the Romans finally resorted to the property of the judgment debtor for the collection of the judgment, the practice was instituted, which has come down to our day, of taking first the personal property before resorting to the land, and the sale was conducted by officers of the court.

Another peculiarity of the early Roman procedure was that it required the actual presence of the parties. No attorney or agent was admitted, and only a Roman citizen could take part in actions. Aliens dwelling in Rome were wholly shut off. The length of time given to the defendant to answer a summons was at first five days, afterwards ten days, and it was finally established by Justinian at twenty days, which is the present rule in our courts of record.

The early Roman law contained no provision for costs; in the "*sacramentum*" each party deposited a "stake," which went, however, not to the winner, but to the State, to pay the expenses of the court, and it was only by a very slow development that the Romans arrived at a system which recognized the principle so familiar to us, that a person who makes an unjust claim, or resists a just claim, is regarded as inflicting a distinct wrong, and is bound to make compensation, the measure of which is well described by the term "costs." In A. D. 530, Justinian enacted that the defeated litigant should pay costs to the victor, according to established allowance, and if the judges neglected to impose costs they could be compelled to pay the costs themselves.

In the early days the Roman magistrates were independent of each other, representing theoretically the sovereign power of the people; consequently there were no appeals from their judgments; but as the system developed, an appellate tribunal was provided, and appeals were allowed. Costs on appeal were in the discretion of the court.

So much of the later Roman law has become a part of modern systems of jurisprudence, and is therefore so familiar to the modern lawyer, that it is unnecessary at this time to discuss other important features, such as evidence, equity, special proceedings, real and personal actions, and damages. The purpose of this sketch is to show the pioneer conditions of procedure, rather than law in its maturer form; and it is important to remember that the

Twelve Tables did not contain all the law, but that there was a body of customary law, in part unwritten, which was not abrogated, but was evaded or amplified by persons acting under the ideas of later times; "using, however, the Twelve Tables as a firm foundation for the structure of private law." In the great development of Roman law, from the Twelve Tables to the institutes of Justinian (A. D. 533), there was a remarkable change in arrangement and classification. In the Twelve Tables procedure stands first, while in the Institutes it comes last. Substantive law takes precedence in the later classification, and the principle is recognized that procedure is only a means to an end. It is also worth while to remember that the Romans understood and applied the essential features of jury trial. There were "judges of the law" and also "judges of the facts, who answered to our jurors, and it was a fundamental principle of Roman law that no citizen could be condemned except upon the judgment of his fellow citizens, or his "peers."

Trial by jury is not an institution of exclusively English origin. The essential principle of the jury, which involves the selection of judges unknown beforehand, from a particular body, with the power of deciding within certain limitations, and under the direction of certain rules, on questions of fact, is to be found in the institutions of many other countries already noted. It was a peculiar characteristic of the laws of the northern barbarians, and was the cornerstone of the Athenian constitution, whence it was probably borrowed by the Romans; and during the middle and later period of Roman law, the suitor was entitled to submit his cause to judges of the facts, drawn by lot from annual lists prepared for that purpose. The functions of the magistrate and of the *judex* were kept almost entirely apart. For many centuries the Senators alone were judges, but afterwards this power was transferred to the Knights. After a series of contests the right was shared by the two orders, and extended to persons even of inferior rank; so that the 300 of the Senatorial times had become 4,000 by the time of Augustus. Although several centuries later, this body quite strongly resembled the Greek dicastery, for which a list of 5,000 names was prepared, divided into ten sections. Cases involving the rights of foreigners were at first determined by a tribunal, composed of three or more persons, called "*recuperatores*," acting as jurors, which at a later period had jurisdiction in cases between citizens.

We possess very little reliable knowledge of the laws and customs of the ancient Britons. The conquest of Britain by the Romans about 55 B. C. and their occupancy for five centuries, necessarily im-



pressed the Roman system upon the early institutions of that country, notwithstanding the general rule of Roman policy to leave the legal systems of conquered nations undisturbed as far as practicable — imposing only such part of Roman law as the exigencies of government might seem to demand — but the presence of a superior civilization in early Britain could hardly fail to have its effect in modifying legal institutions. This effect was not wholly destroyed by the later Danish and Saxon invasions. Traditional laws naturally suffer insensible variations in practice, so that while it is easier to discover the differences between an ancient and a modern usage, it is impossible, as Sir William Blackstone points out, to define the precise time at which the alteration accrued before the period of written law.

The great tribunal among the Saxons for civil business was the county court, held once every four weeks. Here the sheriff presided, but the suitors of the court, as they were called, that is, freemen or landowners of the county, were the judges, and the sheriff was to execute the judgment, assisted, if need be, by the bishop. "In this county court the people formed a sort of tribunal composed of the neighbors, who heard the testimony of the witnesses and settled the disputes among themselves by discussion, or perhaps by acclamation, somewhat like the Athenian dicasteries, without any form of regular justice or the rules of a legal tribunal. It was a mere rough arbitration by the neighbors, and gradually gave place to a more orderly system." The Saxons introduced into early English institutions a spirit of freedom and equity that has never wholly departed from them. We derived from these barbarians a spirit of freedom, infusing life and vigor and energy into all their institutions, and their broad principles of popular government and especially their popular courts, cultivated a spirit of freedom which was the foundation of our modern institutions. As originally organized, the only jurisdiction the king had in the county court was to issue a writ, requiring the sheriff to hear the case; and the king took no other part in the administration of the law. The first step in improvement was the appointment by the crown of a special justiciary to hold the county court. By a later development all judicial proceedings were commenced by the "King's writ." This grew out of the idea that the king was the source and fountain of justice, and was perhaps a direct result of the feudal system, by which the king was recognized as the paramount lord, and he had sole authority to appoint judges, who acted in his place in the administration of justice. Out of this practice, and from this theory, developed the notion of sovereign or superior tribunals, to which appeals could be brought from inferior courts.

An examination of the English system of trial by jury shows that jurors were at first witnesses, and that the development of the system to its present condition was very slow. No one was competent to sit as a juror, unless he had some knowledge of the facts, and if upon being summoned the jurors made oath that they had no such knowledge, they were rejected and others were summoned in their places and it took centuries to develop the idea of trying questions of fact before a jury upon evidence, and before men who knew nothing of the facts, but decided the controversy upon the testimony of witnesses; and yet trial by jury involves the essential duty of "deciding upon contradictory testimony and discriminating the balance of credibility." The old practice of arbitration, originating with the Saxon county court, was still retained, even after trial by jury was well established. The old rule of trying cases before a jury "from the vicinage," has come down to us, and is so firmly established that it is not likely to be soon disturbed, for it is based upon the familiar principle that the matter in dispute should be tried where it arose, by neighbors of the parties, with such knowledge of them and of the subject matter as might either assist them in forming a correct judgment, or serve to test the credibility of the witnesses brought before them.

The popular character of the administration of justice among the Goths was particularly noticeable in the early Swedish tribunals. The defendant had five days from the summons to the trial, and on the fifth day the complainant and defendant met at the village assembly, which was held in the open air, and before the trial commenced each party "abjured all falsehood and deceit." Afterwards this simple system gave way to a more regular and technical form, and the country was divided into districts, in each of which was appointed a "law-man" and a jury of twelve men.

The early Irish or Brehon law illustrates the weakness of the State, and the imperfect conception of its authority in matters of private litigation, already noted. The complainant seized the property of the defendant by a violent "distress," and the judicial power was exercised to compel the defendant to give satisfaction to the complainant as a condition of receiving the aid of the court in restoring his property. The aid of the court was invoked, not to begin the litigation, but to settle a quarrel already going on.

We also find here a custom, which was still more firmly established among the Hindus, of invoking the aid of religion to compel debtors to discharge their obligations. This was only another form of "Distress."

Many codes were adopted during the Middle Ages, several of which were based upon Roman law,

modified by local customs; but judicial procedure had become tolerably well-settled, and the history of its development during this period is not within the province of this sketch; but we cannot fail to observe that the administrative tribunals of the European barbarians were popular, as distinguished from the early Roman system, in which the magistrate was the sole dispenser of justice. In these popular forms, founded not upon law, but upon custom anterior to the date of law, consisted the proverbial freedom of the Gothic people, which we have received as an Anglo-Saxon inheritance.

Mr. Smith, in his essay on the "Assize of Jerusalem," says that it was the most important code of the Middle Ages; and that it was a body of laws composed for the use of a new kingdom destitute of customary and traditional authority, full, minute and complete, defining every franchise and establishing by special enactment the nature and jurisdiction of the courts. He points out that it was partly borrowed from Rome, partly founded on prescriptive society, and embodied in large part the customs of France. It exhibits the manner in which the personal laws introduced by Gothic conquests have become amalgamated with the civil law, and shows the gradual assimilation of public law in France to the principles of Roman jurisprudence. It was compiled by Godfrey of Bouillon, first King of Jerusalem, after its conquest by the Crusaders, at the beginning of the twelfth century. It embraced a complete scheme for the administration of justice, with judges and jury composed of twelve men, substantially on the English model.

Arbitration in some form seems to have been the earliest method of settling disputes, and was probably the basis of actual judicial procedure. Later, litigants attempted to settle controversies in their own way, and the State only interfered to keep the peace. By a still later development the State assumed jurisdiction at the outset of a controversy, by requiring its permission to begin a suit, and there is a striking similarity in the practice in this respect in different nations widely separated, as the Swedish Goths, the Greeks and the Hindus. In all these widely distant nations, almost at the dawn of judicial history, the complainant was required to obtain the permission of the tribunal, by a sort of *ex parte* motion, for leave to begin a suit, and he was obliged to satisfy the magistrates that he had a just cause of action before the defendant could be summoned or brought into court.

"The King's writ," or the summons under the seal of the court in modern practice, is simply a modification of this early custom. By the law of the Twelve Tables, the plaintiff himself summoned the defendant, without invoking the aid or permission of the court, and we shall find upon an exami-

nation of the New York procedure, that our present method of commencing actions in courts of record is based upon the early Roman custom.

(Continued in next issue.)

### Abstracts of Recent Decisions.

**ADMIRALTY—MARITIME LIENS—SUPPLIES AND MATERIALS.**—Persons having the entire possession of a vessel, under a contract of purchase, and using her for the transportation of merchandise and passengers, are to be regarded as her owners, so that the port of their residence will be her home port, notwithstanding that, by the contract of sale, title was not to pass until full payment of the purchase money, and that the vessel was still enrolled at the port of the sellers. (The Shrewsbury, U. S. D. C. [Ohio], 69 Fed. Rep. 1017.)

**ADMIRALTY—MARITIME LIENS—WAIVER.**—A maritime lien is waived by accepting notes or other securities extending the time of payment beyond the time within which, by the general maritime law or by statute, the lienor is allowed to enforce the lien. (The Nebraska, U. S. C. C. of App., 69 Fed. Rep. 1009.)

**CONSTITUTIONAL LAW—JURISDICTION OF FEDERAL COURTS.**—The equity of jurisdiction of the Federal courts cannot take cognizance of a suit by a colored person, on behalf of himself and others similarly situated, against the officers of the State of which he and such others are citizens, to retain such officers from acting under a statute of that State, claimed to violate Amend. Const. U. S., articles 14, 15, by abridging or denying his right to vote, since he has an adequate remedy at law. (Gowdy v. Green, U. S. C. C. [S. Car.], 69 Fed. Rep. 865.)

**CRIMINAL PRACTICE—INDICTMENT—JOINDER OF OFFENSES.**—Under Rev. St., § 1024, providing that where there are several charges against a person for the same act, or for two or more acts connected together, or for two or more acts of the same class of crimes, which may be properly joined, the whole may be joined in one indictment in separate counts, an indictment may contain a count under section 5456 referring to the felonious taking away by any one of anything belonging to the United States, from any place, and a count under section 5460, referring to the felonious taking and embezzlement of the metals at the United States mint by a person to whose charge they were committed; and it is immaterial that one might be classed as larceny, and the other as embezzlement, or that the punishment is different. (United States v. Jones, U. S. D. C. [Nev.], 69 Fed. Rep. 973.)

## EQUITY — JURISDICTION — PUBLIC LAND. —

Equity has jurisdiction of a bill brought by the United States, as trustee for the Indians to whom lands have been allotted in severalty, pursuant to the treaties and acts of congress providing that the United States will hold the land so allotted in trust for the benefit of the allottees, against persons who have illegally secured leases of such lands and taken possession thereof, — such bill seeking to oust such intruders, and to restrain them from inducing the Indians to make further leases, and from interfering with the Indian agent in the performance of his duties, — since the remedy by action of ejectment, even if such action could be maintained, would be inadequate. (*United States v. Flournoy Live Stock & Real Estate Co.*, U. S. C. C. [Neb.], 69 Fed. Rep. 886.)

EQUITY—JURISDICTION.—Complainant, the holder of a judgment against a drainage district of Illinois, recovered upon its bonds and coupons, brought suit against the district and the commissioners and treasurer thereof, alleging that the commissioners had collected assessments, and failed to apply them on complainant's judgment; that they had received in payment of assessments coupons cut from bonds held by parties who had consented to a compromise agreement, and bought below par, and that the commissioners were chargeable with considerable sums collected,—this allegation being based on the theory that coupons re-received for taxes were to be treated as cash. The bill prayed that the commissioners be held personally responsible for taxes discharged under their direction, and enjoined from receiving anything but money for taxes: Held, that the bill should be dismissed, since, if there was any personal liability of the commissioners, there was an adequate remedy at law, and that, for the failure to collect the taxes in money, the remedy was *mandamus*. (*Coquard v. Indian Grave Drainage Dist.*, [U. S. C. C. of App.], 59 Fed. Rep. 867.)

FEDERAL COURTS — CIRCUIT COURT OF APPEALS.—The mere fact that the validity of a State law under the constitution of the United States is drawn in question will not, of itself, deprive the circuit court of appeals of jurisdiction to decide other questions involved in the case, although the judiciary act of March 3, 1891, provides, in section 5, for direct appeals from the circuit to the Supreme Court, when constitutional questions are involved. And, if it appears that the case may be disposed of upon grounds independent of the constitutional question, the court will take jurisdiction and dispose of it accordingly: Held, therefore, that where, on appeal from an interlocutory injunction, it appeared that, while the bill challenged the constitutionality of a State law, the further question was

also raised whether the case was one of equitable cognizance, the court would take jurisdiction, and, being of opinion that the case was not of equity cognizance, would dissolve the injunction, and order the bill dismissed. (*Green v. Mills*, U. S. C. C. of App., 69 Fed. Rep. 852.)

PRINCIPAL AND AGENT — AUTHORITY TO SIGN NOTES.—The G Co., a manufacturing and trading corporation located in Ohio, had a branch in Missouri, which was conducted by one D, as general agent and manager, and at which a large business was carried on, in the purchase and working up of raw material, and the sale of the finished product over a large territory. D was left in full control of all departments of this business conducted in Missouri and managed all its affairs, financial and other, with the knowledge and consent of the officers of the G Co., and generally without directions or oversight by them. He reported to the G Co., from time to time, and some of his reports showed entries of "bills payable." Upon the trial of an action against the G Co., upon notes signed in its name by D, as treasurer, the president of the G Co., testified that he knew that D was signing all the bills payable made by the Missouri concern for goods purchased; that he supposed it was the natural order of things for D to procure the discount of bills receivable by indorsing them as treasurer of the G Co.; and that, if money were required in an emergency, he supposed D would be expected to make and procure the discount of the company's notes. Held that D, being left in the absolute control and management of the whole business of the G Co., in Missouri, to act on his discretion, had authority to do whatever a reasonably prudent merchant or manufacturer would do, and accordingly, to sign promissory notes in the name of the G. Co. (*Glidden & Joy Varnish Co. of Ohio v. Interstate Nat. Bank of Kansas City*, U. S. C. C. of App., 69 Fed. Rep. 912.)

TRIAL BY COURT — ADDITIONAL FINDINGS.—Where a case has been tried by the court upon waiver of a jury, and the court has decided it, and made special findings covering the ultimate facts of the case, additional findings cannot afterwards be made upon the request of a party. (*Lang v. Baxter*, U. S. C. C. [Me.], 69 Fed. Rep. 905.)

TRUSTS — MONOPOLIES.—The act of July 2, 1890, to protect trade and commerce against unlawful restraint and monopolies, is not applicable to the case of a State which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (*Act S. C. Jan. 2, 1895*). A State is neither a "person" nor a "corporation," within the meaning of the act of Congress. (*Lowenstein v. Evens*, U. S. C. C. [S. Car.], 69 Fed. Rep. 908.)

# The Albany Law Journal.

ALBANY, DECEMBER 28, 1895.

## Current Topics.

[All communications intended for the Editor should be addressed simply to the Editor of THE ALBANY LAW JOURNAL. All letters relating to advertisements, subscriptions, or other business matters, should be addressed to THE ALBANY LAW JOURNAL COMPANY.]

WE have devoted considerable space during the last year to discussion on the Monroe Doctrine, which has been a subject of intense interest ever since the President's message to Congress. Whether the Monroe Doctrine forms a part of international law or whether an alleged encroachment of territory by a foreign nation violates its letter or its spirit are questions which we consider have become merged in the greater principle of international arbitration. Civilization has advanced too far to permit resort to arms; the financial conditions of the countries of the world are too homogeneous to allow war to be the arbiter of nations. In short, the dispute of boundaries between English provinces and Venezuela is one which most properly belongs to a properly-constituted international tribunal to consider and decide. The vague hints at resorting to arms, these bombastic harangues of the injudicious, will find their sudden deaths in the peaceful settlement of all controversies by a cool-headed, impartial court. Dogs delight to bark and bite, we have found the missing link, and may learn at the same time that we have left with our alleged former kind many of their unpleasant peculiarities.

Some eminent students of the law are contending for and against the Monroe Doctrine as a part of international law, and that the encroachment by a European power on territory of a country in this country is a violation of its spirit and its letter. As a mere question of principle, it is interesting, and Professor J. B. Moore, of Columbia College, in a pamphlet issued last May, said:

"The suggestion has lately been made in various quarters that it is a violation of the Monroe Doctrine for a European power to employ force against an American republic for the pur-

pose of collecting a debt or satisfying a pecuniary demand, whatever may have been its origin. As has been seen, there is nothing in President Monroe's declaration even remotely touching this subject, and the examples I have given of the employment of force by the United States, as well as by other powers, for such objects show that the American republics have not heretofore been supposed to enjoy so desirable an exemption. But I think I can trace the idea of its origin. In Wharton's 'International Law Digest,' under the section entitled 'Monroe Doctrine,' there is the following sentence: 'The government of the United States would regard with grave anxiety an attempt on the part of France to force by hostile pressure the payment by Venezuela of her debt to French citizens.' The authorities cited for this statement are two alleged manuscript instructions of Mr. Blaine to our minister to France, of July 23 and December 16, 1881. The whole matter is, however, erroneously stated. The instructions are both published in the volume of Foreign Relations for 1881. They refer not to 'hostile pressure,' but to rumored design on the part of France of taking forcible possession of some of the harbors and a portion of the territory of Venezuela in compensation for debts due to citizens of the French republic. They nowhere express any 'grave anxiety.' They do not mention the Monroe Doctrine. They merely argue that such a proceeding as that reported to be in contemplation would be unjust to other creditors of Venezuela, including the United States, since it would deprive them of a part of their security. And they express the solicitude of the government of the United States 'for the higher object of averting hostilities between two republics, for each of which it feels the most sincere friendship.' It is plain that this latest development of the Monroe Doctrine, based upon the erroneous passage in Wharton's Digest, has no actual foundation whatever."

On this subject the *New York Law Journal* says:

"The preponderating influence of the American Bar in framing legislation and directing public policy is generally recognized. We think that members of the legal profession should further feel a special responsibility in molding public opinion. The Venezuelan

episode, which has thrown the country into a fever of excitement, makes it the emphatic duty of lawyers as a class to counsel thoughtful and deliberate action and to spread a dispassionate realization of the legal bearing of the controversy.

"The *American Law Review* for November-December, 1895, contains an article by Mr. Mark B. Dunnell, of Minneapolis, on 'The Monroe Doctrine,' which briefly, but adequately, sketches the history of the events leading to its promulgation, and presents, in very cogent form, the author's conception of the true status of such doctrine to-day. Mr. Dunnell's article was published before the recent diplomatic correspondence between England and America was given out; but he substantially concurs with Lord Salisbury as to the causes and immediate occasion of President Monroe's utterance, and it would seem that, to a material extent, he anticipated the English prime minister's position as to the necessary modification of the doctrine by change of conditions. Mr. Dunnell says:

"On the other hand, we should not fall into the corresponding error of maintaining that the declaration of Mr. Monroe is binding upon us to-day. His declaration was made to meet a particular exigency and ceased to be operative long ago. Its life was limited to the continuance of the circumstances that provoked it. What we now call the Monroe Doctrine, and cherish as a fundamental rule of our foreign policy, is the principle which underlay Monroe's declaration, and not the declaration itself. The declaration of 1823 was simply a particular application of a general principle, and is valuable merely as a precedent. It is like a judicial decision—not the law itself, but an application of the law; and, as the lawyer studies cases to get at the principle they embody, so we may study Monroe's declaration to get at its principle or 'doctrine.'"

"The author then contends that the principle of the doctrine is merely a rule of self-defense, to wit: 'The United States will oppose any interference on the part of a European power in the affairs of this hemisphere which it may deem, under all the circumstances of the particular case, dangerous to its life or interests.' He further says:

"It follows that each case of interference

must be decided on its merits. The mere fact that it is an interference does not close the question of our duty. It must be such an interference that, from all the circumstances of the case, it would be 'dangerous to our peace and safety.' It is owing to a failure to keep in mind this necessary limitation of the doctrine, that much confusion of thought has arisen, and that wholly unwarrantable extensions of the doctrine have been made. Mr. Monroe's ideas of what is 'dangerous to our peace and safety' are dead. Mr. Monroe's ideas that we should resist dangerous interference is a living force in our national life to-day. It matters not whether Mr. Monroe's language is susceptible of the construction that all interference is dangerous and to be resisted. His ideas were founded on the condition of things existing in 1823. An interference that might well have been thought dangerous then might safely be disregarded by us to-day. It is palpably absurd to impose the ideas of danger entertained by a government of seven millions, on a government of seventy millions. The American who regards European interference in distant South America a danger to this country has a ridiculously inadequate conception of his country's greatness. We have long since outgrown the infantile weakness of seventy years ago. The area of danger has shrunk with our increasing strength. It is inconceivable that any sensible American would willingly shed his blood to keep England out of Chili, for example. On the other hand, it is quiet conceivable that he would be willing to do so to keep her out of Cuba. The one act would be largely a matter of self-defense; the other, sheer quixotism. So far as the Monroe Doctrine is concerned we have no more cause to check the alleged territorial encroachments by England in Venezuela, than to enter a *caveat* against her expansion in India; and for the sufficient reason that the enlargement of her power in one place is no more dangerous to us than in the other."

"We venture to say that many members of the American Bar agree in the main with Mr. Dunnell's contention, and that many more, if they would give the merits and gravity of the situation due consideration, would exert all their influence towards proceeding deliberately, and

at least give the present popular ebullition time to subside. Granting, of course, that an ostensible movement to settle a just boundary line may conceal a design for territorial encroachment, and admitting, for the sake of argument, that such is England's intent in Venezuela, it still must be conceded that any proposed apprehension of actual danger from an encroachment in that quarter is not *bona fide*. With our whole Canadian frontier exposed and accessible, alarm at the possibility of Great Britain making war on us from Venezuela is absurd. The only object in resorting to force to determine the Venezuela boundary line, according to our interpretation of the rights of the primarily interested parties, would be to settle an abstract principle. And such principle is not one recognized by international law. The British government is the only European power that has ever given even a qualified assent to the Monroe Doctrine, and the substantial purport of Lord Salisbury's remarks on the subject seems to be that, according to English interpretation, such recognition as was given by England extended only to the application of the doctrine to the peculiar circumstances existing when it was promulgated. In insisting on a general right of supervision in the United States, co-extensive with the hemisphere, our government would, therefore, not have the moral sanction of settled international law. We would have to be prepared to maintain our position perpetually by force, and certainly such a burdensome extension of our foreign policy should not be adopted without a fair presumption of practical utility, and, in any event, not without sober second thought.

"Undoubtedly, the great avidity with which the proposition for interference in Venezuelan affairs has been caught up is due to the intoxicating effect upon the popular imagination which the possibility of war always has. Without in the least deprecating patriotic enthusiasm, or a legitimate sentiment of national pride, we believe there has been of late far too much stimulation of mere national braggadocio. We may always look for such element as a political expedient, but there are special causes which have contributed to ingrain the warlike spirit into the popular mind. For instance, there has been during the past year or two a great deal of indiscriminating and intemperate laudation

of the character and acts of Napoleon Bonaparte in magazines and newspapers. And we fear that, incidental to legitimate utterances of loyalty and love for the American flag as the symbol of our national unity and life, there has been a large amount of uncalled for bellicose declamation. It would seem that the essential need of the hour is a spirit of calm reasonableness. We believe that the policy suggested by the President's message involves a very material extension of what thoughtful students of American history have understood as the "Monroe Doctrine." Whether the nation is to be finally committed to such extension certainly should not be determined without bringing to the minds of the people, after some measure of sobriety shall have returned, the historical bearings and theoretical merits of the question, the possible benefit to accrue from our success and its probable cost.

The difference of views of lawyers and laymen is well exemplified by an article in the *Nation*, which said :

"The difficulty of getting things exactly right in this world is well exemplified in an article in the last number of the *Forum*, by Mr. Cassatt of the Cincinnati bar, on the Monroe Doctrine. He shows easily enough that it was a doctrine produced for purposes of defence under circumstances which have totally changed, and that no contemporary expositor thought of giving it the offensive, aggressive character which some of our present preachers claim for it, and that the Congress to which Monroe presented it, as a suggestion of his own, never acted on it, nor took any notice of it; so that, in fact, it has no legal status and is no part of American polity. In tracing the history of it, however, he says that 'the general principles of the Holy Alliance were in harmony with the monarchical institutions and ideas of Great Britain, but the possession of Central America by Spain would have been injurious to the commercial interests of Great Britain,' and therefore she joined us in the protest known as the 'Monroe Doctrine.' It would be difficult to give a more misleading account of the whole transaction. England refused to admit that the Alliance after the Congress of Vienna meant anything more than the maintenance of the territorial divisions then made. She denied

by formal circular the right of interference in the internal affairs of the States then carved out. She refused to enter into the Holy Alliance, and when, in pursuance of the policy of interference the Alliance traced out, the French entered Spain to put down the revolution there, Canning declared he would 'call the New World into existence to redress the balance of the Old' by acknowledging the independence of the Spanish colonies then in revolt. But this famous saying was anticipated by Lord Castlereagh in his instructions to the Duke of Wellington when, going as a delegate to the Congress, he said, 'it was evident from the course which events have taken that their recognition of the revolted colonies as independent states was merely a question of time.' But Canning's action in this hemisphere was really taken in furtherance of a European policy, and was intended as a counterstroke against the Holy Allies. The view that it was due to a desire to get the Spanish-American commerce away from Spain is original with Mr. Cassatt, as is also the view that 'the general principles of the Holy Alliance were in harmony with the monarchical institutions and ideas of Great Britain.' It was because the contrary was true that Great Britain refused to enter into the Alliance, although Castlereagh and Wellington would probably have liked to do so."

Professor Lammasch is to day the greatest authority on International Law in Austria and in discussing the Monroe Doctrine he said:

"In the first place, a word about that curious motto. 'America for Americans,' from which Americans now deduce the conclusion that no European State can intervene in American affairs in general. This theory does not appear to me to be sustainable from any point of view.

"It recalls a similar motto—that of the Eastern Empire, in which all Europeans were called collectively Franks, because France was then, in the twelfth century, the principal power of the west. It goes without saying that that circumstance would not give France the slightest right to assert a protectorate over all the Franks of the Levant.

"Such a case, however, would be just as valid as that of the United States. The fact that it is now the custom to speak of the United States collectively as 'America' gives it

no right to set itself up as a protecting power over all the States of North, Central and South America.

"Furthermore, the interpretation that the Washington government now gives the Monroe doctrine does not at all agree with the text of the address of President Monroe, on December 2, 1823, where he expressly states that the existing colonies or dependencies of any European Power shall not be interfered with.

"Besides, the Monroe doctrine is not a dogma of international law, but only a political programme. The United States has interpreted it as it pleased—sometimes more and sometimes less vigorously. I have merely to recall the treaty regarding the Panama Canal; also its attitude in the Mexican question of 1863. Only in 1865 did the United States government at last find strength and occasion to remember about the Monroe doctrine.

"The doctrine might become even prejudicial to the United States, for only the little South and Central American States would derive benefit from it. It was indeed these States which, in 1826, following the lead of Peru, showed forthwith an intention of rendering effective the presidential declaration of December 2, 1823.

"Calvos, in his international law, writes that the republics of South America at once understood the advantages of associating themselves with the cause of the United States and of combining in this respect in one exterior policy for the entire New World.

"But the power that did not participate in the congress convoked by the government of Peru at Panama was the United States; and Mr. Adams who, in 1825, became President, made personal efforts to weaken as much as possible the Monroe doctrine over the creation of which, in his capacity as Secretary of State, he had exercised as essential influence. He declared that it was not the duty of the United States to see that the territory of other American states remained in an unaltered condition.

"The agreement among all the parties represented at the meeting to the effect that each will guard by its own means against the establishment of any future European colony within its borders may be found desirable.

"I resume, then. The Monroe doctrine contradicts the principles of non-intervention if it

looks upon every intervention in every American affair as an act against the United States. President Monroe has even declared that the United States ought not to mix itself up in the affairs of existing European colonies.

"It derives no advantage from doing so, but on the contrary incurs serious prejudice, for on this very basis it might be rendered responsible by the European Powers, if any American states failed to fulfil their obligations."

A curious case has been recently decided by the Court of Appeals, and is that of Philip Schuyler against Ernest Curtis and the members of the Women's Fund Association. It is highly interesting as shedding light on the "right of privacy," and is as follows:

Schuyler brought this action to prevent the defendants from making a statue or bust of his aunt, the late Mrs. Mary M. Hamilton Schuyler, in any form, and from causing it to be made or exhibited at the World's Fair. The lower court granted the injunction and found that Schuyler is the only son of George L. Schuyler and of Eliza Hamilton Schuyler, who was a daughter of the late James A. Hamilton and grand-daughter of Major-General Alexander Hamilton.

Mrs. Schuyler died in 1863, and the plaintiff's father, for his second wife, married Mary Morris Hamilton, a younger sister of his first wife. The second Mrs. Schuyler died in May, 1877, and her husband died in July, 1890, and her only brother died in December, 1889. The only immediate relatives now living of the second Mrs. Schuyler are certain nephews and nieces, an uncle and aunt, all of whom approved of the commencement and maintenance of the action.

The defendant's avowed object was the completion of two sculptures to honor "Woman as the Philanthropist" and "Woman as the Reformer," to be placed on exhibition at the Columbian Exposition in 1893. They announced in May, 1891, that "as the typical philanthropist" Mary M. Hamilton, who died Mrs. G. L. Schuyler, had been chosen as the subject, and that they intended to place the statue on exhibition at the same time and place as a statue of Miss Susan B. Anthony, whom they had chosen as the subject of the statue of the "Representative Reformer."

Schuyler requested the defendants to abandon the making of the statue, but they denied his right to prevent them.

The lower court found that the acts of defendants constituted an unlawful interference with the right of privacy, and that the relatives of the deceased were specially injured by the acts.

Upon the trial the defendants showed that Mrs. Schuyler was a very charitable woman, was a member of many private charitable associations; that in 1852 she was one of the founders of the School of Design for Women in New York, and one of its managers until it was adopted by the Cooper Institute; that some of the female defendants were members of the School of Design for Women and had frequently met Mrs. Schuyler and were on terms of intimacy with her; that the "Ladies' Art Association" was founded about 1867, partly at the suggestion of Mrs. Schuyler made to some of the defendants, who were members of the School of Design for Women; that the "Woman's Memorial Fund Association" was composed largely of members of the "Ladies' Art Association," and that Mrs. Schuyler was prominently identified with the United States Sanitary Commission during the late war; and also that she was one of the vice regents for the State of New York of the Mount Vernon Association, which was organized for the purpose of securing the preservation of the home of Washington.

In deciding this case the Court of Appeals says in part:

"This action is of a nature somewhat unusual. Briefly described, it is founded upon an alleged violation of what is termed the right of privacy.

"It may, perhaps, be somewhat difficult for the ordinary mind to perceive any reason for the plaintiff's distress, arising out of this contemplated action by women of respectability who are desirous of honoring the memory of a woman whom they regarded in life as a friend and benefactor of their sex. For the purpose we have in view it is unnecessary to wholly deny the existence of the right of privacy, to which the plaintiff appeals as the foundation of his cause of action.

"In the present case the grounds of the plaintiff's objection are not very many, and have been stated in the complaint and by the



plaintiff on the witness stand. They are these :

“1. The persons concerned in getting up the proposed statue were not friends of the plaintiff's deceased aunt, and, as plaintiff alleged, did not know her.

2. They were proceeding with their plan without consulting with the plaintiff or other immediate members of the Schuyler-Hamilton family, and without their consent to the making of any statute.

3. The circulars issued by or in behalf of the defendants contained a statement that Mrs. Schuyler was the founder of or the first woman in the enterprise for securing the home of Washington, and that this statement was inaccurate, because a prominent woman in South Carolina was in fact such founder and justly entitled to the honor arising therefrom. This mistake, it was asserted, has caused adverse comment in the newspapers as to the attitude of the family of plaintiff in permitting such a claim to be made when they must have known it was without foundation.

4. It was disagreeable to the plaintiff, because the making of such a statute would have been disagreeable and obnoxious to his aunt were she living. She had, as plaintiff said, a great dislike to have her name brought into public notoriety of any kind, as she was a singularly sensitive woman and of a very retiring nature, anxious to keep her name from the public prints or newspapers.

5. That plaintiff's aunt had not been personally acquainted with Susan B. Anthony, and he was quite sure she had not sympathized with or approved the position taken by Miss Anthony upon the question of the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs. Schuyler joined with principles of which she did not approve.

“After taking all the objections into careful consideration, we cannot say that we are in the least degree impressed with their force. The first ground of objection, even if well founded in fact, is not of the slightest importance. Whether the defendants were friends or not of Mrs. Schuyler in her lifetime does not seem to us to have any legitimate effect upon the question. No surviving relative, male or female,

would have, in our judgment, the least ground of complaint that an action, confessedly meant to do honor to the memory of a noble woman, was proposed by those who in her lifetime had not the honor of her personal acquaintance or friendship, but whose proposed action was nevertheless the outgrowth of admiration of her character as a friend and benefactor of the sex of which she was herself so great an ornament.

“The second ground of objection, we think, is equally untenable. The fourth ground may properly be considered as a part of it. It is true that these defendants have assumed to take the preliminary steps leading to the making of the proposed statue without having consulted with or obtained the consent of the plaintiff. The whole of the plaintiff's claim of the right of privacy in this case rests upon the lack of this consent.

“It is stated that Mrs. Schuyler was not in any sense a public character during her life, and consequently had not surrendered to any extent whatever her own right of privacy.

“It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right or privacy Mrs. Schuyler had died with her. Death deprives us all of rights in the legal sense of that term, and when Mrs. Schuyler died her own individual right to privacy, whatever it may have been, expired at the same time.

“A woman like Mrs. Schuyler may very well in her lifetime have been most strongly adverse to any public notice, even if it were of a most flattering nature, regarding her own works or position. She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her.

“It is therefore impossible to credit the existence of any real mental injury or distress to a surviving relative grounded upon the idea that the action proposed in honor of his ancestor would have been disagreeable to that ancestor during his life.

“We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants

propose on the ground that as mere matter of fact his feeling would be thereby injured. We hold that in this class of cases there must, in addition, be some reasonable and plausible ground for the existence of this mental distress and injury.

"It must not be the creation of mere caprice nor of pure fancy, nor the result of a super-sensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy. Such a class of mind might regard the right as interfered with and violated by the least reference even of a complimentary nature to some illustrious ancestor without first speaking for and obtaining the consent of his descendants.

"Feelings that are thus easily and unnaturally injured and distressed under such circumstances are much too sensitive to be recognized by any purely earthly tribunal.

"A shy, sensitive, retiring woman might naturally be extremely reluctant to have her praises sounded, or even appropriate honors accorded her while living, and the same woman might, upon good grounds, believe with entire complacency and satisfaction that after her death a proposition would be made and carried out by her admirers to do honor to her memory by the erection of a statue or some other memorial.

"We think that so long as the purpose is to do honor to the memory of one who is deceased, and such purpose is to be carried out in an appropriate and orderly manner by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not necessary, and they have no right to prevent, for their own personal gratification, any action of the nature described.

"The third ground of objection is based upon a claim made in the circulars issued by defendants that Mrs. Schuyler was the founder of the Mount Vernon Association, while in truth she was connected with it only as a vice regent from this State. If corrected, all ground of complaint of that nature would disappear.

"The fifth ground is an equally vague and shadowy one. Whether Mrs. Schuyler sympathized with the work or the views of Miss Anthony, we must say, seems to us utterly foreign to the subject. There was no proposition look-

ing toward the placing the statues of these two ladies together as representatives of the same ideas, or as in any way, even the remotest, united in the same works, or in inculcating the same principles in regard to the rights of women.

"The fact, if it be a fact, that Mrs. Schuyler did not sympathize with what is termed the 'Woman's Rights' movement is of no importance here. The proposed placing of the two statues would, if carried out, have had no tendency to show that Mrs. Schuyler did so sympathize. Many of us may, and probably do, totally disagree with these advanced views of Miss Anthony in regard to the proper sphere of woman, and yet it is impossible to deny to her the possession of many of the ennobling qualities which tend to the making of great lives.

"While not assuming to decide what this right of privacy is in all cases, we are quite clear that such right would not be violated by the proposed action of the defendants. The plaintiff's cause of action is, we think, wholly fanciful. The defendant's contemplated action is not such as might be regarded by reasonable and healthy minds as in the slightest degree distressing or tending in the least to any injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts.

"Upon the whole, we are of the opinion that the plaintiff has made a mistake in his choice of this case as an appropriate one in which to ask for the enforcement of the right of privacy. The judgment must be reversed as to the parties appealing and the complaint dismissed to them, with costs."

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**RAILROAD COMPANY — STREET RAILWAYS — MORTGAGES.**—A claim for damages for personal injuries, caused by the negligence of a street railway company five months before the appointment of a receiver in mortgage foreclosure proceedings, is not entitled to priority of payment over the mortgage debt out of the earnings accruing during the receivership. Such a claim is not based upon any considerations inuring to the benefit of the mortgage security, or tending to keep the road a going concern.—(St. Louis Trust Co. v Riley [U. S. C. C. of App.], 70 Fed. Rep. 32.)

## REPORT OF COMMISSIONERS TO REVISE THE CODE.

(Continued from Dec. 21, 1895.)

### PRACTICE IN OTHER STATES.

We are commanded by the act authorizing our appointment to examine the Code of Procedure of this State, and also the codes and practice acts of other States and countries. A comparative study of procedure in other States would, doubtless, be profitable in attempting to revise or reconstruct the civil procedure of this State, and we shall try to make such an examination as the law requires before submitting a scheme of revision. But the early date at which this report is required prevents any extended study of other systems of procedure. We deem it proper, however, to submit at this time a statement showing briefly which States have codes of procedure, and in which of them procedure is governed by general practice acts, rules of the courts, or the common law. The following table shows the broad field spread out before us by the statute, and which we are directed to explore:

Alabama has no separate code of civil procedure. Part 3 of the Code of Alabama, entitled "Proceedings in Civil Actions," containing 1,125 sections, constitutes a complete scheme of civil procedure, beginning with actions and parties, and ending with appeals and fees.

Arizona has no separate code of civil procedure. The titles of the Revised Statutes are arranged alphabetically, and many of them relate to civil procedure.

Arkansas: Chapter 119 of the Revised Statutes (1884), entitled "Pleadings and Practice," contains 407 sections, and is in the nature of a code of civil procedure. The chapters of the statutes, however, are arranged alphabetically, and many other chapters relate to civil procedure.

California has a code of civil procedure containing 2,104 sections. This State has adopted the entire code system, including a civil code, a code of civil procedure, a penal code, a code of criminal procedure, and a political code.

Colorado has a code of civil procedure, containing 445 sections.

Connecticut has no separate code of civil procedure. The practice act (L. 1879, Ch. 83) is the basis of the civil procedure. Many chapters of the Revised Statutes, however, relate to matters generally included in a code of civil procedure, including service of process, place of trial, parties and appearances, pleadings and set-off, practice, evidence, trials, costs, new trials, appeals and executions.

Delaware has no separate code of civil procedure. Title 16 of the Revised Laws is entitled "Of Civil Actions in General," but it is merely a compilation

of various laws relating to the subject. The practice in the State, except as modified by statute or rule of court, is under the common law. The Superior Court is empowered by rules to make alterations in the manner of pleading, of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and in relation to the payment of costs.

Florida has no separate code of civil procedure. The second part of the Revised Statutes (1892), entitled "Of Civil Courts, Their organization and Proceedings Therein," containing 340 sections, is practically a code of civil procedure.

Georgia has no separate code of civil procedure. Part 3 of the Code of Georgia (1882), entitled "The Code of Practice," containing 310 sections, is practically a complete code of civil procedure.

Idaho has no separate code of civil procedure. Part 3 of the Revised Statutes (1887), entitled "Code of Civil Procedure," with 2,350 sections, embraces a practically complete scheme of civil procedure.

Illinois has no separate code of civil procedure. Chapter 110 of the Revised Statutes (1885), is entitled "Practice," but cannot be considered a complete code of civil procedure, as it is only a compilation of various statutes, modifying or superseding the common law practice, which otherwise prevails.

Indiana has no separate code of civil procedure. Chapters 2 and 3 of the Revised Statutes (1894), entitled "Civil Procedure" and "Courts," containing 1,392 sections, constitute a complete code of civil procedure. The Appellate and Supreme Courts are empowered to make rules in relation to proceedings where not specially provided for by law.

Iowa has no separate code of civil procedure. Part 3 of the Annotated Code (1888), entitled "Code of Civil Practice," containing 1,415 sections, is practically a complete code of civil procedure. The judges of the District Court are empowered to adopt rules as to filings of pleadings or motions, other than as provided by the Code, and generally to adopt such rules as they may deem expedient, not inconsistent with the Code.

Kansas has a code of civil procedure (L. 1863, ch. 80), consisting of 732 sections. This code is also the code of Oklahoma.

Kentucky: The Civil Code contains 767 sections, and covers civil procedure. The Court of Appeals is empowered to make rules in relation to arguments, etc., before it.

Louisiana has a code of practice, containing 1,161 sections, and it is a complete scheme of civil procedure. The Code of Practice was originally enacted in 1825. The State of Louisiana has also a civil code, being a compilation of the substantive civil law.

Maine has no separate code of civil procedure. Practice, except as modified by statute, is under the common law. Various parts of the Revised Statutes (1888), however, relate to matters generally included in a code of civil procedure; such as commencement of civil actions, attachments, arrest, the limitation of personal actions, proceedings in courts, executions and bail.

Maryland has no separate code of civil procedure. The practice in the State, except as modified by statute, is under the common law. Various articles of the Public General Laws (1888), relate to matters usually included in a code of civil procedure, such "pleadings, practice and process at law;" "Appeals," "Attachments," etc., arranged alphabetically.

Massachusetts has no separate code of civil procedure. Part 3 of the Public Statutes (1882), is entitled "Of courts and judicial officers and proceedings in civil actions," and is practically a complete scheme of civil procedure. The Revised Statutes enacted that "the courts shall respectively, from time to time, make and promulgate uniform codes of rules, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law."

Michigan has no separate code of civil procedure. The Annotated Statutes (1882), titles 29 to 38 inclusive, containing 2,685 sections, practically constitutes a code of civil procedure. The judges of the Supreme Court are empowered to modify and amend the practice in cases not provided for by statute.

Minnesota has no separate code of civil procedure; but the General Statutes (1891), chapters 61 to 85, include practically all the subjects ordinarily embraced in a code of civil procedure, and contain 1,595 sections. Chapter 85 is entitled "The Probate Code," and was enacted in 1889. The judges of the district courts and the Courts of Common Pleas are empowered to adopt uniform rules of practice in civil actions, not inconsistent with law.

Mississippi has no separate code of civil procedure. The chapters of the Annotated Code are arranged alphabetically, and many of them relate to matters generally embraced in a code of civil procedure. The Supreme Court may establish rules in relation to practice, not inconsistent with law.

Missouri has no separate code of civil procedure, but chapter 33 of the Revised Statutes (1889), is entitled "Code of Civil Procedure," and contains 311 sections.

Montana has a code of civil procedure, consisting of 3,484 sections, which was adopted February 14, 1895. Montana has also adopted a political code, a civil code, and a penal code, all of which were adopted in February, 1895. The criminal procedure constitutes Part 2 of the penal code.

These codes are substantially the same as the codes in California.

Nebraska: Part 3 of the Consolidated Statutes (1891) is entitled "The Codes of Civil and Criminal Procedure." The code of civil procedure contains 1,039 sections. The Supreme Court is empowered to make rules not inconsistent with the provisions of the code.

Nevada has no separate code of civil procedure. Chapter 20 of the General Statutes (1885), being the General Practice Act of 1869, containing 970 sections, is a complete scheme of civil procedure. The Supreme Court is empowered to adopt rules of practice not inconsistent with law.

New Hampshire has no separate code of civil procedure. Several chapters of the Public Statutes (1891) relate to civil procedures, such as "of actions, process, service of process," "of proceedings in courts," etc. The common law practice is in vogue except as modified by statute. The Supreme Court is empowered by statute to establish rules of practice not inconsistent with law; and the practice is largely governed by the rules of the Supreme Court. (Published in 56 New Hampshire Reports.)

New Jersey has no separate code of civil procedure. The Revised Statutes of New Jersey (1887) contain many provisions in relation to practice, but, except as modified by statute, the common law practice prevails.

New Mexico has no separate code of civil procedure. The compiled laws (1884), title 38, entitled "Civil Procedure," contains 624 sections, but it is not a complete scheme of civil procedure, the first section providing that the common law shall be the rule of practice and decision.

New York has a code of civil procedure.

North Carolina has a code of civil procedure constituting chapter 10 of the code of 1888. It is a complete code of civil practice, containing 505 sections. The Supreme Court is empowered to adopt rules of practice not inconsistent with law. The practice is largely governed by the rules of the Supreme and Superior Courts.

North Dakota, in 1895, adopted a complete code system, consisting of a political code, civil code, code of civil procedure, probate code, justices' code, penal code, and code of criminal procedure.

Ohio has a code of civil procedure, constituting a chapter of the Revised Statutes, and containing 1,746 sections. The probate practice is not contained in the Code. The Supreme Court is empowered to make rules not inconsistent with law.

Oklahoma territory adopted the Kansas Code in its entirety August 14, 1893.

Oregon has no separate code of civil procedure, but the acts relating to practice have been arranged

as a code in the publication of the Annotated Laws (1887), and constitute a complete scheme of civil procedure, in 1,199 sections.

Pennsylvania has no separate code of civil procedure. The common law generally prevails, and has been modified by statute perhaps as little as in any State of the Union. Many acts, however, relate to matters usually embraced in a code.

Rhode Island has no separate code of civil procedure. The Judiciary Act of 1893 regulates the practice in the courts to a great extent, but is not a complete scheme of civil procedure. The common law practice still prevails, except as modified by statute.

South Carolina has a code of civil procedure, containing 453 sections. The justices of the supreme court are empowered to make rules of practice not inconsistent with the code of procedure.

South Dakota: The code of civil procedure of the territory of Dakota became the law of South Dakota upon its admission as a State. This code contains 1,598 sections. It is distinct from the probate and justices' codes, which, together, contain 488 sections.

Tennessee has no separate code of civil procedure. Part 3 of the Code of Tennessee (1894) is entitled "The Redress of Civil Injuries," containing 1,998 sections, and is a complete scheme of civil procedure, with the exception of probate practice, which is contained in another chapter of the code.

Texas has no separate code of civil procedure. The chapters of the Revised Statutes (1887) are arranged alphabetically and many of them relate to civil procedure. The Supreme Court is empowered to make rules of practice for the government of itself and other courts of the State.

Utah: Part 10 of the Compiled Laws (1888) is "The Code of Civil Procedure." Part 11 of the Compiled Laws relates to procedure in probate courts. The two parts together contain 1,380 sections.

Vermont has no separate code of civil procedure. Part 1 of title 11 of the Revised Laws (1888) is entitled "Courts and Judicial Proceedings," and contains 918 sections. Many other chapters of the Revised Laws also relate to matters of practice usually included in a code. The Supreme Court is authorized to make necessary rules of practice in such court.

Virginia has no separate code of civil procedure. Title 48 of the Code of Virginia (1887) is entitled "Proceedings in Civil Actions," and contains 290 sections. Many other titles of the code, however, relate to matters usually included in a code of civil procedure. The practice is under the common law, except as modified by statute.

Washington has a code of procedure consisting of 1,712 sections. It includes criminal as well as civil

procedure. The criminal procedure is included in 208 sections. The Supreme Court is authorized to adopt rules of practice not inconsistent with law.

West Virginia has no separate code of civil procedure. The Code of West Virginia (1891) contains many chapters relating to procedure in the courts, but except as modified by statute, the common law practice prevails.

Wisconsin has no separate code of civil procedure. Part 3 of the Annotated Statutes (1891) is entitled "Courts and Judicial Officers and Actions and Proceedings in Civil Matters," and contains 1,942 sections. It is practically a complete scheme of civil procedure. The Supreme Court is empowered to make rules of practice in the Supreme Court, the Surrogate Courts, County Courts, and other courts of inferior jurisdiction.

Wyoming: Title 38 of the Revised Statutes (1887) is entitled "Civil Procedure." It contains 813 sections and is practically a complete code of civil procedure, with the exception of the practice of the probate courts, which constitutes title 37 of the Revised Statutes, and contains 367 sections.

The District of Columbia has no separate code of civil procedure. The practice in the District is largely under the common law. Both the courts of law and equity are empowered to adopt rules of practice, and the proceedings are largely governed by the rules so adopted. Chapter 55 of the Compiled Laws of 1894, entitled "Pleading and Practice," contains 80 sections relating to this subject.

United States: Chapter 18 of title 13 of the Revised Statutes relates to civil and criminal procedure and contains 132 sections, of which 98 concern civil procedure. By section 914, it is provided that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and modes of proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

All writs and processes issuing from the federal courts must be under the seal of the court from which they issue and must be signed by the clerk, and if issued from the Supreme Court or a circuit court bear test of the chief justice, or if from a district court, of the judge thereof.

The Supreme Court, by section 917, is given power to regulate the practice of circuit and district courts in suits in equity or admiralty. By section 918, the several circuit and district courts are authorized to make rules regulating their own practice, if not inconsistent with any law of the United States, or any rule prescribed by the Supreme Court. Section 914, adopting the practice

of the several States, should be construed in connection with this section.

#### PROCEDURE IN OTHER COUNTRIES.

We have not had access to the laws of all nations, and are unable to give, at this time, a complete statement relative to the procedure in foreign countries; but from various sources of information at present available, we have prepared the following partial synopsis. Before submitting a proposed revision, we shall endeavor to complete our examination of this subject.

Belgium has a code of civil procedure.

British Columbia: The "Local Administration of Justice Act," 1881, contains provisions as to the organization, powers and jurisdiction of courts. Rules regulating practice and procedure are promulgated by the judges, or a majority of them, with the approval of the lieutenant-governor in council. By similar acts, courts of judicature are established in the provinces of Manitoba, Nova Scotia, New Brunswick, Prince Edward's Island and Newfoundland.

Canada: Supreme and Exchequer Courts were established for the Dominion of Canada by "the Supreme and Exchequer Court Act of 1875." The Supreme Court has an appellate jurisdiction throughout the Dominion of Canada, and such special original jurisdiction relating to controversies between any province and the Dominion of Canada, between any two or more provinces, and of suits in which the question of the validity of an act of the parliament of Canada or of any of the provincial legislatures is at issue, as may be conferred by the legislatures of the provinces. The Court of Exchequer has concurrent original jurisdiction in cases to enforce any law of the Dominion of Canada relating to revenues, fines, penalties, etc., and exclusive original jurisdiction in all cases in which the demand is for relief sought in respect to any matter which might be the subject of a suit against the Crown, or any officer of the Crown, in the Court of Exchequer, on its revenue side, in England. The Court of Exchequer and Supreme Court are composed of the same judges. Procedure in the Exchequer Court is regulated by the practice and procedure of Her Majesty's Court of Exchequer at Westminster, on its revenue side. Judges of the Supreme Court make rules regulating procedure in that court. There are 269 of these rules.

Cape of Good Hope: The Roman-Dutch Laws (Laws of Holland) prevail. Book III contains procedure in civil and criminal cases. Practice is also regulated by rules of court.

Denmark: Christian the Fifth's "Danish Code" was promulgated in 1683. It is a classification and

remodeling of the ancient Danish law codes and statutes. The contents are divided into six books relating to (1) procedure, (2) ecclesiastical law, (3 and 5) civil law, (4) maritime law, (6) penal law.

This code has been employed as a basis for further additions, and though certain portions have since been dropped out by the enactment of more recent statutes, it still forms the groundwork of Danish law, especially in civil cases. In the eighteenth century efforts were made to revise it, but after a generation of fruitless labor the attempt was given up.

The Ground-law (Constitution) of 1849, as revised in 1866, provides that the exercise of judicial powers can only be regulated by law; that the administration of justice be separated from police functions, according to rules enacted by law, and that publicity and oral process be carried out as far as possible. In criminal and political cases trial must be by jury. By virtue of this constitution, great reforms in the administration of justice were introduced. The maritime and commercial court in Copenhagen was established, and a new code of criminal procedure adopted in 1866. But not all the regulations contained in the Ground-law relating to the administration of justice have yet been carried out.

Egypt has a commercial code which relates to the law of business relations, a statute of judicial organizations, and a code of civil and commercial procedure, 816 sections, which relates to practice and procedure in courts exercising jurisdiction over civil and commercial affairs.

England: "The Supreme Court of Judicature Act," 1873, amended by the acts of 1875, 1876, 1877, 1879, 1881, 1883, relates to the constitution and judges of the Supreme Court, its jurisdiction, sittings and distribution of business, trial and procedure, its officers and their powers and duties, the jurisdiction of inferior courts, and miscellaneous provisions.

Part 4, relating to trial and procedure, comprising 21 sections, relates to reference, the directing of trial of issues before referees, and the power of referees, and also the establishment of district registers for the Supreme Court, the conducting of business by registrars, and their powers and duties.

Section 75 imposes upon the justices of the Supreme Court the duty of inquiring and examining into any defects which may appear to exist in the system of procedure, or the administration of law in such court, and they shall report such amendments and alterations to her majesty's principal secretaries of state, as in their judgment are expedient to be made.

By the Supreme Court of Judicature Act (1875, § 17), as amended by the act of 1891, § 19, her majesty

may, by order in council, made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of Rolls and the President of the Probate Division and four other judges of the Supreme Court to be nominated in writing by the Lord Chancellor, make rules for regulating the sittings of the court, the pleading, practice and procedure therein, and generally for regulating any matters relating to the practice and procedure of the several courts, the duties of officers thereof, and the cost of proceedings therein. By section 100 of the act of 1873, the rules of court shall include forms. There are sections in the other judicature acts, giving special power to certain judges to make rules in special cases. The general rules of the Supreme Court are divided into seventy-two orders, which orders are subdivided into rules. To these rules, as a part thereof, are appended certain forms.

**France:** The judicial system embraces justices of the peace, civil tribunals of first instance, Courts of Appeal and the Court of Cassation. Justices of the peace are appointed in each canton, and have jurisdiction in cases involving not more than 200f. The decision is final in cases involving less than 100f. Civil tribunals of first instance exist in every district constituting a "sous prefecture," and have general jurisdiction in all civil cases not cognizable by justices of the peace. No appeal is allowed when the amount involved is less than 1,000f.

Courts of appeal revise decisions of civil or commercial tribunals appertaining to their jurisdiction. There are 25 Courts of Appeal. The authority of the Court of Cassation extends over all the tribunals of France, civil, commercial, administrative and criminal. The code of procedure regulates the practice in all these courts.

The German Empire has a code of judicial organization and code of civil procedure, which were first published as a complete draft in 1876, and were ultimately adopted and received imperial assent. They took effect October 1, 1879. The code of civil procedure is limited to matters which are dealt with by the ordinary courts in the exercise of their usual jurisdiction.

**Greece:** The code of laws in use is substantially the "Code Napoleon," and the administration of justice is nearly identical with the French system. There is a Supreme Court at Athens, a Court of Appeal in each "monarchy," and courts of first instance in the chief towns.

**Hayti:** The law is based upon the French codes, and the administration of justice is similar to the French system.

**Honduras (Colony of British):** The Consolidated Laws were adopted in 1887. Part V. relates to the administration of justice, including the organization of the Supreme Court, trial by jury, recogniz-

ances, procedure in escheat, and appeals from inferior courts. Part VI. relates to civil procedure, including practice and modes of procedure in the Supreme and District Courts, the probate of wills, letters of administration, and powers and duties of the official administrator. Part VII. relates to oaths and evidence, including oaths of allegiance by colonial officers, oaths of jurors, witnesses, and interpreters; the subpoenaing, examination, competency and privileges of witnesses, and the manner of proving handwriting, addresses to jury, medical experts, confessions, etc.

**India:** The Indian code of civil procedure was adopted in 1859. In 1860, the penal code was adopted, and in 1861 the Code of Criminal Procedure. The Code of Civil Procedure extends to all the provinces and states under the British government in India, and regulates the practice of all courts therein. This code was amended by act number 10 of 1877. The several provinces have enacted civil codes, containing acts upon various subjects, including the organization of the courts, and their jurisdiction and powers. These judicature acts generally give the courts the power to promulgate certain rules of procedure, not in conflict with the form of procedure prescribed by the Indian Code of Civil Procedure. Among the Indian provinces and States which have adopted codes are Bengal, Burmah, Pegu, Madras, Punjab, the North Western provinces, the Central provinces, and Coorg.

**Ireland:** The "Supreme Court of Judicature (Ireland) act of 1877" and amendments of 1878, 1882, 1887, 1888, contain provisions relating to the constitution and judges of the court of judicature, its jurisdiction, powers, and sittings, the distribution of business, trials and procedure therein, subject to the rules of court, and officers and their duties. To this act is added a schedule of rules, relating to the form of action and summons, interpleading, processes, parties, pleading, new trial, motions, and appeals.

Additional rules are also made by the Lord Lieutenant, by order in council, upon recommendation of the Lord Chancellor, Lord Justice of Appeal, the Chief Justice of the Common Pleas, and the Chief Baron, or any three of them, and by the other judges of the several courts, or a majority of them. These rules regulate sittings of courts, pleading, practice and procedure, fees and costs, and practice in chambers.

**Italy:** The codes of law in use are the civil code, the code of civil procedure of 1866, the code of commerce of 1882, and the penal code and code of criminal procedure of 1889.

**Japan:** A system of justice founded on modern jurisprudence has been established. Judges cannot be removed, except by way of criminal or disciplinary punishment. The system includes a

court of cassation, which hears appeals on questions of law, both civil and criminal, whether errors in matters of jurisdiction, misinterpretation and misapplication of law or violation of the rules of procedure; seven courts of appeal, having appellate jurisdiction over cases decided in the courts of first instance, and which sit as courts of criminal jurisdiction for the trial of major offenses; ninety-nine courts of first instance, one in each *Fu* or *Ken*, having unlimited original civil jurisdiction, and one hundred and ninety-four peace tribunals, with jurisdiction over minor claims and offenses.

A criminal code and a code of criminal procedure based upon the Napoleon Codes, but modified by the old native criminal law, were published in 1880, coming into force in 1882. The code of civil procedure and the commercial codes received the sanction of the Emperor in 1890, and became law January 1, 1891. The civil code became a law January 1, 1893.

Lagos (British Colony): A Supreme Court ordinance was adopted in 1876. It relates to the constitution and jurisdiction of the court, its sittings and the distribution of its business, the transfer of causes to other courts, commissioners to relieve the court, appeals, officers of the court, barristers, solicitors and proctors, and the subpoenaing and examination of witnesses. Under sections 69-98 the Supreme Court may in civil cases "provide reconciliation and encourage and facilitate the settlement in an amicable way, and without recourse to litigation, of matters in difference among persons over whom the court has jurisdiction."

To this ordinance is appended schedules containing rules of court which regulate the practice, and which are subject to change from time to time, by the chief justice of the court, with the concurrence of the puisne judges.

Mexico: The code of civil procedure, adopted in 1873, regulates practice in the courts. It contains 2,362 sections.

Monaco has adopted the French codes.

Morocco: Government by the Sultan is unrestricted by any laws, civil, or religious. The Sultan has six ministers, whom he may consult if he wish.

Netherlands has a civil code, a code of commerce, a code of civil procedure, a penal code, and a code of penal procedure, which were adopted in 1886. The code of civil procedure has 899 sections, and contains no substantive law. These codes superseded the laws of Holland, which were a codification, containing civil and penal provisions. Book III. of such laws prescribed a mode of procedure in civil and criminal cases.

New South Wales: The Supreme Court was organized by the "Charter of Justice," granted by George IV. in 1828. A great number of acts have

been passed since that time, which provide for the constitution of the court, its powers and jurisdiction. These had not been consolidated in 1879.

New Zealand: The Supreme Court Act of 1882 contains provisions relative to the constitution of the court, its jurisdiction, practice and procedure, solicitors, officers, and miscellaneous provisions. To this act are attached as a part thereof, a schedule of 531 rules, regulating the practice and procedure of the court, in all causes and matters within its jurisdiction. The Court of Appeal Act of 1882, relates to the constitution of the court of appeal, and its civil and criminal jurisdiction, to which is appended a schedule of rules regulating practice on appeals.

Ontario: The supreme court of judicature act relates to the constitution and jurisdiction of courts, rules of law, sittings and distribution of business, appeals, trial and procedure, officers and offices. Rules are adopted by the supreme court, with the concurrence of a majority of the judges, regulating the sittings of the court, and the pleading, practice and procedure therein. The consolidated rules of practice of the supreme court (1890) number 1,264, with a schedule of forms attached.

Orange Free State: The Roman Dutch Law prevails (Laws of Holland), in which is prescribed the mode of procedure in civil and criminal cases.

Persia: All laws are based on the precepts of the Koran, and though the power of the Shah is absolute, it is only in so far as it is not opposed to the accepted doctrines of the Mohammedan religion, as laid down in the sacred book of the prophet, his oral commentaries and sayings, and the interpretation of the same by his successor and the high priesthood. Justice is administered by the Governors of the provinces (22 in number), and their representatives, and by the *Sheikhs-il-Slam*, and the priesthood. The former administer justice according to the *Urf*, the unwritten or common law; the latter, according to the *Shai*, the written or divine law.

Portugal has codes modelled after the French codes, including the code of civil procedure.

Quebec, Province of: The constitution and jurisdiction of the courts, and the trial and practice therein, are prescribed by the code of civil procedure. The judges of the courts may make rules of practice necessary for regulating proceedings therein, not provided for by the code of civil procedure. The code contains 1,361 sections.

Queensland: The Supreme Court Act of 1867 provides for the constitution and jurisdiction of the court. By section 52, rules regulating the forms of process and mode of pleading are made by justices of the supreme court, or a majority of them. The Common Law Pleading Act of 1867 regulates the



forms of pleading, and contains 63 sections. The Common Law Practice Act of 1867 regulates the trial of causes and contains 95 sections. The Common Law Process Act of 1867, 77 sections, regulates the forms of process and the service thereof. The Costs Act of 1867 regulates the recovery of costs and their taxation. The Equity Act of 1867 contains 157 sections, and regulates equitable proceedings in the supreme court. Supplemental to this act is the Equity Procedure Act of 1873.

Russia: The whole legislative, executive and judicial power is united in the Emperor, whose will alone is law. A new system of jurisprudence was promulgated in 1864, containing separate codes, relating to the organization of courts and civil procedure therein. The main features of this system are the complete separation of the courts from all other parts of government; trial by jury in open court in all criminal cases; the establishment of inferior tribunals for the trial of petty causes, and great simplification of the procedure.

Servia has a civil code, a civil code of procedure, a criminal code with procedure, a code of commerce, press law, tax law, law of bankruptcy, and a special law for advocates and lawyers.

Spain: Justice is administered by the Supreme Tribunal, by courts for civil causes, and courts for criminal causes; and every important town has one or more judges with civil and criminal jurisdiction. There is a civil code, and also a penal code. Practice is regulated by rules adopted by the courts, and by usage and custom.

Sweden: Nothing like the English common law as opposed to statute law is known in Sweden. All law is statute law. The judiciary is intimately connected with the legislature. Laws were made by the judiciary and approved by the people prior to 1347. After that no code came into use without the approval of the King. Commissioners were appointed for reporting a "Common country code," which was promulgated by the King in 1352. A common city code was promulgated in 1365. These codes brought to an end provincial legislation and the common law in Sweden, and from that time to the present no such law has been able to grow in Swedish soil.

Several commissions were appointed from time to time, but accomplished nothing until, in 1686, a commission was appointed to revise the old codes. They first decided to report one code in place of the country and city codes. Five parts out of nine of the present common, civil and penal codes were framed by the commissioners between 1686-1710. The whole scheme was completed in 1723. The code was adopted in the legislative sessions of 1731 and 1734, and became law September 1, 1736. This code was known as the New Code.

Since that time several attempts have been made at revision. A code was reported by a commission in 1844, '47, '49, and '50. It comprised a civil and penal code. The civil code contains a code of procedure.

(This information is obtained from a letter written by Professor Bergfalk, Professor of Law in the University of Upsala, to David Dudley Field in 1851, and published in 15 Law Review, 126.)

Turkey: The laws of the Empire are based on the precepts of the Koran. The will of the sultan is absolute. (See Persia.) The Ottoman civil code contains sixteen books. Books 9 to 16 relate to the bringing of actions, trials and the enforcement of judgments.

Victoria: The Supreme Court Act of 1890 is divided into seven parts; namely, introductory, constitution, jurisdiction, powers and duties of court and judges, sittings and distribution of business; rules of law in civil procedure; civil procedure; appeal to privy council; officers of the court.

The part on civil procedure is in 14 divisions, relating to foreign procedure; foreign attachment; arrest and bail; arbitration; references; proceedings before chief clerk; opinions of experts; judgments and execution; changing stocks and shares; specific delivery; action for recovery of land; replevin; bills of costs; miscellaneous.

Rules regulating practice in the supreme court are adopted by the justices. The Justices' Act of 1890 provides for justices' courts, their powers and jurisdiction, and regulates the practice therein.

*(To be concluded next week.)*

#### HOW TO MAKE LAWS—AS RECOMMENDED BY THE LEGISLATIVE COMMISSION.

AS TO THE MANNER IN WHICH MUNICIPAL LEGISLATION SHALL BE BROUGHT ABOUT—A PROVISION TO PREVENT PIGEON-HOLING—TO ENLARGE POWERS OF REVISION COMMITTEES.

THE committee appointed by Gov. Morton to recommend changes in the methods of legislation on December 16, 1895, filed its report with the governor. The committee consists of Lieutenant-Governor Saxton, Hon. Danforth E. Ainsworth, who has seen much experience in legislative halls; ex-Senator John J. Linson, John S. Kenyon, clerk of the State Senate, and Simon Sterne, of New York city.

The committee is acting under a law passed by the last Legislature, having for its object a reduction of the number of measures which come before the Legislature annually for its attention, and to subject those which do make their appearance to a proper scrutiny and consideration.

The commission recommended as follows:

*First.* That all private and local bills, including bills which relate to municipalities, shall be filed either before the beginning of the legislative session or within thirty days before their presentation to the legislature, unless the governor of the State takes upon himself the responsibility of making a special recommendation for urgency; and that each bill shall be accompanied with proof that a notice was duly published or personally served, or both, as the circumstances of the case may require, on every interest which may be affected by such legislation.

*Second.* That the petition for such legislation shall set forth its general scope, object and utility. This petition may be answered in writing by any adverse interest. Such petition and one or more answers which partake of the nature of pleadings in a civil suit shall be filed with the bill, and these petitions and counter-petitions, duly signed, shall accompany each bill of this character during the whole of its legislative progression.

*Third.* The committee of revision, both Senate and Assembly, should have their powers enlarged for the consideration of all measures, both public and private or local, and that each of such committees shall be assisted in its labors by a lawyer of at least ten years' standing, with an adequate salary to insure proper talent, who shall have such assistants as may be necessary. These committees to act as advisory committees for re-drafting bills, and for recommendations as to their effect, with suggestions as to their operation upon the general body of the law, and to point out constitutional or other defects. Such counsel to be appointed by the governor, lieutenant-governor and speaker of the house, for a fixed term.

*Fourth.* That a day calendar shall be printed one day in advance and distributed among the members.

*Fifth.* That general public measures should be referred before passage to the commissioners to revise the statutes to report upon the effect of such measures and their place in the body of the statute law.

*Sixth.* That committees of the Legislature should be empowered to take testimony.

*Seventh.* That every committee should be required to report the private and local bills which have been submitted to it, with the reason for its action, within a certain number of days after the bill has been committed to its care.

*Eighth.* That some of the Senate committees should be enlarged, particularly such committees as have imposed upon them the most onerous duties of the legislative session, such as the committee on cities, the committee on finance, the committee on judiciary.

*Ninth.* That a proportionate share of the printing expenses incident to a legislative session, which

amounted, during the last session, to the sum of \$200,000, should be borne by the parties interested in the bills, and in whose interest legislation is considered, particularly moneyed corporations, stock corporations or private individuals.

*Tenth.* That the general laws should be completed as rapidly as possible, and all public statutes should be incorporated into them or into one of the Codes.

*Eleventh.* That all bills amendatory of the general laws, or of the Code, should refer briefly in their title to the general subject to which they relate.

*Twelfth.* That all amendments for city charters or to the general municipal incorporation laws should briefly state in the title the subject of the sections of the statute which are proposed to be amended.

*Thirteenth.* That with reference to every bill affecting any department of the State government, or the general administration of the law subject to the supervision of such department, notice thereof shall be given to the head of the department having the administration of such subject under his supervision, and an opportunity afforded him to be heard before the bill is reported or passed.

Most of these propositions have been considered in other States of the Union, and the more important of them have been adopted in some of those States and work well. Attention is particularly called to the provision relating to the giving of notice of intention to apply for the passage of special and local bills, and also the requirements that applicants for bills shall pay the expense of printing the same, and that committees shall report within a certain time upon private and local bills.

Accompanying the report of the commission are additions to the sections of the legislative law, embodying the recommendations of the commission.

The commission is of the opinion that the rules of Senate and Assembly should provide that all bills of a private or local nature shall be on a calendar known as the private and local calendar, and that all bills relating to cities shall be on a calendar known as the cities calendar, and that all other bills shall be placed on a calendar known as the general calendar; that all calendars of bills shall be printed, and on the desks of the members twenty-four hours prior to their consideration, and that certain days shall be set apart for the consideration of the various calendars as above subdivided. But the commission has not assumed to formulate rules upon these or other similar subjects, leaving that matter for the action of the two houses of the Legislature.

MALICIOUS PROSECUTION—PROBABLE CAUSE.—In suits for malicious prosecution, the question of the existence of reasonable cause—the facts not being in dispute—must be decided by the court. (*Bell v. Atlantic City R. Co.* [N. J.], 33 Atl. Rep. 211.)

## A FAMOUS LEGAL AUTHOR.

CHARLES FREDERICK WILLIAMS DIES IN BOSTON—  
WIDELY KNOWN IN THE PROFESSION AS COM-  
PILER OF WORKS OF LAW.

Charles Frederick Williams, the managing editor of the last eight volumes of the American and English Encyclopedia of Law, died Friday morning, December 20th, at the Massachusetts General Hospital in Boston. His death was due to paralysis and heart failure, following a serious attack of grip from which he suffered last spring.

He had been living in Northport, L. I., for a year or two past, but he went to Roxbury a few weeks prior to going to the Massachusetts General Hospital. It was after he went to Roxbury that he was stricken with paralysis. According to the opinion of Drs. Shattuck and Edes, cerebral embolism supervened. He has since remained in a listless condition. His death has been expected for several days past.

Mr. Williams was born in Charlestown, Oct. 31, 1842, being the eldest son of Frederick J. and Abby Tufts Williams. His father was a prominent engineer, and one of the projectors of the Mystic river improvement. He was educated in the public schools of Brookline and in the Harvard law school. His encyclopedia work, great as it has been, is only a small portion of his contributions to law literature. He had been chief clerk of the John L. Hayes tariff commission, and his "Tariff Laws of the United States, with Explanatory Notes and Citations from the Decisions of the Courts and the Treasury Department" was published by Messrs. Soule & Hugbee in 1888.

His "Index of Cases Overruled, Distinguished, etc., in England and America," was published in 1887. He was a most rapid and expert digester of law reports. Although his name did not appear on the title page, he was one of the principal collaborators of Messrs. Little, Brown & Co.'s "Annual Digest" (now merged in the West Publishing Company's "American Digest"); also of "Jacob's Complete Digest" (now similarly superseded). His services upon the "Federal Digest," published by Messrs. Little, Brown & Co. in 1886, were acknowledged and commended in the preface of the principal compiler, Mr. J. K. Kinney. In 1891 appeared his "Digest of Decisions of the Massachusetts Supreme Court, Embracing Volumes 142 to 151," and published by Messrs Banks and Bros., as a continuation of "Throop's Massachusetts Digest,"

Mr. Williams had a remarkably logical mind, possessing almost the quickness of intuition in distinguishing genera from species in the arrangement of the syllabus (or "Analysis") at the head of the

leading treatises in the law encyclopedia. In private life he was rather reserved, and in intercourse direct and courteous. He had a keen sense of humor, and was widely conversant with general literature, both English and French.

He leaves three eminent brothers, namely, Dr. Edward T. Williams, of Roxbury; Rev. Theodore C. Williams, pastor of All Soul's Unitarian Church, New York city, and Horace G. Williams, of Ashmont, Dorchester; also a sister, Mrs. Mary C. (Williams) Reed, wife of William Garrison Reed, of Upham's Corner.

## Abstracts of Recent Decisions.

**ADVERSE POSSESSION.**—D. having entered on land which he supposed to be vacant, intending to pre-empt it, improved it, and remained in possession until his death, 18 years afterwards, when the improvements, without the land, were sold; D's heirs subsequently releasing to the purchaser of the improvements their claim to the land, for a nominal consideration: Held, that D's possession was not adverse to the real owner. (*Hartman v. Huntington*, [Tex.,] 82 S. W. Rep. 562.)

**APPEAL—BOND—WAIVER.**—Where, in an action against a corporation and its directors, one of the directors dies before judgment, and the action abates as to him, an appeal bond given by the other directors, against whom judgment was rendered in favor of plaintiff, payable to plaintiff and the corporation, and also to the deceased director, his heirs, and representatives, is not so fatally defective as to deprive the appellate court of jurisdiction.—(*Futch v. Palmer*, [Tex.,] 82 S. W. Rep. 566.)

**CARRIERS OF STOCK—NOTICE OF INJURY.**—Where the validity of a carrier's contract depends upon the reasonableness of a provision that in case of an injury to stock the shipper must give notice of his claim therefor, in writing, to the agent, before it is delivered to any connecting line, or taken from the station, the carrier must, in order to avail itself of this provision as defense in an action by the shipper for damage so suffered, allege in its answer a state of facts showing that the shipper had failed to give the notice before defendant delivered to its connecting line, and that he had the opportunity to do so. (*Houston & T. C. Ry. Co. v. Davis* [Tex.,] 32 S. W. Rep. 510.)

**CRIMINAL LAW—GAMES OF CHANCE.**—The putting up by each of several persons of a piece of money, and the deciding by throwing dice which of such persons should have a certain turkey, constitutes a game of chance. (*State v. De Boy* [N. Car], 28 S. E. Rep. 167.)

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